

Soumayah v Minnelli

2009 NY Slip Op 32474(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 113894/2004

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

M' Hamed Joumayah

INDEX NO. 113844/04

MOTION DATE 9/30/09

MOTION SEQ. NO. 008

MOTION CAL. NO. EFM-4

- v -

Suzi Minelli

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

See attached A

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

PARTIAL SEALING | The underlying paper in support of the motion & cross-motion are sealed pursuant to Uniform Rule 216 (E-filed documents 83, 84, 85, 87, 89, 90, 91, 97, 98, 99, 100 and their exhibits). This short form order & the accompanying decision & order are not sealed.

Compliance Conference: 12/9/09; 2:15pm
NOI Ext 1/29/10.

Dated: 10/19/09

PAF

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST cc 12/9/09
NOT to be sealed

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

M'HAMMED SOUMAYAH,
Plaintiff,

- against -

LIZA MINNELLI,
Defendant.

-----X

LIZA MINNELLI,
Plaintiff,

- against -

M'HAMMED SOUMAYAH,
Defendant.

-----X

Index Number 113894/2004
Submission Date 9/19/2009
Mot. Seq. No. 008
Calendar No. 12 EFM-4

DECISION AND ORDER

Index Number 115809/2004

For Soumayah:
Law Office of Harvey S. Mars LLC
By: Harvey S. Mars, Esq.
322 West 48th Street, 6th Fl.
New York, NY 10036
(212) 765-4300

For Minnelli:
Greenberg Traurig, LLP
By: Israel Rubin, Esq.
200 Park Avenue, 39th Floor
New York, NY 10166
(212) 801-9200

E-Filed papers considered in review of this motion to strike and cross-motion in opposition and to unseal:

| Papers | E-Filed Documents Numbers |
|--|---|
| Minnelli Order to Show Cause and Annexed Affirmations | 83-85, 90, 91 (SEALED) |
| Mem. of Law in Support | 87 (SEALED) |
| Affirmation of Good Faith | 89 (SEALED) |
| Minnelli Supplemental Affirmation | 90 (SEALED) |
| Soumayah Order to Show Cause, Annexed Affirmations, Exhibits | 97, 99, 99-1 - 99-5, 100, 100-1 - 100-5 (SEALED) |
| Mem. of Law in Opposition | 98 (SEALED) |

PAUL G. FEINMAN, J.:

The above-captioned two matters have been joined for purposes of discovery. In the action *Minnelli v Soumayah*, Minnelli moves to dismiss the second amended complaint in its entirety as against LMM, LLC for failure to state a cause of action and on the basis of

documentary evidence (*see* CPLR 3211 [a] [1][7]). Minnelli and LMM, LLC also move to dismiss the second cause of action of Soumayah's second amended complaint alleging sexual harassment and retaliation on the grounds that it does not comply with this court's July 2009 decision and order granting plaintiff leave to replead certain claims. The court previously denied the portion of the motion which sought a stay of discovery pending resolution of these motions.

Separately, Soumayah cross-moves, pursuant to CPLR 3124, to compel Minnelli's examination before trial and for sanctions, pursuant to 22 NYCRR 130.1-1 and CPLR 8303-a, alleging frivolous conduct and failure to abide by a prior court order. For the reasons set forth below, Minnelli's motion is denied in its entirety, Soumayah's cross-motion to compel Minnelli's deposition is granted, and the branch of Soumayah's cross-motion for sanctions and/or costs is denied.

Background

Originally, Soumayah's complaint named two defendants: Liza Minnelli and LMM Productions, Inc. (Order to Show Cause, Ex. A, Order and Dec. at 1). During the course of disclosure, Soumayah received a reply affidavit from Arlene Graff, Minnelli's accountant (Aff. in Opp., Ex. 2), which stated that Soumayah had actually been employed by LM Concerts Inc., "a corporate entity of which Minnelli was a [p]rincipal" (Mars Aff. at 3). Accordingly, Soumayah moved to amend the complaint (motion sequence 006) and, on July 15, 2009, this court heard oral arguments on, among other things, that motion, and ruled on the record (Order to Show Cause, Ex. A, Tr.). By written decision and order of that date, and entered July 16, 2009 as E-Filed Document 72, the court indicated that it had granted the motion in part and denied the motion in part to the extent indicated on the record.

