

Sirico v F.G.G. Prods., Inc.

2008 NY Slip Op 32333(U)

August 19, 2008

Supreme Court, New York County

Docket Number: 0604403/2005

Judge: Eileen Bransten

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 3

PHYLLIS J. SIRICO and PEGGY S. DAVISON

INDEX NO. 604403/05

v.

MOTION DATE 6/23/08

F.G.G. PRODUCTIONS, INC.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to reargue and renew and cross-motion for sanctions.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 22 2008

COUNTY CLERK OF NEW YORK

Dated: 8-19-08



EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X
PHYLLIS J. SIRICO and PEGGY S. DAVIDSON,

Plaintiffs,

-against-

F.G.G. PRODUCTIONS, INC

Defendant.

-----X
PRESENT: EILEEN BRANSTEN, J.

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Index No. 604403/05
Motion Date: 6/23/08
Motion Seq. No.: 03

Pursuant to CPLR 2221, plaintiffs Phyllis J. Sirico and Peggy S. Davison¹ move, for the second time, to “renew and/or reargue” the motion for summary judgment by defendant F.G.G. Productions, Inc. (“FGG”), which was granted in a Decision and Order dated December 28, 2007. FGG opposes the motion and cross-moves for sanctions. The motion, for the second time, is denied. The cross-motion is denied as well.

Background

In their complaint, Ms. Sirico and Ms. Davison, who were members of the musical group The Angels, claim that FGG agreed, in separate contracts, to pay them royalties on their recordings. FGG moved, among other things, for summary judgment dismissal of the complaint pursuant to CPLR 3212. The Court (Moskowitz, J) granted the motion and dismissed the complaint, holding:

¹ Ms. Davison’s name is incorrectly set forth as Davidson in the caption.

“In support of the motion FGG carefully analyzed each cause of action in thorough detail, and, based on both the evidence (including an affidavit based on personal knowledge) and law, demonstrated the insufficiency of each claim that plaintiffs assert. Thus, FGG has made a ‘prima facie’ showing of entitlement to judgment as a matter of law In opposition, plaintiffs submitted only an attorney’s affirmation. Although plaintiffs’ counsel, who lacks personal knowledge about this case, vehemently argues that plaintiffs may rest upon the Complaint (verified by counsel) and the Bill of Particulars only, counsel is mistaken, and, consequently, has left defendant’s motion virtually unopposed Since plaintiffs did not, by admissible evidence, demonstrate the existence of a factual issue requiring a trial, FGG’s motion for summary judgment dismissing the Complaint is granted” (Supp, Ex.1, at 5).²

In March 2008, plaintiffs moved to reargue and renew (*see* Affirmation in Opposition to Plaintiffs’ Motion for Leave to “Renew or Reargue” [“Opp”], Ex. A, at 1). On April 21, 2008, this Court denied the motion for reargument because nothing was overlooked or misapprehended and denied renewal based on affidavits that plaintiffs submitted because neither plaintiff had appeared before a notary and swore to the truth of the facts in the statements they signed (*id.*, at 2), rendering them ineffectual. The motion for renewal was denied “without prejudice to re-filing upon presentation of new affidavits with original signatures from both plaintiffs properly dated and notarized . . .” (*id.*, at 3).

Plaintiffs now move to “renew and/or reargue” again. They contend, among other things, that:

² In its motion, FGG unsuccessfully sought judgment on its counterclaim seeking reimbursement of certain costs and expenses from Sirico, which was severed.

- defendant, “simply supported its motion with conclusory allegations by one of its principals without offering any proof of the allegations” (Supp, at ¶ 3);
- the underlying motion was made before there was an opportunity for discovery (Supp, at ¶ 4);
- in their “first motion for renewal and reargument, [they] offered their ‘affidavits.’ Actually, [they] offered their statements that were not notarized. There was no intention to deceive this Court or [defendant] with those statements. Obviously, the notary stamp and signature . . . did not declare that she had the affiants swear before her. Nor were the affidavits in proper affidavit form” (Supp, at ¶ 6).

In support of the motion, plaintiffs submit an “affidavit” from Ms. Davison. Just like the materials provided in support of the first reargument/renewal motion, the statement here begins with the declaration that Ms. Davison was “duly sworn.” She states: “Although I never signed a recording contract with FGG, it was agreed by all the parties . . . that I would become a member of The Angels and be entitled to royalties from the songs I sang on” (Plaintiff Peggy Davison’s Affidavit in Support of Motion for Leave to Reargue and Renew [“Davison Stat”]). Significantly, at the end of the submission, a Maryland notary certified that the subscriber personally appeared and acknowledged that “she executed [the statement] for the purposes therein contained.”

