

Constantine v Teachers College

2011 NY Slip Op 33595(U)

May 23, 2011

Sup Ct, NY County

Docket Number: 116528/08

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

MADONNA CONSTANTINE,
Plaintiff,

INDEX NO. 116528/08

- against -

MOTION DATE _____

MOTION SEQ. NO. 008

**TEACHERS COLLEGE and TRUSTEES OF
TEACHERS COLLEGE OF COLUMBIA UNIVERSITY,
CHRISTINE YEH, KAREN CORT, TRACY JULIAO,
GEORGE DAVIDSON, and HUGHES HUBBARD
and REED, LLP,**
Defendants.

The following papers were read on this motion by plaintiff to reargue and/or renew pursuant to CPLR 2221.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
FILED
JUN 13 2011

Cross-Motion: Yes No

**NEW YORK
COUNTY CLERKS OFFICE**

This is a motion by plaintiff Madonna Constantine ("Constantine" or "plaintiff") for an order, pursuant to CPLR 2221, granting reargument and/or renewal of this Court's decision and order, dated October 13, 2010 (Prior Decision), which granted defendants' motions to dismiss the second amended verified complaint. Constantine contends that the court misapprehended both the law and the facts relevant to the Prior Decision, and that new evidence and other procedural developments have come to light which require this court to grant her motion and to direct the parties to proceed with discovery. Defendants oppose the motion both on the merits and due to untimely, improper service. Familiarity with the Prior Decision is presumed.

Through the Prior Decision, this Court dismissed the plaintiff's plenary action sounding in defamation, defamation per se and intentional infliction of emotional distress (the Action).

By executing the November 24, 2010 stipulation, and by opposing the motion on its merits, defendants waived their opposition both to the timeliness and manner in which plaintiff served the instant motion.

The Action stemmed from Constantine's termination from her position as a full, tenured professor at Teachers College following findings that she had used the works of others without attribution, submitted altered and/or fabricated documents during the investigation process, and had committed misconduct. Constantine's state court Article 78 proceeding for reinstatement and her federal discrimination law suit (the Federal Action) also stemmed from the plagiarism investigation and employment termination, and both had been dismissed prior to the decision, order and judgment of this court.

An examination of plaintiff's submissions, including the affirmations, sworn affidavits, exhibits, and memoranda of law, reveals that the gravamen of the motion for leave to renew and reargue are the assertions that: (1) this Court failed to accept the facts alleged in the second verified amended complaint (Complaint) as true, and to give them the favorable inferences to which they are entitled; and (2) the court has an obligation to recognize the fraud perpetrated upon Article 78 court by the various defendants and therefore, not to give preclusive effect to that court's judgment.

CPLR 2221 (d) provides, in relevant part, that a motion to reargue must be identified as such and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." A reargument motion is based solely on the papers submitted in connection with the prior motion. It is not a means by which an unsuccessful party can obtain a second opportunity to argue one or more issues previously decided, nor is it an opportunity to submit new or additional facts not previously submitted as part of the motion (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *15 E. 63 St. Co. v Cook*, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]).

Likewise, CPLR 2221 (e) provides, in relevant part, that a motion to renew must be identified as such. A renewal motion "shall be based upon new facts not offered on the prior

motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2] and [3]). For this Court to consider the new facts, it must find that the party seeking renewal (Constantine) did not know of the facts at the time of the original motion or had a reasonable excuse for failing to present the new facts in her original motion (*Yarde v New York City Tr. Auth.*, 4 AD3d 352, 353 [2d Dept 2004]; *Foley v Roche*, 68 AD2d at 568]). It is not an opportunity for an unsuccessful party to advance facts which were known or could have been known and presented to the motion court but for deficiencies in the prior papers (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beiny*, 71 NY2d 994 [1988]).

CPLR 2221 (f) permits movants to combine their request for reargument and renewal in one notice of motion, provided that they "identify separately and support separately each item of relief sought." A review of the instant papers reveals that plaintiff made little attempt to comply with this requirement, using each submission as a vehicle to restate the facts and arguments presented in opposition to the prior motion.²

A review of plaintiff's submissions fails to reveal a basis for granting leave to either renew or reargue the Prior Decision. Each of plaintiff's 45 causes of action stem from the investigation and ultimate determination that Constantine had plagiarized the works/articles of two students, Karen Cort and Tracy Juliao, and a colleague at Teachers College, Christine Yeh. As stated in the Prior Decision, plaintiff's unsuccessful challenge to this final determination, via her Article 78 petition, precludes this Court from inquiring further into the veracity of the plagiarism charges. This is so despite Constantine's current assertions regarding the different

²It is also noted that plaintiff counsel's 49-page affirmation impermissibly exceeds the 25-page limit set forth in section 14 (b) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County.

burdens of proof and the failures of each court to follow proper procedure and give due consideration to her evidence. That differing types of relief are available in a plenary action, a federal discrimination action, and an article 78 proceeding, in no way affects the obligation of each court to give preclusive effect (collateral estoppel and/or res judicata) to a previously rendered judgment. This is true regardless of the fact that Constantine is currently seeking an order, pursuant to CPLR 5015 (a), vacating the Article 78 Judgment on the basis of fraud. Unless and until the Article 78 decision and judgment are reversed, the issues pertaining to the charges of plagiarism cannot be revisited.

With respect to plaintiff's assertion that this Court erred in not following the rule that facts in a complaint are presumed true and entitled to favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), plaintiff is directed to CPLR 3211 (a) (1), (5) and (7). Where, as here, the Complaint contains legal conclusions and factual allegations which are flatly contradicted by documentary evidence, and/or subject to collateral estoppel and res judicata effect, they are not presumed to be true and accorded favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000]; CPLR 3211 [a] [1], [5] and [7]). Under these circumstances, "the criterion is whether the proponent of the pleading has a cause of action, not whether [she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

After examining all of the parties' submissions, this Court determined that, for the reasons set forth in the Prior Decision, the 45 causes of action set forth in the Complaint could not survive defendants' respective motions to dismiss. Plaintiff's current motion for leave to reargue the Prior Decision appears to be little more than a reworded attempt "to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d at 567).

There is also no basis to grant leave to renew the Prior Decision based upon plaintiff's assertions that there are new facts based upon newly discovered evidence. To this end,

Constantine contends that: (1) the affidavits submitted by the respondents in the Article 78 proceeding were fraudulent because they contained sworn statements which the respondents knew to be untrue (essentially, that it was plaintiff who plagiarized from her accusers, and not the other way around); (2) certain discovery was disclosed during the Federal Action which conclusively established her prior authorship of the disputed language and articles; and (3) the Article 78 respondents knew of these documents at the time they swore to the contrary in their respective affidavits. Because all of the respondents are defendants in this Action, it is plaintiff's contention that their submissions to this court must be deemed unreliable, and that this court should not give preclusive effect to the Article 78 Judgment.

Plaintiff's newly discovered proof consists of two letters, a series of e-mails, and selected portions of examination before trial transcripts which were either previously submitted in opposition to the original motion, or known to plaintiff at that time, but, for reasons unstated, not incorporated into her previous opposition.

The letter which plaintiff offers as an official finding, back on July 27, 2006, that she had, in fact, not committed plagiarism, was written by Teachers College prior president, Arthur Levine (Levine) to nonparty Professor Suniya Luthar, one of Constantine's colleagues. The letter states the following:

Dear Suniya,

I have examined your claims against Professor Madonna Constantine. I have examined each of the charges except plagiarism of student papers and abuse of students. In all of the other areas your charges cannot be substantiated; in fact, they are refuted by the facts. As for claims of misconduct regarding students, I have asked you for evidence. You have told me students are unwilling to talk to me, the dean, college counsel or the ombudsman. The offer of outside counsel was also rejected by the student you contacted.

As I have explained on several occasions, I cannot accept anonymous allegations against any member of this community. Therefore, I am rejecting your charges against Professor Constantine.

According to Constantine, this is the document which should be accorded preclusive effect, and incoming Teachers College President Susan Fuhrman (Fuhrman) acted improperly

when she reopened the matter and guided it, with the help of defendants George Davidson and Hughes Hubbard and Reed, LLP, toward a predetermined result. These actions, coupled with the fact that the letter was hidden until federal court's disclosure forced its production, constitutes evidence of the defendants' malice and of their large scale conspiracy to cause her harm on the basis of fabricated plagiarism charges.

However, despite plaintiff's firm resolve to read Levine's letter as her complete and final exoneration, it is not. The former president was merely deferring any consideration of plagiarism charges until such time as competent proof was forthcoming.

Also unavailing is the second letter which appear to be a joint letter from Scott McGowan, Editor, *Journal of Counseling & Development*, and Christopher Sink, Editor, *Counseling and Values*. In it, the editors state their opinion that they did not find deliberate duplication or plagiarism upon their own examination of the similarly written articles. Their opinion, like the Levine letter, was and is not entitled to preclusive effect, and neither can be considered as new evidence as both letters were submitted as exhibits E and C to plaintiff counsel's letter to the court, dated September 22, 2010, and reviewed by the court at that time.

The remaining proofs are equally unavailing. The supposed new facts based upon newly discovered evidence are, upon examination, merely new arguments based upon a combination of the previously submitted, and newly submitted, proofs. While some of these proofs may not, as plaintiff suggests, have been produced until after the Article 78 Judgment had been entered, "the allegedly new and additional facts proffered by [plaintiff] in support of [her] motion for renewal were readily available at the time of [her] original opposition to the [defendants'] motion, [and, therefore, these] facts [do] not constitute newly discovered evidence within the meaning of CPLR 2221" (*Guerrero v Dublin UP Corp. of N.Y.*, 260 AD2d 435 [2d Dept 1999]).

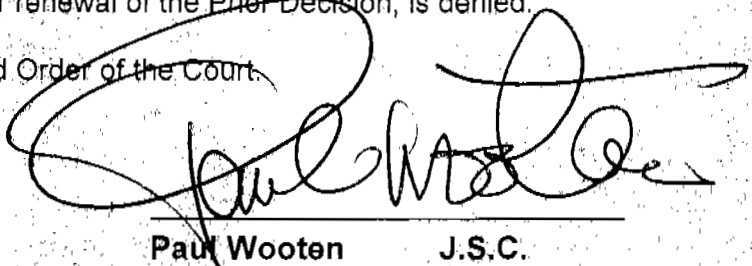
Furthermore, to the extent that plaintiff relies upon these proofs to demonstrate that a

fraud was perpetrated on the Article 78 court, and/or that she was not provided with a full and fair opportunity to develop and present her case during that proceeding (or the Federal Action), they do not present a proper ground for granting leave to renew or reargue the Prior Decision, nor is this the proper forum for these arguments.

Accordingly, it is

ORDERED that the motion by plaintiff Madonna Constantine for an order, pursuant to CPLR 2221, granting reargument and/or renewal of the Prior Decision, is denied.

This constitutes the Decision and Order of the Court.



Dated: May 23, 2011

Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

FILED

JUN 13 2011

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