During the July 15, 2009 proceedings, the court granted Soumayah leave to amend the complaint. The scope of that leave is now at issue. On July 15, 2009, the court ruled on the record that Soumayah “could substitute the name of the correct production company [but] can’t start adding new claims” (Order to Show Cause, Ex. A, Tr. at 48). Minnelli’s counsel essentially argued that allowing the sexual harassment and retaliation cause of action to proceed against the corporation would constitute such a new claim. The court did not agree. The cause of action for sexual harassment and retaliation, the court explained, could be read as against the corporation as well, rather than just against Minnelli personally (Order to Show Cause, Ex. A, Tr. at 51).

In a written decision and order, dated July 16, 2009, and entered July 21, 2009 as E-Filed document number 73, this court decided motion sequence 007, which concerned joinder of these two actions. In a footnote, the court described the previous days’ proceedings as follows: “The court permitted, inter alia, an amendment of the complaint and caption to add LM Concerts, Inc., a production company of which Minnelli is a shareholder and through which she does business” (Order to Show Cause, Ex. A, Decision and Order at 1, fn. 1).

Soumayah then served a second amended complaint which added LMM, LLC rather than LM Concerts, Inc. as a defendant (Soumayah’s Memo of Law, Ex. 7) because Graff’s affidavit along with Soumayah’s own “[f]urther research indicated that LMM was the corporate entity through which Minnelli received recording royalty payments . . . and the proper corporate entity rather than LM” (Mars Affirmation, ¶¶ 7, 9). These motions and cross-motion ensued.

Minnelli’s Motions to Dismiss

A. Failure to State a Cause of Action and Documentary Evidence

In the context of a motion to dismiss premised upon CPLR 3211 (a) (7), “[i]t is axiomatic

that . . . the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference” (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 454 [1st Dept 2009]). “The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be *reasonably implied from its statements*, a cause of action can be sustained” (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995] [emphasis added], quoting *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]). On a motion to dismiss pursuant to CPLR 3211 (a) (1), this court will only grant dismissal if “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

As to Soumayah’s second cause of action for sexual harassment and retaliation, “to assert a viable claim of retaliatory discharge, an employee must demonstrate that there was a reasonable basis to believe that his or her employer engaged in an actionable discriminatory practice and that the employer discharged the employee as a result of the employee’s opposition to that practice” (*McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 [2d Dept 2006]). The Appellate Division, First Department, has recently upheld the applicability of the “single employer doctrine” to Executive Law § 292 (5), which provides that “interrelated entities may be aggregated to meet the four-employee statutory minimum required to be deemed an ‘employer’ under [the Human Rights Law]” (*Matter of Argyle Realty Assoc. v New York State Div. of Human Rights*, 65 AD3d 273, 273 [1st Dept 2009]).

Here, Minnelli’s contention that the second amended complaint should be dismissed as

against LMM, LLC because the “the documentary evidence produced by [Soumayah] himself establishes that the only employer he ever had in connection with his claims herein, was [defendant] Minnelli” is unavailing (Minnelli’s Memo of Law, at 14). As the movant, Minnelli bears the burden of pointing to “documentary evidence that utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]). An examination of the pleadings clearly demonstrates that questions of fact exist, the first of which is whether Soumayah was employed by Minnelli, LMM, LLC or both. Second, whether Minnelli and LMM, LLC constitute a “single employer” by sharing “common management, common ownership, and common financial control” (*Matter of Argyle Realty Assoc. v New York State Div. of Human Rights*, 882 NYS2d at 460-461, 465) for the purposes of aggregating employees, “cannot be conclusively determined, on the basis of the documentary evidence” (*Sprung v Command Sec. Corp.*, 38 AD3d 478, 479 [1st Dept 2009]). When considering the extent to which the New York City Administrative Code “is more liberal than either its state or federal counterpart” (*Brightman v Prison Health Servs., Inc.*, 62 AD3d 472, 472 [1st Dept 2009]; see Administrative Code of City of NY § 8-130; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [2009], *lv denied* ___ NY3d ___, 2009 NY Slip Op 81649, *1 [Aug. 27, 2009]), and viewing the pleadings in a light most favorable to Soumayah, it is premature, at this juncture, to find that LMM, LLC is entitled to judgment as a matter of law, and it cannot be said that Soumayah fails to state a claim for sexual harassment and retaliation as against LMM, LLC.

