

Goodstein v Jones

2008 NY Slip Op 33018(U)

November 7, 2008

Supreme Court, New York County

Docket Number: 114335/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Justice

Index Number : 114335/2006

GOODSTEIN, STEVEN

vs

JONES, CHARLES

Sequence Number : 002

AMEND

INDEX NO.

114335/2006

MOTION DATE

10-14-08

MOTION SEQ. NO.

002

MOTION CAL. NO.

6

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

NOV 10 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/7/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~

Check if appropriate

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

STEVEN GOODSTEIN, TAFT PARTNERS, LTD.,
and GOODSTEIN DEVELOPMENT CORPORATION,
Plaintiffs,

Index Number 114335/2006
Submission Date Oct. 14, 2008
Mot. Seq. No. 002
Cal. No. 47

against

CHARLES JONES,

DECISION AND ORDER

Defendant/Counterclaim Plaintiff,

against

STEVEN GOODSTEIN, TAFT PARTNERS, LTD.,
and GOODSTEIN DEVELOPMENT CORPORATION,
Counterclaim Defendants.

-----X

For the Plaintiff:
Charles Jones, *pro se*
150 West 51st Street, Ste. 802
New York NY 10019
(212) 969-9500

For the Defendant:
Gildin, Zelenitz & Shapiro P.C.
Bradley M. Zelenitz, Esq.
138-44 Queens Boulevard, 2nd Floor
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(781) 523-1111

FILED
NOV 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of this motion to amend and other relief:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affirmation	2
Replying Affidavit	3

PAUL G. FEINMAN, J.:

Defendant/counterclaim plaintiff Charles Jones, who is self-represented, moves for an order the amend his counterclaim/complaint, to find the sole claim in the now dismissed complaint to have been frivolous and impose sanctions, to impose sanctions against the law firm representing plaintiffs/counterclaim defendants, and to schedule a preliminary conference. The motion is granted in part and otherwise denied.

This action grew out of a previous litigation commenced by Jones in 2003 against the plaintiffs and certain others in which he sought damages based on fraud as concerned renovations to

a property in which Jones purchased an apartment. That litigation was discontinued against plaintiffs in May 2006 (New York County Index No. 116782/2003), and against the other parties in July 2006. Plaintiffs then commenced this litigation, alleging abuse of process. Defendant's motion for summary judgment and dismissal of the complaint was granted, and the branch of the motions seeking sanctions was denied on December 10, 2007, by the justice previously assigned to this matter. Left remaining were the three counterclaims sounding in abuse of process, prima facie tort, and fraud.¹

Defendant Jones, as counterclaim plaintiff, now moves for various relief. The branch of his motion seeking a preliminary conference as to the counterclaims is granted, as set forth below. The branch of his motion seeking to amend his counterclaims to add a claim of malicious prosecution is denied. In order to state a cause of action for malicious civil prosecution, there must be a showing of initiation, favorable termination, lack of probable cause, malice, and special injury (*Engel v CBS, Inc.*, 93 NY2d 195, 204 [1999]). Defendant fails to establish special injury. The nature of his injury, which he describes as "a suffering from the after effects of construction of an illegal exhaust flue inside an interior airshaft of Executive Plaza Condominium to counterclaim plaintiff's damage in the sum of \$150,000.00" (Mot. Jones Aff. ¶ 9), is not an injury that resulted because of the instant litigation. See, *Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept. 2005, quoting *Engel*, at 205 [special injury requires a showing of "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit"]).

¹After the motion was decided, the matter was reassigned to another justice for administrative reasons. Defendant/counterclaim plaintiff's motion was filed on April 25, 2008 and assigned to that justice. However, again because of administrative reasons, the matter was again reassigned in October 2008, for decision, when it was deemed fully submitted.

The branch of the motion seeking an order finding that the now dismissed claim of abuse of process was frivolous, and sanctionable, is denied on the ground that the arguments could have and should have been litigated in the context of defendant's motion for summary judgment and dismissal of the complaint, and therefore defendant/counterclaim plaintiff is now precluded from making further arguments about the claim (*see, Rainbow v Swisher*, 72 NY2d 106, 110 [1988]).

Finally, defendant/counterclaim plaintiff seeks sanctions against the law firm representing plaintiffs/counterclaim defendants, alleging that the firm failed to appear at three scheduled preliminary conferences. Jones alleges that he appeared on September 13, 2007, October 4, 2007, and November 15, 2007, but that no one from the law firm in opposition appeared (Mot. Jones Aff. ¶ 10, 29-30).² He seeks sanctions.

The attorney for plaintiffs/counterclaim defendants, who was newly substituted as the attorney of record in September 2007, states that any failure to appear at a conference was not willful or contumacious, and also that the preliminary conferences were adjourned because of the instant pending motion (Zelenitz Aff. in Opp. ¶ 24). As this litigation was not in this court's inventory during the months in question, the court has no way of knowing what may have occurred, and of course has no say in how other court parts are managed. Typically, dispositive motions will stay discovery, and a discovery conference, if scheduled while the decision on the motion is pending, would normally be adjourned until after the decision is issued. The Supreme Court Records On-line Library's records of this litigation indicates that the preliminary conference was adjourned three times, and that the last adjournment on November 15, 2007, was because "disposed-

²Allegations contained in the reply papers concerning what the previous Part 12 clerk may have stated are hearsay and not considered.

result of motion.”³ When the complaint is dismissed, but the counterclaims are continued, the court ordinarily issues a directive as to whether the County Clerk and Trial Support Office should continue the counterclaims under the same index number, or it will sever them and require purchase of a separate index number and a separate request for judicial intervention. It appears that in this case, inadvertently, no such guidance was given in the decretal paragraphs of the court’s decision on the defendant’s summary judgment motion.

The motion for sanctions and costs is denied in the exercise of the court’s discretion. However, all parties are placed on notice that the court expects full compliance with all future directives and appearances and its orders will be strictly enforced.

Accordingly, it is

ORDERED that the three extant counterclaims are severed and shall be continued under a new index number to be purchased by defendant/counterclaim plaintiff Charles Jones herein within 30 days of entry of this order; and it is further

ORDERED that if required by the Trial Support Office, defendant/counterclaim plaintiff Charles Jones shall purchase a request for judicial intervention at the time of purchase of the index number; and it is further

ORDERED that if defendant/counterclaim plaintiff Charles Jones fails to comply with the foregoing in a timely fashion, the counterclaims will be deemed dismissed with prejudice; and it is further

ORDERED that upon the timely purchase of an index number, and request for judicial

³Supreme Court Records On-Line Library (SCROLL), under “Appearances” in this litigation, Index No. 114335/2006..

intervention, if required, the Clerk of Court and the Trial Support Office shall transfer the counterclaim pleadings and reply to same to the file for the new index number, and the counterclaim pleadings shall stand as the pleadings in an action which shall bear a caption as follows:

-----X

CHARLES JONES, Plaintiff,	New Index Number to be Purchased
-against-	
STEVEN GOODSTEIN, TAFT PARTNERS, LTD., and GOODSTEIN DEVELOPMENT CORPORATION, Defendants.	

-----X, and it is further

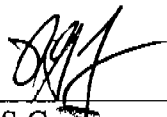
ORDERED that upon compliance with the foregoing the Trial Support Office shall assign the new index number to this part inventory and set this matter down for a preliminary conference for a Wednesday at 9:30 a.m. in Part 12, 80 Centre Street, room 289; and it is further

ORDERED that the defendant/counterclaim plaintiff Charles Jones shall serve a copy of this order together with notice of its entry upon the plaintiff/counterclaim defendants and upon the Clerk of the Court (60 Centre Street, Basement) and the Trial Support Office (60 Centre Street, Room 158); and it is further

ORDERED that all other relief requested in the motion is denied.

This constitutes the decision and order of the court.

Dated: November 7, 20008
New York, New York



 J.S.C.

FILED
 NOV 10 2008
 COUNTY CLERK'S OFFICE
 NEW YORK