

Zaretsky v Berlin

2011 NY Slip Op 32348(U)

August 25, 2011

Supreme Court, Nassau County

Docket Number: 17869-08

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

ELLIOT ZARETSKY, HAROLD ZARETSKY,
SHIRLEY ZARETSKY and MAXI-AIDS INC.,

Plaintiffs,

-against-

AARON BERLIN and FEIGE ZARETSKY,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 17869-08

MOTION SUBMISSION
DATE: 8-15-11

MOTION SEQUENCE
NO. 14

The following papers read on this motion:

Order to Show Cause, Affirmation, and Exhibits	X
Affirmation in Opposition	X
Affirmation by Aaron Berlin dated May 25, 2011 in Opposition	X
Reply Affirmation dated August 15, 2011	X

In Motion Sequence No. 14, defendants pro se move by Order to Show Cause dated December 29, 2010 (Driscoll, J.) for an order pursuant to 5015(a)(2) and (3) to (1) vacate the prior order dated January 9, 2009 (Feinman, J.) granting summary judgment without opposition and setting the matter down for a hearing on damages; (2) vacate the order dated November 2, 2009 (Feinman, J.) confirming the Referee's report and directing the entry of money judgments in the total sum of \$1,290,000.00; and (3) granting summary judgment dismissal of the complaint or scheduling further proceedings herein. Plaintiffs oppose all requested relief.

Defendants requested temporary restraining orders staying enforcement of the money judgment and staying the Sheriff's sale of defendant FEIGE ZARETSKY's right, title and interest in her residence in Plainview, New York, and for other temporary relief.

All such temporary relief was not granted by Justice Driscoll. Defendants sought leave to appeal from said determination and for a stay from the Appellate Division, Second Department. Leave to appeal was denied on April 6, 2011 and all other relief was denied as academic.

This is defendants' third motion in this Court to vacate the default order and the money judgment. There were also appeals and motions made to the Appellate Division by defendants.

Defendants moved in the Second Department to stay enforcement of the money judgments, while they were appealing. Plaintiffs cross-moved to dismiss the appeals since the judgment and order were entered on default. On May 2, 2010, the Appellate Division granted the cross-motion to dismiss the appeal.

Defendants moved to vacate their default (Mot. Seq. No. 4), which motion was denied on July 27, 2010 (Feinman, J.). Another motion for a stay was made to the Appellate Division and denied on August 30, 2010.

Thereafter, defendants moved pursuant to CPLR 5015(a)(3) to vacate the summary judgment order, the order granting money judgments, the order directing the sale of the Plainview property, and other orders (Mot. Seq. #9). The Court (McCarty, J.) denied the motion on September 13, 2010, holding that the order dated July 27, 2010 denying their motion for the same relief was law of the case.

Plaintiffs, as petitioners, filed a Petition to sell FEIGE ZARETSKY's interest in the Plainview property (Index No. 8498-10) which was granted without opposition on May 26, 2010 (Feinman, J.). Thereafter, defendant FEIGE ZARETSKY moved to vacate said default. Justice Lally denied that motion on November 22, 2010. The

Court noted that there was no direct appeal of the orders and the motions to vacate the orders were denied on July 27, 2010 and September 13, 2010. Thus, the Court held the prior orders were law of the case.

Insofar as defendants now move for the third time pursuant to CPLR 5015(a)(3), that portion of the motion is DENIED as the prior orders denying such relief are law of the case.

Insofar as defendants move pursuant to CPLR 5015(a)(2) on the ground of newly discovered evidence, the motion is determined as follows:

Defendants present, as “newly discovered evidence”, an affidavit of a non-party witness, Natan Galant, sworn to on December 7, 2010. Defendant BERLIN claims he was not aware “of the existence of a witness” until November 20, 2010. Galant now claims he heard certain conversations in September and October, 2008 between plaintiff ELLIOT ZARETSKY and David Wacholder, an individual who represented himself at that time to be defendant’s lawyer. Galant overheard conversations Wacholder had using “his cell phone with the speaker open”. The sole basis for believing ELLIOT ZARETSKY to be the other participant was Wacholder’s statement it was Elliot. Some days later Galant first met ELLIOT ZARETSKY and believed his was the voice Galant heard on the phone days earlier.

Galant stated Wacholder told him Wacholder prepared a certain document at the request of ELLIOT ZARETSKY and emailed it to ELLIOT ZARETSKY from Defendant BERLIN’s home computer while BERLIN was not present. This document was meant to contain all negative information BERLIN had on ELLIOT ZARETSKY. This document is allegedly the libelous document that was the subject of Plaintiffs’ Complaint herein.

[* 4]
Galant also stated that in late October, 2008 Wacholder told him, in essence, that ELLIOT ZARETSKY was blackmailing him with certain recordings.

CPLR 5015(a) lists the principal grounds upon which a judgment or order may be vacated. Subdivision 2 of CPLR 5015(a) permits a court to vacate an order or judgment upon:

...newly discovered evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404...

The significant word above is "probably". Newly discovered evidence is only sufficient if the court is convinced that the new evidence would "probably" change the result. A mere showing of possibility is insufficient, as is new evidence that is cumulative or relevant only to witness's credibility. See, e.g., Cizler v. Cizler, 19 AD2d 819 (1st Dept. 1963; Mattwell v. Mattwell, 220 AD2d 727 (2nd Dept. 1995).

The movant must satisfy the Court that the evidence is material and not merely cumulative and that it is not offered simply to impeach the credibility of an adverse witness. Further, the movant must demonstrate both that the new evidence would have materially impacted the factual issues of the case and that he or she acted with due diligence in discovering the new evidence. Structural Concrete Corp. v. George Cambell Assocs., 224 AD2d 516 (2nd Dept. 1996).