In fact, the court addressed this very contention at oral argument as to the initial motion to dismiss, indicating that the cause of action for sexual harassment and retaliation could be read as

against the corporation as well, rather than just against Minnelli personally (Order to Show Cause, Ex. A, Tr. at 51). The court explained that despite the fact that the corporation through which Minnelli does business, LMM, LLC, was initially improperly named, it was nevertheless “on notice of what her claimed actions are [and] certainly for a pleading, [Soumayah] should be permitted to allege that her actions are attributable to the corporation” (Order to Show Cause, Ex. A, Tr. at 51-52). However “inartfully or inarticulately drafted, [Soumayah] clearly puts” Ms. Minnelli and the corporation on notice that he was intending to raise the claim (Order to Show Cause, Ex. A, Tr. at 53) (*see Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]). Therefore, Minnelli’s motions to dismiss the second amended complaint in its entirety and the second cause of action in the alternative as against LMM, LLC are denied.

B. Failure to Comply with July 2009 Orders

Leave to amend the pleadings “shall be freely given” (CPLR 3025 [b]) unless the proposed amendment is prejudicial (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]) or “palpably improper” (*Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 22 [2d Dept 2008]). This determination “is committed to the court’s discretion” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see Murray v City of New York*, 43 NY2d 400, 404-405 [1977]). If leave to amend is granted and the subsequent “amendment [i]s not warranted under the permission granted by the prior order[, then] the remedy available [is] to strike out the excessive portions ” (*Ias Bicolor Corp. v Mezrahi*, 22 AD2d 898 [2d Dept 1964]; *see* CPLR 3024 [b]). Nevertheless, this court recognizes that the “granting of a motion to strike pleadings is a drastic remedy” (*Shapiro v Kurtzman*, 32 AD3d 508, 510 [2d Dept 2006]).

Here, Minnelli contends that Soumayah has added a new claim in violation of this court's July 15, 2009 ruling on the record on motion to amend (motion sequence 006) and in violation of this court's passing reference contained in footnote 1 in its written decision and order dated July 16, 2009 on the motion for joinder. Specifically, she complains that by adding several phrases to the second amended complaint, including, among other things, the word "professional" before "bodyguard," Soumayah has gone beyond the relief afforded by the court. These arguments are not persuasive.

First, for the reasons stated above, this court does not find that Soumayah has added a new claim. Next, to the extent that Minnelli is also arguing that LMM, LLC is prejudiced because they were not put on notice of this matter and "surprise result[ed] directly from the delay" (*Murray v City of New York*, 51 AD3d 502, 503 [2008], *lv denied* 11 NY3d 703 [2008], quoting *Fahey v County of Ontario*, 44 NY2d 934 [1978]), such contention is equally without merit because this court has already found, as evidenced by the first amended complaint, that Soumayah plainly intended to pursue the claim against Minnelli as well as the corporate entity through which she conducted business (Order to Show Cause, Ex. A, Tr. at 51-52). Therefore, Minnelli's motion to strike Soumayah's second amended complaint is denied.

Soumayah's Cross-Motion to Compel Disclosure

A party seeking disclosure may move to compel compliance under CPLR 3124. Here, a prior court order unambiguously directed Minnelli to appear for an examination before trial no later than September 18, 2009 (Order to Show Cause, Ex. A, Decision and Order at 4). On August 6, 2009, Soumayah, pursuant to that same decision and order, served a "Second Amended Complaint" upon Minnelli, but apparently failed to serve an amended summons along

with it (Rubin Aff. ¶ 7; “Amended Complaint” E-file Doc #81). Minnelli notified Soumayah of the same and he sought to correct it by filing a summons and “Revised Second Amended Complaint” thereafter (“Amended Complaint” E-File Doc # 82). Minnelli also alleges that Soumayah “was not ready to proceed with Ms. Minnelli’s deposition on September 18, 2009” (Order to Show Cause, Weber Aff. ¶ 2). On the other hand, a letter from Minnelli’s counsel to Soumayah’s counsel, dated August 20, 2009, “ask[s] that [Soumayah] consent to adjourn Ms. Minnelli’s deposition subject to approval by [the court]” (Order to Show Cause, Ex. C), which indicates a lack of clear communication. However, the parties then immediately filed motions and cross-motions, none of which are so bereft of merit as to rise to the level of a “failure to comply with discovery demands [that] is willful, contumacious or in bad faith (*Chadbourne & Parke v Coleman*, 281 AD2d 278, 278 [1st Dept.], *lv dismissed* 97 NY2d 638 [2001]). Accordingly, Soumayah’s motion to compel Minnelli’s examination before trial is granted to the extent that the parties are to proceed with the deposition on November 16 and 17, 2009, a mutually agreed upon date (Minnelli Supp. Aff. of Rubin ¶ 4). As the court expressed to the parties when last before it on September 30, 2009, the deposition may not be adjourned. The unexcused failure to proceed will result in the imposition of monetary and other sanctions.