Ms. Sirico provides an “affidavit,” formatted in an identical manner, in which she sets forth that in the early 1960’s she entered into a recording agreement with FGG and in “exchange for the use of our voices on these records, FGG and its owners . . . agreed to pay

us royalties for FGG's: (1) direct manufacture of products containing The Angels' master recordings; and (2) licensing of The Angels' master recordings to third parties, i.e., to other record, television, film companies, etc." (Plaintiff Phyllis J. Sirico's Affidavit in Support of Motion for Leave to Reargue and Renew ["Sirico Stat"], at ¶ 2).

There is no indication at the end of either affidavit that either plaintiff took an oath before those who notarized their statements (*contrast* with Supp, Affidavit of Gabin Rubin [containing notary's statement that the affidavit was "sworn to before me"]).

FGG opposes the motion, pointing out that plaintiffs were only authorized to seek renewal again, not reargument. In fact, FGG cross-moves for sanctions, arguing that seeking reargument now is frivolous. FGG also urges that renewal should be denied because plaintiffs have not demonstrated a reasonable justification for failing to provide proper evidence in response to the underlying motion and they once again failed to swear to the truth of their statements before a notary.

Analysis

Reargument

To the extent that plaintiffs' motion seeks reargument, it must be denied. At the outset, plaintiffs' initial motion for reargument was denied, a second motion for reargument was not authorized, and now the motion is untimely (*see* Opp., Ex. A, at 1; CPLR

2221[d][3]). More importantly, based on FGG's deficient submissions, this Court cannot conclude that FGG's evidence was insufficient to meet its burden of establishing entitlement to summary judgment as a matter of law. Plaintiffs failed to supply the allegedly defective affidavit or any of the underlying motion papers to this Court in support of this motion, wrongly believing that the *ipse dixit* that "defendant did not meet it's evidentiary burden" and isolated quotations from the motion papers could support reargument and then vacatur of the order of dismissal (*see Lower Main Street LLC v Thomas Roth Partners*, NYLJ, Apr. 5, 2005, at 19, col 3 [without submission of the papers on the motion for which reargument is sought and other relevant documents "reargument is not available"]). In the end, this Court has absolutely no reason to conclude that FGG failed to offer sufficient proof or that anything was overlooked or misapprehended. Plaintiffs' bald claim on this defective motion for reargument is plainly insufficient to warrant the relief sought.

Renewal

Pursuant to CPLR 2221, a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion."

The statements plaintiffs submitted on this motion would not change the prior determination. Incredibly, in the moving papers, plaintiffs' counsel twice acknowledges that

statements by a party should be sworn to before a notary (*see* Supp, at ¶ 6 [referring to prior submissions: “Obviously, the notary stamp and signature . . . did not declare that she had the affiants swear before her”]; Attorney Affirmation in Opposition to Defendant’s Cross-Motion for Sanctions and in Reply to Plaintiffs’ Motion [“Reply”], at ¶ 13 [defective affidavits did not state that notary was “swearing in” plaintiffs]). Nonetheless, there is no indication that either plaintiff swore before a notary here.

In any event, the submissions are insufficient to defeat a *prima facie* showing of entitlement to judgment as a matter of law (*see Harvest Moon, Inc. v Arochas*, 270 AD2d 138 [1st Dept 2000] [in response to defendants’ showing plaintiff offered only “self serving conclusory assertions”]; *see also CBS, Inc. v American Society of Composers, Authors and Publishers* 276 AD2d 337, 338 [1st Dept 2000]). For example, Ms. Davison’s statement does not detail any specifics of her agreement with FGG, such as who the agreement was with and what its terms were.

Plaintiffs, moreover, failed to offer any justification for their failure to offer proper evidence in response to FGG’s summary judgment motion, much less a reasonable one (*see Ostreich v Present*, 50 AD3d 522 [1st Dept 2008]; *Russek v Dag Media Inc.*, 47 AD3d 457, 459 [1st Dept. 2008]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007]; *Chichilnisky v Trustees of Columbia Univ.*, 45 AD3d 393, 394 [1st Dept 2007]; *NYCTL-1999-1 Trust v 114 Tenth Avenue Assoc.*, 44 AD3d 576, 577 [1st Dept 2007], *appeal*

dismissed 10 NY3d 757 [2008]). On this record--riddled with procedural mistakes and deficiencies--there is no reason for the Court to exercise its discretion and overlook plaintiffs' repeated oversights.

Finally, plaintiffs' mistakes do not rise to the level of warranting the imposition of sanctions and the cross-motion is denied.

Accordingly, it is

ORDERED that Plaintiffs' motion for reargument is denied; it is further

ORDERED that Plaintiffs' motion for renewal is denied; and it is further

ORDERED that FGG's cross-motion for sanctions is denied.

This constitutes the Decision and Order of the court.

Dated: New York, New York
August 19, 2008

ENTER


Hon. Eileen Bransten

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK