

Gluck v Kenneth M. Kamler, M.D., LLC

2008 NY Slip Op 32639(U)

September 17, 2008

Supreme Court, Nassau County

Docket Number: 018776/2005

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

ROBERT I. GLUCK, M.D., LLC and
HAND TREATMENT CENTER, LLC,

Plaintiffs,

INDEX NO.: 018776/2005
MOTION DATE: 09/04/2008
MOTION SEQUENCE: 017

-against-

KENNETH M. KAMLER, M.D., LLC
and KENNETH M. KAMLER, M.D.,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavit & Exhibit Annexed	1
Affidavit in Support of Motion for Reargument and Renewal of Robert L. Dougherty & Exhibits Annexed	2
Affirmation in Opposition of David A. Bythewood & Attachment	3
Reply Affidavit in Support of Motion for Reargument and Renewal of Robert L. Dougherty	4

This motion by defendant, Kenneth M. Kamler, M.D., brought pursuant to CPLR 2221, to reargue and renew a prior motion by plaintiff for summary judgment on liability on the seventh cause of action which resulted in an order granting such relief and upon reargument and renewal for an order denying such relief is determined as follows.

Reargument may be granted where the court has overlooked, or misapprehended a material factual matter or a controlling principle of law. Cisco v Lavine, 72 Misc.2d 1087 (Sup.

COUNTY

Ct. Nassau Co. 1973). On a motion to reargue, it is inappropriate to raise new arguments which have not previously been advanced upon the court, Simpson v. Loehman, 21 N.Y.2d 990 (1968), and new material facts need not be presented in order to reargue. Aldrich v County of Oneida, 299 A.D.2d 938 (4th Dept. 2002). Most importantly, a motion to reargue or to renew is not a procedural device to permit counsel to argue the same issues previously considered and decided.

Defendant argues that the court was in error in finding that the parties had a verbal agreement “concerning referral of patients by Dr. Kamler to Dr. Gluck [as it] is inherently an issue of fact.” He argues that Dr. Kamler previously denied, in sworn testimony, that there was ever an agreement between Gluck and Kamler that patients “coming to the practice would be referred to Dr. Gluck if they had their health insurance coverage with one of Dr. Gluck’s health insurance carriers.” He continued that the reason that the insurance claim forms “showed Dr. Gluck as the treating physician [was] only because Dr. Kamler billed under Dr. Gluck’s provider number, not because they were Dr. Gluck’s patients.” See Aff in Support ¶5.

That branch of defendant’s motion which is to reargue the prior motion is denied.

In reaching its prior determination, the court did not opine as to whether there had been such an agreement. The gravamen of the seventh cause of action is unfair competition, not breach of contract. The court found there was no question of fact as to whether defendant had engaged in unfair competition.

The facts of the unfair competition are that defendant created “sub-accounts” to record the respective income of the parties, and others, but that he recorded in a special sub-account the insurance reimbursement derived from Kamler’s treatment of patients referred for treatment by a board certified hand surgeon, which could only have been Dr. Gluck, and which would only be insurance reimbursable if treated by such a board certified hand surgeon. There is no question of fact concerning whether Dr. Kamler authorized the submission, or did actually submit information to the insurer stating - intentionally- that Dr. Gluck, when it was Kamler, who had treated such a patient but diverted the income to, the by now infamous, sub account 10, of which Gluck knew nothing, and of course derived no benefit.

The history and elements of a claim for unfair competition have not heretofore been written about by this court. It seemed patent that the underlying conduct was wrong. However,

ancient verbiage could be of some value at this juncture. Insofar as can be gleaned from this motion, defendant appears to be insensitive to the claims made in this lawsuit.

In passing upon the question of the sufficiency of a complaint alleging unfair competition it is helpful to bear in mind the origin and evolution of this branch of law. It originated in the conscience, justice and equity of common-law judges. It developed within the framework of a society dedicated to freest competition, to deal with business malpractices offensive to the ethics of that society. The theoretic basis is obscure, but the birth and growth of this branch of law is clear. It is an outstanding example of the law's capacity for growth in response to the ethical as well as the economic needs of society. As a result of this background the legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions. There is no complete list of the activities which constitute unfair competition (Nims, *Unfair Competition and Trademarks*, 4th ed., 1947, Chaps. I and II; Handler, *Unfair Competition*, 21 *Iowa L. Rev.*, p. 175; Schechter, *The Rational Basis of Trademark Protection*, 40 *Harv.L.Rev.* 813).

The statement of a sufficient cause of action in unfair competition, in the last analysis, is therefore dependent more upon the facts set forth and less upon technical requirements than in most causes of action. This may best be illustrated by a consideration of the objections raised by the defendants [Wagner – Nichols].

