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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 601984/2008

PITCOCK, JEREMY S.

vs

KASOWITZ, BENSON, TORRES

Sequence Number : 006

REARGUMENT/RECONSIDERATION

INDEX NO. 601984/08

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

...papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A - K	1
Answering Affidavits — Exhibits A-E	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
FEB 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: February 22, 2010

MARTIN SHULMAN J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

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JEREMY S. PITCOCK,

Plaintiff,

Index No.: 601984/08

-against-

DECISION & ORDER

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP, ERIC WALLACH and SITRICK AND COMPANY,

Defendants.

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MARTIN SHULMAN, J.:

Plaintiff Jeremy S. Pitcock ("plaintiff" or "Pitcock") moves to reargue this court's September 29, 2009 decision and order with respect to four of his fourteen dismissed causes of action alleging unjust enrichment, tortious interference with prospective employment or advantage, defamation and defamation *per se* and injurious falsehood (fifth, tenth, eleventh and twelfth causes of action). Defendants Kasowitz, Benson, Torres & Friedman, LLP ("KBTF" or the "firm") and Eric Wallach ("Wallach") oppose the motion, which is granted and upon granting same, the court adheres to its prior decision and order.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979); CPLR 2221(d). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally

presented. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dept. 1984); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept. 1992).

Here, Pitcock contends that the court overlooked various facts which support his claims sufficiently to withstand a motion to dismiss. However, the court agrees with defendants that plaintiff's motion to reargue rehashes the same arguments and presents new arguments not previously raised. For example, unlike Pitcock's opposition to the underlying motion, his motion to reargue for the first time emphasizes that: 1) Pitcock was not terminated for cause as that term is defined in the parties' partnership agreement; rather, he involuntarily withdrew from the partnership; and 2) plaintiff was not terminated on December 7, 2007.

As proof of the foregoing, plaintiff cites his continued performance of certain transition work after being asked to leave the firm on December 7, 2007 and the firm's subsequent forwarding of a draft severance agreement to him proposing a $60,000 severance payment.[1] While these facts were mentioned in Pitcock's opposition, they were not advanced for the proposition(s) now proffered.

Regardless, even if plaintiff raised his new arguments in opposition to the firm's underlying motion to dismiss, the outcome would have been the same. First, as to the defamation/defamation *per se* cause of action, Pitcock denies that the e-mail admission the court relied upon admits "extremely inappropriate personal conduct". The court rejects this notion outright as plaintiff clearly admitted "inappropriate behavior" in the

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[1] Pitcock points to the partnership agreement's provisions *inter alia* that partners terminated for cause shall have no further professional duties to the partnership, nor shall they be paid any salary or bonus. See partnership agreement at Exh. C to motion, ¶¶ 10.1.2 and 10.2.1.

subject e-mail. The addition of the term "extremely" to describe the admitted behavior is merely an exaggerated statement of opinion.

Plaintiff also argues the court overlooked the falsity of the first portion of KBT&F's statement that Pitcock was terminated for cause in December, 2007 and Wallach's statement that a thorough week long investigation had been conducted prior to his December 7, 2007 termination. As stated in *Dillon v City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999):

> In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Silsdorf v Levine,* 59 NY2d 8, *cert denied* 464 US 831).

Here, the average reader would be unaware of the definition the parties' partnership agreement ascribes to the phrase "terminated for cause". Rather, read in its entire context, the average reader would interpret the firm's statement that Pitcock "was terminated for cause . . ." as conveying that he involuntarily left the firm, which is true.[2] As previously held, the reason for the departure (to wit, "extremely inappropriate

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[2] The case at bar is factually distinct from *Carney v. Memorial Hosp. & Nursing Home of Greene County*, 64 NY2d 770, 772 (1985), wherein the court held that a jury should determine whether, "taken in [its] natural and ordinary meaning", the statement that plaintiff was terminated "for cause" was subject to a defamatory connotation. There, the court reasoned that the words in question were "not clearly susceptible to only one interpretation" and it could not "be said as a matter of law that the average reader . . . would not interpret it as meaning that plaintiff had actually been derelict in his professional duties." Here, given his admission, the statement at issue is not subject to more than one interpretation.

personal conduct") is conceded. For these reasons, plaintiff fails to establish that any false statement was made.

Similarly, Wallach's statement that plaintiff was terminated following a thorough week long investigation into reported inappropriate conduct is not defamatory in light of plaintiff's admission regarding his behavior and the fact that he did not leave the firm of his own volition. The addition of the information regarding the alleged investigation, even if false, is irrelevant in light of the foregoing. *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 638 (2d Dept 2007) ("Even if a publication is not literally or technically true in all respects, the defense of truth applies as long as the publication is 'substantially true,' and minor inaccuracies are acceptable [citation omitted]"). Based on the foregoing, the cause of action for defamation and defamation *per se* was properly dismissed.

As to the cause of action for tortious interference with prospective employment or advantage, Pitcock argues he established defendants acted using wrongful means (to wit, misrepresentation) and the cause of action should thus be reinstated. As set forth above, plaintiff fails to establish that defendants made any representations. Accordingly, this cause of action was properly dismissed.

Plaintiff further argues that his complaint adequately alleged special damages of "lost income" to support his injurious falsehood cause of action. As stated in the court's prior decision and order, to allege a sustainable cause of action for injurious falsehood, a plaintiff must allege special damages by itemizing specific business lost (*Squire Records, Inc. v Vanguard Recording Soc'y, Inc.*, 19 NY2d 797 [1967]). In *Squire*

Records, the plaintiff sufficiently alleged special damages, a necessary element, "because of the specific naming of the customers lost." By contrast, Pitcock fails to set forth what, if anything, he allegedly lost.

Finally, Pitcock argues that his unjust enrichment cause of action can be maintained since no binding agreement governed his transitory work. The court previously held that the parties' partnership agreement precluded this cause of action. *See MT Property, Inc. v Ira Weinstein & Larry Weinstein, LLC*, 50 AD3d 751 (2d Dept 2008)(claim for unjust enrichment is precluded where there is a valid agreement between the parties covering the same subject matter). Contrary to plaintiff's claims, the partnership agreement addressed the rights and obligations of expelled partners and provides no basis for compensation for transition work. For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion to reargue is granted, and upon granting reargument the court adheres to the decision and order dated September 29, 2009.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: February 22, 2010

Martin Shulman, J.S.C.