

Truong v Alphonse Hotel Corp.
2010 NY Slip Op 34063(U)
February 2, 2010
Supreme Court, New York County
Docket Number: 101405/09
Judge: Richard B. Lowe III
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

-----X

DR. MAC TRUONG,

Index No. 101405/09

Plaintiff,

- against -

ALPHONSE HOTEL CORPORATION, SANG KIM
NGUYEN, ELAINE NGUYEN, and
TRUONG DINH TRAN,

Defendants.

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Hon. Richard B. Lowe, III.:

Motion sequence numbers 004, 005, 006, and 007 are consolidated for disposition.

In Motion 004, plaintiff Dr. Mac Truong moves for an order (1) granting him leave to reargue this Court's order dated April 17, 2009 (Order) that granted the motion by defendants Alphonse Hotel Corporation, Sang Kim Nguyen, Elaine Nguyen, and Truong Dinh Tran to dismiss the complaint and enjoined him from filing further actions without leave of court, (2) reinstating the complaint to the active calendar, (3) vacating the Order on the ground that the court lacked subject matter jurisdiction due to plaintiff's Chapter 7 bankruptcy filing subsequent to the commencement of this action, and (4) vacating the Order enjoining plaintiff from commencing a new action against defendants herein without prior order of this court.

In Motion 005, plaintiff moves for an order (1) finding that defendants have defaulted in the action entitled *Truong v Robinson Brog Leinwand Greene Genovese & Gluck PC*, Index No. 105547/09 (Related Action), (2) ordering the Clerk of the Court to enter judgment against defendants in the Related Action of the relief sought therein, (3) declaring the Order that enjoined plaintiff from filing another action against defendants without leave of court does not

apply to the commencement of the Related Action, or, in the alternative (4) granting plaintiff leave nunc pro tunc to file or continue the Related Action, (5) directing defendants to discontinue their “frivolous” motion practice in the U.S. Bankruptcy Court for the Southern District of New York in *In re Mac Truong, Chapter 13 Debtor*, Docket No. 11047/09 (MG) (Bankruptcy Action) to lift the automatic stay over this action, and (6) granting plaintiff’s motion to reargue that is presently pending adjudication before this court in this action.

In Motion 006, plaintiff moves for an order (1) declaring the Order that granted defendants’ motion to dismiss the complaint as abandoned, (2) restoring this action to the active calendar for trial, (3) directing that plaintiff’s appeal of the Order to the Appellate Division may be withdrawn without prejudice as moot, and (4) transferring this action from the Commercial Division to a non-commercial part of this Court.

In Motion 007, defendants move for an order (1) holding plaintiff in contempt of court by his alleged violation of the Order that prohibits him from filing another lawsuit without prior court approval, and (2) directing plaintiff to reimburse defendants for their counsel fees on this motion.

Discussion

Motion 004

Plaintiff’s motion for reargument is denied. Plaintiff has not demonstrated that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (*Spinale v 10 W. 66th St. Corp.*, 193 AD2d 431 [1st Dept 1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Plaintiff’s request for reargument is based on his assertion that, at oral argument on the motion, held on April 17, 2007, the court denied his request for “more time to re-articulate” his “oral argument” (see plaintiff’s affidavit,

sworn to April 20, 2009, at 4). A review of the transcript of that oral argument reveals, however, that plaintiff was afforded adequate opportunity to articulate his position.

Motion 005

The motion is denied. Any issues pertaining to the Related Action or the Bankruptcy Action should be addressed in those actions. Moreover, the claim that defendants defaulted in the Related Action is without merit, because the bringing of that action violates the Order. The assertion that the Order, that enjoined plaintiff from filing another action without leave of court, does not apply to the commencement of the Related Action is without merit. By its express language, the Order is applicable.

Motion 006

The motion is denied. Plaintiff's argument that the Order is not enforceable is without merit. Plaintiff was in the courtroom at the time that the "open court" order was made, and it was so-ordered on the record. Moreover, a review of the record in this action shows that the Order was filed with the New York County Clerk's Office on April 22, 2009.

Motion 007

The motion is granted to the extent of directing plaintiff to reimburse defendants for their counsel fees on this motion. A finding of contempt is warranted in that defendants have established that plaintiff "violated a clear and unequivocal mandate of the court, thereby prejudicing a right of another party to the litigation" (*Riverside Capital Advisers, Inc. v First Secured Capital Corp.*, 43 AD3d 1023, 1023 [2d Dept 2007]). Plaintiff violated the Order by filing in a Bankruptcy Action, on August 12, 2009, the identical claims that this court dismissed, and by commencing the Related Action. The commencement of both of these actions was a willful violation demonstrated by "clear and convincing evidence" (*Denaro v Rosalia*, 50 AD3d

727 [2d Dept 2008])).

While the plaintiff is unequivocally subject to a finding of contempt, the court is limiting the sanction only to the payment of the defendants' attorneys' fees for defending this action.

However, the plaintiff is admonished that he may subject himself to a more severe penalty, to be imposed by the court, if there is any further violation of its order.

Conclusion

Accordingly, based on the foregoing, motion sequences 004, 005, and 006, all of which were filed by the plaintiff, are denied. Motion sequence 007, filed by the defendant, is granted to the extent set forth above.

Settle order on notice. Together with the Notice of Settlement, counsel for defendants will serve and file an affidavit setting forth the amount of attorney's fees sought and how said amount was arrived at. In the event that plaintiff wants to contest the amount of attorney's fees sought, he may do so by filing an affidavit in opposition thereto within 10 days after service of the Notice of Settlement. The actual amount of attorney's fees allowed will be set in the order.

Dated: February 2, 2010

HON. RICHARD B. LOWE, II.