The defendants contend that no cause of action is stated due to the absence of an allegation of 'palming off.' One of the inferences which may fairly be drawn from the allegations of the complaint and the prayers for relief is that the activities of the defendants appropriate and trade on the name and reputation of Metropolitan Opera and tend to mislead the public into believing the recordings are made with the co-operation of Metropolitan Opera and under its supervision. However, even in the absence of such an inference the failure to allege 'palming off' would not be a fatal defect. The early cases of unfair competition in which relief was granted were cases involving 'palming off'-that is, the fraudulent representation of the goods of the seller as those of another. The early decisions condemning this practice were based on the two wrongs inflicted thereby: (1) The deceit and fraud on the public; and (2) the misappropriation to one person of the benefit of a name, reputation or business good will belonging to another. Taylor v. Carpenter, 3 *Fed.Cas.* page 742, No. 13,784, 3 *Story* 458, D. Mass. 1844; Howard v. Henriques, 5 *N.Y.Super.Ct.* 725, 1851.

With the passage of those simple and halcyon days when the chief business malpractice was 'palming off' and with the development of more complex business relationships and, unfortunately, malpractices, many courts, including the courts of this state, extended the doctrine of unfair competition beyond the cases

of 'palming off.' The extension resulted in the granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another.

The courts have used various formulae in making this extension. Many of the earlier of such decisions relied on the presence of special elements: For example, inducing breach of trust or breach of contract in misappropriating the property, Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 25 S.Ct. 637, 49 L.Ed. 1031; Bitterman v. Louisville & Nashville R. Co., 207 U.S. 205, 28 S.Ct. 91, 52 L.Ed. 171; Sperry & Hutchinson Co. v. Mechanics' Clothing Co., C. C., 128 F. 800. However, in Fonotipia, Limited, v. Bradley, C. C., 171 F. 951, the Circuit Court, after reviewing these decisions, found there was unfair competition in a case of misappropriation even in the absence of any of the special factors. In that case the plaintiff had engaged artists and made recordings of their musical performance for sale to the public. The defendant obtained some of these recordings, mechanically reproduced them and sold the copies in competition with plaintiff's records at much lower prices. The court posed the question as follows 171 F. at page 959: '* * * whether the taking of property in the shape of valuable ideas and products, by mechanical imitation or reproduction, is susceptible of notice by a court of equity, and whether any remedy therefor can exist apart from the questions of patent, trade-mark, and intentional deception or imitation and deceitful substitution of the product.'

...

Subsequently, in 1918, the Supreme Court of the United States laid down a similar principle in International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211. In that case the Associated Press sued to enjoin International News Service, among other things, from copying its news from bulletin boards and early editions of member newspapers and selling it bodily or in rewritten form to International News Service customers. The case presented particular difficulty because of the great public interest in the freest dissemination of the news. However, the court recognized that, as between the parties, even news was quasi-property. In granting an injunction to the Associated Press against the pirating of its news the court held 248 U.S. at page 239 et seq., 39 S.Ct. at page 72, 63 L.Ed. 211. 'The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant-which is what defendant has done and seeks to justify-is a very different matter. In doing this, defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers

that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those.

Metropolitan Opera Association v Wagner-Nichols, 199 Misc. 786 (N.Y. Supp 1950).

That branch of the motion sub judice as seeks renewal is analyzed according to the standard which requires the submission of new facts which are material to the earlier decision but which were not known at the time of deciding the earlier motion.

A motion to renew must be based on material facts which existed at the time the motion was made but for some reason were not available to the party seeking renewal and were not accordingly made known to the court. Ragus v Law Department, 166 Misc.2d 157 (Sup. Ct. NY Co. 1992); Brann v. City of New York, 96 A.D.2d 923 (2d Dept. 1983). The new evidentiary material that movant seeks to bring before the court must be pertinent to the decision already rendered. Cisco v. Lavine, 72 Misc.2d 1087 (Sup. Ct. Nassau Co. 1973).

Defendant argues that the record considered by this court in determining the prior motion was procedurally improper. Plaintiff did not submit, with the moving papers, copies of any of the falsified insurance claims. Yet they were submitted, and considered, in reply papers with the result, as argued by defendant, that he had no opportunity to reply and test their integrity. The decision was thus, in effect decided on newly found information.

It is a curious assertion since Dr. Kamler states that " Dr. Gluck was listed as the treating physician solely for billing purposes." In other words, their integrity is not challenged but authenticated. Moreover, it is a misapplication of the legal standard underlying a motion to renew.

Accordingly, defendant's motion to renew is denied. Defendant's motion to reargue is granted and upon reargument the court adheres to its initial decision.

Dated: September 17, 2008

J.S. Warkowski
 J.S.C.
ENTERED

-5-

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