Soumayah’s Cross-Motion for Sanctions

In addition, Soumayah argues that Minnelli’s motion to strike and/or dismiss Soumayah’s revised second amended complaint is frivolous warranting the imposition of sanctions (Soumayah’s Mem. of Law in Supp. at pp. 4-5) (*see* CPLR 8303-a [c]; 22 NYCRR 130-1.1). Conduct is frivolous if it is “is completely without merit in law” or undertaken for the purposes of delay or harassment (*see Matter of 155 W. 21st St., LLC v McMullan*, 61 AD3d 497, 501-502

[1st Dept 2009]).

The court is mindful of this matter's prolonged history inasmuch as it was commenced in 2004 and Minnelli is yet to be deposed. However, since its commencement, this litigation has been the subject of two appeals (*see Soumayah v Minnelli*, 41 AD3d 390 [1st Dept 2007], *appeal withdrawn* 9 NY3d 989 [2007]; *Soumayah v Minnelli*, 19 AD3d 337 [1st Dept 2005]) and however significant the amount of motion practice has been, it cannot be said that Minnelli's "attorney[s have made] repetitive and meritless motions" (*Nachbaur v American Tr. Ins. Co.*, 300 AD2d 74, 75 [1st Dept 2002], *lv dismissed* 99 NY2d 576 [2003], *cert denied* 538 US 987 [2003]) such that their conduct constitutes frivolity (*see Matter of 155 W. 21st St., LLC v McMullan*, 61 AD3d at 501-502). Accordingly, Soumayah's motion for sanctions is denied.

Minnelli's Motion to Stay Discovery

Finally, this court previously declined to stay discovery while this motion was *sub judice*. This decision and order renders any further consideration of Minnelli's motion to stay discovery academic and that branch of Minnelli's motion is denied (*see Arts4All, Ltd. v Hancock*, 54 AD3d 286, 289 [1st Dept 2008], *app dismissed* 11 NY3d 908 [2009] *and affd* 12 NY3d 846 [2009]; *Rappaport v Blank*, 72 AD2d 717 [1st Dept 1979]).

Therefore, it is

ORDERED that Minnelli's motions are denied in their entirety, and it is further

ORDERED that Minnelli and LMM, LLC shall answer the second amended complaint within 20 days of entry of this order; and it is further

ORDERED that the branch of Soumayah's cross-motion for sanctions is denied, and it is further

ORDERED that the branch of Soumayah's cross-motion to compel disclosure is granted to the extent that the parties shall conduct Minnelli's examination before trial on November 16 and 17, 2009; and it is further

ORDERED that all other disclosure must be completed by January 15, 2010, and that the note of issue must be filed by Soumayah by January 29, 2010; and it is further

ORDERED that the caption shall be amended to reflect the addition of LMM, LLC as a defendant in the first action as follows:

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

-----X

M'HAMMED SOUMAYAH,
Plaintiff,

Index No. 113984/2004

- against -

LIZA MINNELLI and LMM, LLC,
Defendants.

-----X,

and it is further

ORDERED that a copy of this order be served by Soumayah upon the Clerk of Court (60 Centre Street, Basement) and the Clerk of Trial Support (60 Centre Street, Room 158) who shall mark their files, records and papers to reflect the amended caption; and it is further


ORDERED that pursuant to Uniform Trial Rule 216 only the *underlying papers* filed in support of the motion and cross-motion (E-Filed Documents Bearing Document Numbers 83, 84, 85, 87, 89, 90, 91, 97, 98, 99, 100, and their exhibits) are sealed as they contain factual averments and sensitive personal data, such as tax documents, that should not be disclosed to the public;

and it is further

ORDERED that inasmuch as this decision and order do not specifically contain factual statements and personal data which should not be disclosed to the public, there is no basis to seal this decision and order which discuss matters only with a generalized reference to the underlying factual averments and personal data.

This constitutes the decision and order of the court.

Dated: October 19, 2009
New York, New York



J.S.C.