The most important element of CPLR 5015 is that in order to vacate a judgment, newly discovered **evidence** must be provided. It is well settled that the definition of evidence is "the demonstration of a fact" which "makes clear the truth of fact, persuades a court of the existence of a fact, or produces a just conviction of truth." 57 NYJur2d

Evidence and Witnesses 1. Thus, the purpose of "evidence" is to inform the trier of fact of the material facts or the means by which such facts can be established or disproved so that a fair determination of the controversy may be reached.

However, out-of-court statements which are offered to establish the truth of the facts asserted therein are hearsay and inadmissible as evidence. People v. Goldstein, 6 NY3d 119, 127 (2005). Such a statement is admissible only if it falls within one of the recognized exceptions to the hearsay rule. The "evidence" that Defendants claim supports a vacatur of the judgment herein is merely hearsay and cannot be the basis for vacating a judgment or order.

A review of the Galant affidavit confirms it consists of hearsay and conclusory opinions of the affiant. As such, it cannot meet the standard under 5015(a)(2). Defendants are offering Mr. Galant's affidavit for no other purpose than for the truth asserted therein, to wit: he overheard Plaintiff Elliot Zaretsky conspiring with Mr. Wacholder to fabricate the libelous emails that began this litigation. Since it is inadmissible as hearsay, it cannot be deemed evidence. If it is not evidence, it cannot be "newly discovered evidence" sufficient to vacate the judgment.

Defendants' entire argument is based on Mr. Galant allegedly overhearing conversations between Mr. Wacholder and Plaintiff Elliot Zaretsky. A telephone conversation between **the parties to litigation** upon the subject matter of the litigation, **which has been testified to by one of the parties**, may also be testified to by a bystander. Mankes v. Fishman, 163 AD 789 (3d Dept. 1914); Clark v. Donovan, 34 AD2d 1099 (4th Dept. 1970); People v. Lynes, 64 AD2d 543 (1st Dept. 1979). However, the allegedly overheard conversations herein were not between the parties hereto; it

was allegedly between Plaintiff Elliot Zaretsky and Mr. Wacholder, a non-party. Here, as set forth in Plaintiff Elliot Zaretsky's Affidavit in Support, Plaintiff wholly denies such a conversation ever took place. In fact, Plaintiff avers that he never met Mr. Wacholder. Therefore, Mr. Galant's testimony would be inadmissible on the basis.

Moreover, the identification of a person who is claimed to be a **participant** in a telephone conversation is required as a pre-requisite to the admissibility of the conversation in evidence. **A witness may only testify that he or she recognized and identified the voice of the person with whom he or she talked, if he or she is acquainted with that person.** 57 NY Jur2d Evidence and Witnesses 236 (emphasis added); Colligan v. City of New York, 155 AD 475, 478 (2d Dept. 1913). The witness must be a participant in the conversation and can only testify as to recognition and identification of a voice with whom the person is already familiar.

Based on the above, Mr. Galant's affidavit would be inadmissible. He was not a participant in the alleged conversation between Mr. Wacholder and Plaintiff; he allegedly overheard the phone call on speakerphone. Further, these alleged phone calls were prior to September 17, 2008, the first day Mr. Galant claims he met Plaintiff. Mr. Galant states in his sworn affidavit that it was Mr. Wacholder who "identified [the voice] to me as being Elliot Zaretsky, Berlin's *mechuten*."

Defendants contend in this motion that Mr. Wacholder was an active co-conspirator of Plaintiff Elliot Zaretsky's and was working against Defendants during his representation of them. Yet, in their August 3, 2010 Order to Show Cause to vacate the judgment pursuant to CPLR 5015(a)(3) (Exhibit "E"), Defendants claimed that Mr. Wacholder was simply a legal "quack" who took advantage of them. In fact, Mr.

Wacholder submitted an affidavit in support of that motion (Exhibit "F") and at no time did he disclose the alleged conspiracy with Plaintiff, the statements made by Zaretsky, nor the allegations of blackmail. Clearly, if the conspiracy existed, that motion would have been the time to disclose it.

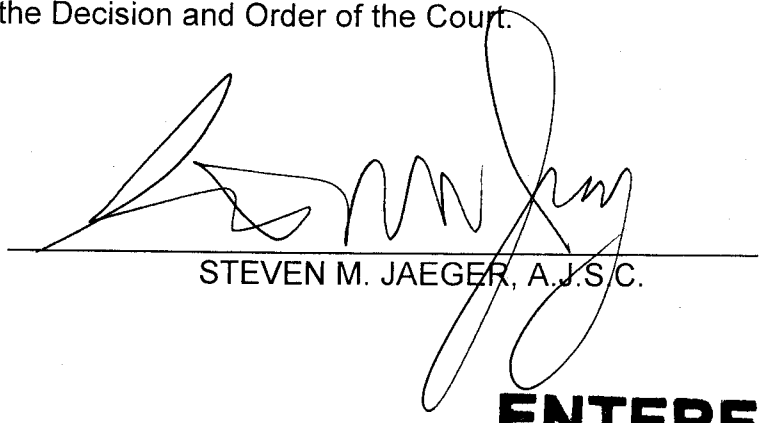
Thus, the Court finds that the alleged newly discovered evidence, that is, the affidavit of Natan Galant, does not satisfy the standard set forth in CPLR 5015(a)(2). The testimony of this witness, even if admissible at a trial or upon a summary judgment motion, would not have changed the result.

Accordingly, defendants' motion to vacate the order and judgment pursuant to CPLR 5015(a)(2) is denied.

The remaining branch of the motion is denied as moot in light of the above rulings.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 25, 2011


STEVEN M. JAEGER, A.J.S.C.

ENTERED
AUG 29 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE