

Arkun v Farman-Farma

2009 NY Slip Op 32780(U)

November 17, 2009

Supreme Court, New York County

Docket Number: 107335/06

Judge: Judith J. Gische

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: HON. JUDITH J. GISCHE PART 10
Justice

Arkun

Plaintiff (s),

INDEX NO.

107335/06

- v -

MOTION DATE

Farman-Farma

Defendant(s)

MOTION SEQ. NO.

005

MOTION CAL. NO.

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

NOV 30 2009

NEW YORK COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 11/19/09

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x

ARKUN, SUSAN BAIDZAR, a/k/a SUSAN ARKUN

Plaintiff,

-against-

FARMAN-FARMA, AMIR, a/k/a FARMAN-FARMA,
AMIR ALI, and GIMON, NATHALIE, A/K/A
FARMAN-FARMA, NATHALIE,

Defendants.
-----x

Decision/Order

Index No.: 107335/06
Seq. No. : 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	FILED	Numbered
Plt's n/m [amend] w/SA affid in support, exhs		1
Def's LME affirm in opp, exhs		2
SA reply affirm	NOV 30 2009	3
SA affirm		4
LME sur-reply affirm	NEW YORK	5
SA sur-reply letter	COUNTY CLERK'S OFFICE	6
SA sur-reply affirm re: defense opp		7
SA sur-reply affid		8
SA service aff		9

-----x
Upon the foregoing papers, the decision and order of the court is as follows:

In this action, plaintiff, *pro se*, now moves for leave to amend the complaint to add claims against Alijandra Mogilner, a/k/a Alijandra Lucille Mogilner a/k/a and d/b/a Faucon International ("AM"). CPLR § 3025 (b). The defendants oppose the motion and, alternatively, if leave to amend is granted, request sanctions and/or attorneys fees.

At the outset, the court must address the fact that many of plaintiff's submissions are in the form of affirmations which are not notarized. Although plaintiff herself is an attorney, under CPLR 2103, she is not entitled to submit her own affirmations in

connection with this action. Rather, an attorney may submit an affirmation in lieu of an affidavit only if the attorney is not a party to the action. Plaintiff is hereby put on notice that all future submissions must be compliant with this Rule, as well as any and all other applicable rules.

Turning to the instant motion, in the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 NY2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, “the sufficiency or meritoriousness of a proposed pleading or matter” should be resolved at the outset “to obviate the possibility of needless time consuming litigation.” Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982).

The party seeking leave to amend is required to show that the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st Dept 1990). In addition, where there has been an extended delay in moving to amend, the moving party must establish a reasonable excuse for the delay (Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC, 4 AD3d 290 [1st Dept 2004] citing Heller v Louis Provenzano, Inc., 303 AD2d 20 [1st Dept. 2003]).

Plaintiff commenced this action by filing a summons and complaint on May 25, 2006 which contained fourteen causes of action. Plaintiff subsequently amended her complaint to add Nathalie Gimon, a/k/a Nathalie Farman-Farma, Mr. Farman-Farma's

wife, as a defendant in this action. Upon plaintiff's application, this case was stayed for a period of time due to a related criminal proceeding then pending (see decision/order J. Gische dated November 3, 2006. In January 2009, plaintiff moved by Order to Show Cause to amend her claims and add AM as a defendant in this action. By decision/order dated January 22, 2009, the court declined to sign the order to show cause without prejudice to renew.

Plaintiff thereafter served a Second Amended Complaint on or before March 11, 2009 which was over 80 pages long and contained over 270 paragraphs. AM's name in the caption as a defendant had been whited and scratched out on the original copy of the Second Amended Complaint. A copy of the original document has been provided by the defendant to the court.

In her moving papers on this motion, plaintiff levies a number of allegations against AM, to wit: that between February and May 2008, AM, a friend of Farman-Farma's, posted numerous statements on the internet about plaintiff, sought disparaging information about plaintiff through online posting, and sent harassing emails to plaintiff. Plaintiff claims that she has suffered "prolonged and grievous harm from these actions."

However, the substance of these allegations was already contained in the plaintiff's Second Amended Complaint. In her Second Amended Complaint, plaintiff details the various emails and web postings that were allegedly made by AM in Paragraphs 268-274. In Paragraph 273 of the Second Amended Complaint, plaintiff alleges the following:

273. Alijandra Mogilner of San Diego, California ("AM"), previously unknown to plaintiff but identified by [Farman-Farma], defendant herein, as a "friend" of his in statements memorialized by the New York County District Attorneys office in March 2008 on information and belief, was revealed via subpoena response from aol to be owner of the mllmntz2@aol.com account used to

send and post these knowingly false and disturbing emails and the IP addresses were in all instances based in San Diego, California. Upon information and belief, AM is approximately 51 years old, based on her professional materials. Upon information and belief [Farman- Farma] specifically chose to employ AM because she was located physically outside New York in a futile attempt to evade responsibility for these actions.

Despite knowing AM's identity and the facts which would otherwise support her claims against AM, plaintiff decided not to name AM as a defendant in this action. Having clearly made that calculated decision, plaintiff has not come forward with any excuse for failing to include AM in her Second Amended Complaint, which was served after plaintiff originally moved to add AM as a defendant in this action. Although leave to amend is typically freely given, this case represents an extreme example of one where leave should be denied because no reasonable excuse for the delay has been established. A motion for leave to amend the pleading should be made promptly after discovery or awareness of the facts upon which such amendment is predicated. See Arias-Paulino v. Academy Bus Tours, Inc., 48 AD3d 350 (1st Dept 2008); Hanford v. Plaza Packaging Corp., 284 AD2d 179 (1st Dept 2001); Chernow v. Chernow, 39 AD3d 684 (2d Dept 2007); Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC, *supra*.

The defendants argue and this court agrees that substantial prejudice would result if plaintiff were granted leave to amend her complaint inasmuch as the ultimate resolution of this action would be further delayed. Given the inexcusable and inordinate delay by plaintiff to add AM to this action at this time, the fact that plaintiff's claims against AM could otherwise be brought within a separate action, and the prejudice that would result if this action were further delayed by adding another party, the instant motion for leave to amend must be denied.

The defendants "request" for sanctions and/or attorneys fees is also denied. First, such an application should have been made by motion, thereby putting plaintiff on notice of the relief requested. However, even if the defendants had not made this procedural error, the application would have been denied. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. While plaintiff's arguments were rejected by the court, the court cannot say that they were frivolous within the meaning of the court rule.

The court also notes that plaintiff has submitted an affirmation dated November 13, 2009 wherein she seeks "reconsideration" of the court's decision/order dated October 14, 2009. Plaintiff's request for "reconsideration" is improper because to the extent that plaintiff seeks to reargue the court's decision, such relief must be made by motion. Therefore, plaintiff's 11/13/09 affirmation is rejected by the court, and has been filed without action.

FILED
 NOV 30 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for leave to amend is denied.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
 November 17, 2009

So Ordered: 
 HON. JUDITH J. GISCHE, J.S.C.