

Amorizzo v Conte

2011 NY Slip Op 31633(U)

May 25, 2011

Supreme Court, Nassau County

Docket Number: 012200/2005

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

ALFONSO AMORIZZO, CHARLES CHIN-SANG,
EDMUND CHIN-SANG, GREGORY CONNORS,
JOHN DELAHANTY, PETER DILL, RAYMOND
DODGE, ROBERT DODGE, NEIL R. DOHREN,
VANESSA ESPEJO, ESTATES HOME DELIVERY,
LTD., JAMES FRAZZITTA, LAURENCE FURNELL,
CHARLES HAGEMEYER, CAROL HAZELDINE,
JUSTIAN A. NICKMICK OF TIME, INC., MAKO
ASSOCIATES, INC., SAME MARTINEZ, DIANE
McDONALD d/b/a DIANE M. McDONALD
ENTERPRISES, JAMES McMULLEN, MICHAEL
RANDANO, REIN DISTRIBUTION, INC., KEITH J.
RUMM, GARY SPIERER, CAROL-ANNE STAUER,
TJ'S PARTY TENTS, INC., TOP DOG DELIVERY
SERVICE, INC., LEN TORCHIN, JOSEPH VETRO,
MARK VON WIEDING, MAREK WADOLOWSKI,
WDC, INC., RHONDA ZELKIIND, VINCENT
ROMANO, On Behalf of Themselves and On Behalf
of All Others Similarly Situated,

Plaintiffs,

INDEX NO.: 012200/2005
MOTION DATE: 3/11/11
MOTION SEQUENCE: 008

-against-

ANTHONY CONTE, ANTHONY CONTE d/b/a
I-MEDIA CORPORATION, ANTHONY CONTE
d/b/a I MEDIA, ANTHONY CONTE d/b/a
IMEDIA CORPORATION, ANTHONY
CONTE d/b/a IMEDIA CORPORATION,
ANTHONY CONTE d/b/a AMERICAN HOME TV
TIME MAGAZINE, ANTHONY CONTE d/b/a
AMERICAN HOME DISTRIBUTION NETWORK,

Defendants.

ANTHONY CONTE,

Third-Party Plaintiff,

-against-

COUNTY OF NASSAU, NEW YORK
NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE,
DENIS E. DILLON, Individually and as Former
District Attorney of Nassau County, New York,
BOB EMMONS, Individually and as Assistant
District Attorney of Nassau County, New York,
PHILIP WASILAUSKY, Individually and as Assistant
District Attorney of Nassau County, New York,
WILLIAM WALLACE, Individually and as Assistant
District Attorney of Nassau County, New York,
MIKE FALZARANO, Individually and as Special
Investigator for the Office of the District Attorney
of Nassau County, New York,
TEFTA SHASKA, Individually and as a Detective
for the Police Department of the City of New York,
LISA BLAND, Individually and as attorney for the
Police Department of the City of New York,
ROBERT VINAL, Individually and as Deputy
Commissioner for the Police Department of
the City of New York,
THE CITY OF NEW YORK,
THE POLICE DEPARTMENT OF THE CITY OF
NEW YORK,
LARRY GUERRA,
MARK HARRINGTON,
NEWSDAY, INC.,
"JOHN" AND "JANE" DOES, 1-30, Individuals
and Business Entities,
CONSUMERS WAREHOUSE CENTER, INC.,
JAMES S. BALOGA, SR.,
JAMES S. BALOGA, JR.,
MARIO ESCAMILLA,

Third-Party Defendants.

The following papers read on this motion:

Notice of Third-Party Defendants’ Motion for Leave to Amend Answer and for Summary Judgment, Janet Deluca Affirmation, and Exhibits Annexed 1

Anthony Conte Affidavit in Opposition and Exhibits Annexed 2

Janet Deluca Reply Affirmation 3

PRELIMINARY STATEMENT

Motion by Third-Party Defendants City of New York and New York City Police Department to amend their Answer to assert affirmative defenses of collateral estoppel and res judicata on the basis of the Honorable J. F. Bianco’s decision and order dated March 31, 2008 in the U.S. District Court for the Eastern District of New York, which dismissed claims by Third-Party Plaintiff Anthony Conte against the moving Third-Party Defendants based upon the same facts alleged in this matter. Based upon the same decision and order, the City of New York and New York City Police Department also move for summary judgment dismissing Conte’s Third-Party claims against them.

FACTUAL BACKGROUND

The underlying class action lawsuit arises out of the alleged breach of home distributorship agreements between defendant/third-party plaintiff Anthony Conte d/b/a I-Media Corporation and the individual plaintiff class members who allege that they were fraudulently induced to purchase home delivery routes for the delivery of TV Time¹, a magazine purportedly published/distributed by I-Media Corporation. The original purchase price of fifty (50¢) cents per household was gradually increased to \$1.50 as the number of distributorship agreements increased. According to plaintiffs, defendant/third-party plaintiff Anthony Conte, using various alter-ego corporate entities under which he did business, engaged in a pyramid scheme to defraud the plaintiff class, used the funds received from them for his own benefit and had neither the financial wherewithal nor expertise to publish and distribute the subject magazine. Moreover, plaintiffs allege that defendant/third-party plaintiff Anthony Conte never delivered a full supply of the subject magazine to plaintiffs and, beginning in April 2005, failed to make fee payments.

¹Plaintiff class members were to be paid twenty (20¢) cents for each copy of TV Time Magazine delivered to a household within their respective routes.

The class action complaint alleges six causes of action arising from the alleged widespread and pervasive fraud committed by defendants. The first cause of action seeks recovery of monies paid as and for non-existent distributorship routes. The second cause of action asserts a punitive damages claim predicated on defendants' alleged malicious and wanton conduct. The third cause of action claims treble damages for violation of the General Business Law including deceptive business practices [§349] and false advertising [§ 350-a]. The fourth, fifth and sixth causes of action allege breach of contract, unjust enrichment and conversion of plaintiffs' monies respectively.

On or about April 8, 2008, approximately three years after the class action litigation was filed, a third party action was commenced by defendant/third-party plaintiff Anthony Conte predicated on allegations that third-party defendants engaged, *inter alia*, in an ongoing and continuous campaign to concoct and disseminate, to numerous vendors and route distributors who had contracted with Mr. Conte and I Media, false accusations that he was a "crook", "fraud" and "scam artist" for the purposes of fomenting and soliciting complaints against Conte and his publishing business as a result of which his business was ruined.

More specifically, the facts alleged in Conte's claims against the movants, the City of New York and the New York City Police Department, stem from the alleged conduct of New York City Police Detective Tefta Shaska. The Third-Party Complaint alleges that non-moving Third-Party Defendant Larry Guerra defaulted in his payments to Conte's businesses, and Conte withheld certain payments as liquidated damages. Thereafter, Guerra threatened Conte with criminal charges. Guerra is married to New York City Police Detective Tefta Shaska. After Guerra's threats to Conte, Shaska allegedly used her official capacity to approach Gabriel Sauro, a sales representative for Quebecor, which performed the printing for Conte's publication. Shaska falsely informed Sauro that she was conducting an investigation of Conte and his companies for fraud and illegal business activity. At Shaska's insistence, Quebecor provided to Shaska certain contract documents and confidential credit application of Conte's companies, which Shaska then shared with Guerra. Conte made a complaint to the New York City Police Department regarding Shaska's conduct, which resulted in an investigation and disciplinary hearing. Conte further alleges that Shaska was able to use her official capacity for private and

[* 5]
illegitimate purposes with the knowledge and sanction of Shaska's commanding officer, Lieutenant West of the Midtown South Precinct. These appear to be the extent of the factual basis of Conte's claims against the City of New York and New York City Police Department.

A prior action instituted by Conte in the U.S. District Court for the Eastern District of New York under Case Number CV-06-4746, is based upon substantially the same facts as those set forth in the Third-Party Complaint. There Conte has alleged causes of action for false arrest, abuse of process and malicious prosecution under 42 U.S.C. § 1983; conspiracy; tortious interference with contractual relations defamation and violations of the First, Fourth, Fifth and Fourteenth amendments of the federal Constitution. Pursuant to the order of the Honorable J. F. Bianco, District Judge, dated March 31, 2008, the federal court action was dismissed as to the City of New York and the New York City Police Department.² The City of New York and New York City Police Department move on this matter to raise affirmative defenses for collateral estoppel and res judicata from Judge Bianco's decision and order, and for summary judgment pursuant to these affirmative defenses.

DISCUSSION

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of

² The decision and order also dismissed claims against the Nassau County District Attorney's Office, as to defendant District Attorney Dennis Dillon, in both his official and personal capacities, and as to the other County defendants sued in their official capacities. Claims against Nassau County and defendants Emmons, Wasilansky, Wallace and Falzarano, individually, for false arrest/false imprisonment, malicious prosecution, first amendment violations, § 1983 conspiracy, abuse of process as well as various state law claims survived the motion to dismiss.

costs and continuances.

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. (*Lucido v. Mancuso*, 49 AD3d 220, 230 [2d Dept. 2008]).

The movants’ proposed affirmative defenses for collateral estoppel and res judicata, predicated on the decision and order of March 31, 2008 in the federal action, state valid affirmative defenses. Leave to amend the Answer is granted. Upon granting such leave, the court next considers the Third-Party defendants’ motion for summary judgment based on these affirmative defenses.

Summary judgment terminates a case before a trial, and it is therefore a drastic remedy that will not be granted if there is any doubt with regard to a genuine issue of material fact, since it is normally the jury’s function to determine the facts. (*Sillman v. Twentieth Century-Fox Film Cor.*, 3 NY2d 395 [1957]). When summary judgment is determined on the proof, it is equivalent to a directed verdict: if contrary inferences can reasonably be drawn from the evidence, then genuine issues of material fact preclude summary judgment. (*Gerard v. Inglese*, 11 AD2d 381 [2d Dep’t 1960]).

If a party has presented a prima facie case of entitlement to summary judgment, because

no triable issues of material fact exist, the opposing party is obligated to come forward and bare his proof by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Considering the facts in the light most favorable to the non-moving party, Anthony Conte, the alleged facts fail to state any cause of action against the City of New York and the New York City Police Department. While Conte's claims were not fully litigated on the merits, the issues upon which Judge Bianco dismissed Conte's claims against the City of New York and the New York City Police Department were adequately litigated in the federal action between the very same parties, and Judge Bianco's determination of these issues has led to a judgment of dismissal as to the City of New York and the New York City Police Department. And, even if principles of collateral estoppel did not apply, this court agrees with Judge Bianco's reasoning.

Conte does not have a cause of action against the New York City Police Department, apart from the City of New York, because of the well settled law that entities such as the New York City Police Department are "administrative arms" of the same municipal entity that has also been sued, the City of New York, and thus the New York City Police Department lacks capacity to be sued. (*See, e.g., Caidor v. M&T Bank*, No. 5:05-CV-297, 2006 U.S. Dist. LEXIS 22980, at *6-*7 [N.D.N.Y. Marc. 27, 2006] ["Under New York law, departments which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued"] [quoting *Hill v. City of White Plains*, 185 F.Supp. 2d 293, 303 [S.D.N.Y. 2002]]).

Conte also does not have any cause of action against the City of New York based on the alleged conduct of Lieutenant West and Shaska. As Judge Bianco explained: "The [United States] Supreme Court expressly rejected liability pursuant to a theory of *respondeat superior* for purposes of § 1983 in *Monell*." (*Conte v. County of Nassau*, No. 06-CV-4746 [E.D.N.Y. March 31, 2008, Bianco, J.] [citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978)]). Indeed, "[a] municipality will not be held liable under § 1983 unless plaintiffs can demonstrate that the allegedly unconstitutional action of an individual law enforcement official was taken

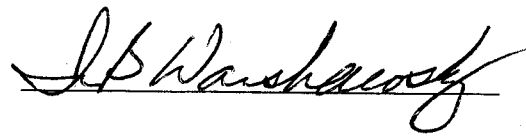
pursuant to a policy or custom officially adopted and promulgated by that [municipality's] officers." (*Abreu v. City of New York*, No. 04-CV-1721, 2006 U.S. Dist. LEXIS 6505, at *11 [E.D.N.Y. Feb. 22, 2006]; see also *Ricciuti v. N.Y. City Transit Auth.*, 941 F.2d 119, 123 [2d Cir. 1991]). Moreover, "the mere assertion... that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." (*Zahra v. Town of Southold*, 48 F.3d 674 [2d Cir. 1995]).

The court agrees with Judge Bianco's reasoning that the alleged facts do not sufficiently describe an official custom or policy supporting Shaska's alleged misconduct. At most, Conte's allegations could support an inference that the City of New York permitted Shaska to engage in unsupervised and illegal abuse of her office. However, Conte's admission that Shaska was promptly investigated and disciplined after Conte's complaint, goes against any inference that the City's custom and policies tolerated or even sanctioned such misconduct or abuse of official capacity. Rather, Conte's allegations are stated only against Shaska's own misconduct and alleged abuse of official capacity. Thus, Conte has failed to state any cause of action against the City of New York.

The motion for summary judgment is granted. The Third-Party Complaint is dismissed as to the City of New York and the New York City Police Department. The court does not address the movants' arguments with regard to the non-appearing Third-Party Defendants, since they do not purport to represent or move on behalf of those parties.

This constitutes the Decision and Order of the court.

DATED: *May 25, 2011*



J.S.C.

ENTERED
JUN 08 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE