

Abrams v Pecile

2011 NY Slip Op 32938(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 110329/09

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Justice

Sandra Piedrabuena Abrams

INDEX NO. 110329/09

MOTION DATE _____

MOTION SEQ. NO. 013

MOTION CAL. NO. _____

- v -

Danielle Peck

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

1, 2
3
4

Cross-Motion: Yes No

FILED

NOV 07 2011

Upon the foregoing papers, It is ordered that this motion

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The arguments contained herein were reviewed and considered by this Court in Epstein Becker & Green P.C.'s motion to reject the referee's report, Seq. #012, and Cristina Culicea's motion to confirm the referee's report, Seq. #014. See attached decision.

Dated: 11/3/11


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
SANDRA PIEDRABUENA ABRAMS,

Plaintiffs,

Index No.
110329/09

- against -

FILED

Seq No.: 012
013 & 014
Decision and
Order

NOV 07 2011

DANIELLE PECILE,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Sandra Abrams, brings this action for, among other things, conversion and intentional infliction of emotional distress. Defendant, Danielle Pecile, is alleged to have unlawfully converted a CD containing topless photographs of Ms. Abrams, which were taken by her husband, Russell Abrams ("Russell"), during their honeymoon.

Pecile was employed as executive assistant to Russell and his brother Marc Abrams ("Marc"), at Titan Capital from March 27, 2008 until April 8, 2009. Pecile alleged that Russell gave her two CDs with the topless pictures and asked her to develop them. Pecile alleged that when she inserted the CD in the photo machine she could not help but view the topless pictures. When she gave Russell the printed photos, Pecile alleges that he "smirked callously," and asked her if she enjoyed looking at them. Pecile concedes that she kept one of the CDs, purportedly as evidence of the sexual harassment.

Thereafter Pecile filed a claim with the EEOC, attaching the subject photographs to her complaint. Ms. Abrams commenced this suit against Pecile, as well as against Cristina Culicea (who also filed an EEOC report against Russell and Marc), and their attorneys, Douglas Wigdor, Thomas Wigdor & Gilly, LLP ("Wigdor").

* 3]

All defendants moved to dismiss the complaint, and sought sanctions for filing a frivolous action pursuant to Part 130-1.1 of the Rules of the Chief Administrative Judge.. The Honorable Walter B. Tolub, issued a decision wherein he held that “ it is clear to the Court that the complaint as to Ms. Culicea and Mr. Wigdor has no basis in law and fact and could only have been brought to harass Ms. Culicea and the Wigdor law firm.” Judge Tolub directed the following, in relevant part:

ORDERED that Defendants' motion to dismiss is granted to the extent that all claims against Ms. Culicea, TWG and Mr. Wigdor are dismissed and that the claims as to Ms. Pecile remain; and it is further

ORDERED that Ms. Culicea’s motion for reasonable attorneys’ fees is granted; and it is further

ORDERED that Mr. Wigdor and TWG are entitled to sanctions in the amount of \$1,000 resulting from the frivolous claims asserted against them; and it is further

ORDERED that the issue of the reasonable attorneys’ fees to be awarded to Ms. Culicea is referred to a Special Referee to hear and report with recommendations . . .

The matter was referred to Special Referee Sue Ann Hoahng, and on January 20, 2010 an attorneys fee hearing was held. Judge Tolub’s decision was appealed, and on May 24, 2011, the Appellate Division, First Department, held that Judge Tolub’s order was “unanimously modified, on the facts, to vacate the awards of costs and sanctions, and otherwise affirmed, without costs.” On June 30, 2011, the referee issued a report awarding \$192,029.00 in attorneys fees to Culicea.

Culicea now moves to confirm the referee’s report. By separate motion, Ms. Abrams’ former attorneys, Epstein Becker & Green P.C. (“EBG”) move to reject and vacate the referee’s report, claiming it was rendered moot by the May 24, 2011 Appellate Division decision. Culicea, in opposition, asserts that the report is not moot because the Appellate Division “clearly left Culicea’s attorneys’ fees award intact,” since it did not address the attorney fees award directly. Further, Culicea submits a letter sent to the referee on May 25,2011, along with a copy of the decision, and claims that the fact that the referee did not reference the decision means that “costs”

vacated by the Appellate Division did not include the calculation of attorneys fees.

CPLR §4403 states, in relevant part:

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part . . .the report of a referee to report . . .

Section 130-1.1 of the Rules of the Chief Administrative Judge states, in relevant part:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys fees, resulting from frivolous conduct . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct . . .

The “costs” referred to in 130-1.1 have repeatedly been held to include both actual expenses *and* attorneys fees. (see; *Leyse v. Domino’s Pizza LLC*, 48 AD3d 359[1st Dept. 2008]; *Sanders v. Copley*, 194 AD2d 85[1st Dept. 1993]; *Dubai Bank Ltd. v. Ayyub*, 187 AD2d 373[1st Dept. 1992]). It is undisputed that Judge Tolub granted attorneys fees to Ms. Culicea solely as a result of the motion seeking to punish Abrams and her attorneys for bringing a frivolous claim pursuant to 130-1.1. Indeed, those fees were the only costs that were awarded. Thus, when the Appellate Division vacated the award of “costs and sanctions,” the referee’s findings were rendered moot.

Wherefore it is hereby


ORDERED that the motion to reject the special referee’s report is granted; and it is further

ORDERED that the report of Sue Ann Hoahng, Special Referee, dated June 30, 2011, is hereby vacated; and it is further

ORDERED that the motion to confirm is denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: November 3, 2011



Eileen A. Rakower, J.S.C

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