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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____ **PART** 62

Justice

Index Number : 100437/2012
AMATO, PETER
vs.
NYC DEPARTMENT OF PARKS
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to 4 **, were read on this motion to/for** motion to reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3, 4

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed hereto decision Memorandum

FILED

JAN 23 2013

NEW YORK
COUNTY CLERK'S OFFICE

GEOFFREY D. WRIGHT
AJSC

Dated: 1/8/13

_____, J.S.C.

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

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

----------X

PETER AMATO, ANNA VISHEV, ANDREY VISHEV, and CITY SAFETY COMPLIANCE CORP.,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, THE CITY OF NEW YORK, JASON BJORNSSON, and JOHN DOES 1-10,

Defendant.

Index No.100437/2012
DECISION AND ORDER
Motion Sequence No.2

----------X

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Memorandum.....	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiffs, individual shareholders and officers, Peter Amato, Anna and Andrey Vishev of plaintiff City Safety Compliance Corp., (City Safety), (collectively Plaintiffs) seek leave to reargue defendants' motion for dismissal of a complaint alleging defamation and related causes of action, pursuant to CPLR 3211(a)(1) (7), which was granted by decision and order dated July 9, 2012. Defendants, the New York City Department of Parks and Recreation (Parks), the City of New York (City), and Jason Bjornsson (Bjornsson) (collectively, the Municipal Defendants") oppose the motion.

In October 14, 2009 Parks entered into a contract with Nasdi LLC (Nasdi) (the "Contract") as contractor for an indoor athletic facility on Staten Island (the "Project"). In November 2010 Nasdi requested that City Safety be approved to perform subcontract work on the Project. Pursuant to both the Contract and the Procurement Policy Board rules (the "PPB Rules"), Parks had the broad discretion to approve any subcontractor for work on the Project. Jason Bjornsson functioned as VENDEX Representative in the Subcontractor Approval Unit for Parks, and was responsible for reviewing and processing Nasdi's application to ensure that City Safety had the appropriate "skill, integrity [and] past experience" to perform work on the Project. see PPB Rule Section 4-13. This action is based upon a May 11, 2011 e-mail from Bjornsson, to Nasdi, that City Safety would not be approved as a subcontractor on the Project for the City because it was affiliated with Testwell Labs, a concrete testing company barred from public work due to a fraud conviction. Bjornsson used in part the VENDEX information on City Safety, which showed that it was related to an entity, Site Safety, controlled by V Reddy Kancharla, who was convicted for defrauding the City as a principal of Testwell, Inc in deciding whether to approve it as a subcontractor.

In the decision, I held in pertinent part:

> [t]he basis for the rejection was the admitted association of Peter Amato with V Reddy Kancharla, in two businesses, Testwell and Site Safety, and Vincent Barone in Testwell. Testwell, has an unfortunate history in dealing with municipal contracts, resulting in a conviction for scheme to defraud. This is not in issue.
> When Mr. Amato's past was mentioned, ... the word 'affiliated' was used. For the purpose of this law suit, the Plaintiffs maintain that the word 'affiliated' is a form of defamation, even though an affiliation is admitted in opposing papers. [T]he opposing papers do not contain any assertion that Mr. Amato is not and has not been investigated by the District Attorney's office for anything arising out of his participation in Testwell or Site Safety. Mr. Amato focuses his opposition, at

> least in part, on the technical definition of affiliated as drawn from 9RCNY 2-08(e)(1) ... (however) there is no statute, code or rule that limits consideration of an applicant to an RCNY definition.
>
> Since the fact of Mr Amato's affiliation with Mr. Kancharla, ... is an admitted fact, there can be no defamation, since even the Plaintiff admits that truth is a defense to this claim. That being so, then the other claims must also fail, since they depend entirely on the falsity of the use of the word "affiliated'.

It is well settled that a motion for re-argument pursuant to CPLR 2221(d)(2) "addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (internal citations omitted)." *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]; *Ito v 324 East 9th Street Corp.*, 49 AD3d 816, 817 [2d Dept 2008]; *Mangine v Keller*, 182 AD2d 476 [1st Dept 1992]. Thus, when an application for leave to reargue, such as this one, fails to show that the court misapprehended relevant facts or law, leave to appeal must be denied. see, *Hernandez v St Stephen of Hungary School*, 72 AD3d 595 [1st Dept 2010]. Furthermore, "[i]t is a mistake for counsel to assume that any particular portion of his argument, which has not been the subject of express reference in the opinion, has been overlooked." *Fosdick v Town of Hempstead*, 126 NY 651, 652 [1891].

Plaintiffs contend they are entitled to re-argument because the Court did not consider the burden of the Municipal Defendants to dismiss the Plaintiffs' causes of action for (a) libel, (b) slander per se, (c) tortious interference with contract and (d) violation of 42 USC § 1983. However, as noted above, it is a mistake to assume that an argument is "overlooked" because it is not specifically referenced. *id.* Moreover, the court specifically noted on the cover sheet to the July 9, 2012 decision and order (the Decision) that it carefully considered the motion and all

affidavits, answering affidavits and replying affidavits. After that careful review it found that the Municipal Defendants met their burden in seeking the dismissal of all four causes of action since they all arise out of the Municipal Defendant's Parks failure to approve City Safety as a subcontractor on the Project. The Court agreed with the Municipal Defendants that Plaintiffs' true claim is one of a disappointed bidder on a public contract and that the action should have been brought as an Article 78 proceeding to review the award, but is now untimely, as they waited eight months to bring this action. see *Press v County of Monroe*, 50 NY2d 695 [1980]; see CPLR 217.

The Court agrees with the Municipal Defendants that rather than pointing out "relevant facts" misapprehended or a "controlling principle of law" that was misapplied, Plaintiffs merely reiterate the very same arguments made in its original motion concerning each of the four causes of action. Thus, Plaintiffs' motion to reargue is merely an attempt to salvage its claims with the same arguments argued previously. *William P Pahl Equip, Corp v Kassis*, 182 AD2d 22, 33 [1st Dept 1992]. For instance, Plaintiffs assert that the Court misapprehended the significance of the Procurement Policy Board Rules' definition of "affiliated", Affirmation of Gregory Chillino in Support of Motion to Reargue dated August 11, 2012, ¶4 at (c). However, Plaintiffs set forth this very same argument in opposition to the Defendant's motion to dismiss. See Affirmation of Gregory Chillino in Opposition to Motion to Dismiss, ¶¶43-47, 61-62, and the Court discussed its reasoning in detail that the Municipal Defendants are not limited in their consideration of an applicant by the definition of the term affiliated in the RCNY. In fact, they are encouraged by RCNY to consider "integrity." While Plaintiffs assert that the Decision overlooks their libel claim, Plaintiffs previously set forth its argument, that the Municipal Defendants committed an

act of libel by claiming that a 'caution existed' on the City's VENDEX. see Chillino Aff. in Opp. at ¶¶ 51-55. In addition, Plaintiffs set forth the same tortious interference argument, Chillino Aff. in Opp. at ¶¶ 65-78 and the same slander argument Chillino Aff in Opp, ¶¶48-50. Plaintiffs' claim that the Decision 'overlooks' the fact that Park's request for an affidavit from Peter Amato was "legally improper and irrelevant to Plaintiffs' claims." id. at (f). The Reply Affirmation of Lo Chan in further support of the Municipal Defendant's motion to dismiss, dated May 31, 2012 and the Reply memorandum of law at Points I and II addressed the fact that Parks made such a request and that it was proper to seek the information.

Even if the Plaintiffs were entitled to leave to reargue, which they have not demonstrated, their substantive arguments are conclusory and unsupported.. Although courts presume the truth of allegations of the complaint on a motion to dismiss, such presumption must fail, as herein, when the complaint contains allegations lacking in factual support, *Mohan v Hollander*, 303 AD2d 473, 474 [2d Dept 2003], or contradicted by the documentary evidence. *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 [1st Dept 1999], aff'd on other grounds, 94 NY2d 659 [2000]. Allegations of defamation present, in the first instance, an issue of law for judicial determination. *Dillon v City of New York*, 261 AD2d 34,38 [1st Dept 1999]. When a court evaluates whether a cause of action for defamation is successfully pleaded, the words must be construed in context of the entire statement and it will not strain to find defamation. *id.* In the first cause of action, the documentary evidence produced from the VENDEX establishes that Bjornsson's statement was substantially true, and taken in context, was meant to be synonymous with the word "related to". Substantial truth is an absolute defense to a defamation action, even when a derogatory statement has been made. *Proskin v Hearst Corporation*, 14 AD3d 782, 783

[3d Dept 2005]; *Heins v Board of Trustees of the Incorporated Village of Greenport*, 237 AD2d 570 [2d Dept 1997]. Thus, the cause of action was correctly dismissed. Moreover, Bjornsson, functioning as a VENDEX representative in the Subcontractor Approval Unit for Parks, is afforded a qualified privilege against the imposition of liability for any defamatory statements he may have made in the course of disapproving City Safety as a subcontractor, *Dillon v City of New York*, 261 AD2d at 38, since Bjornsson had a duty to communicate this important information in furtherance of the City's policy of hiring contractors"integrity." see PPB Rule Section 4-13, entitled Subcontracts. *Stukuls v State of New York*, 42 NY2d 272. Finally, Plaintiffs' request for an affidavit from Peter Amato was legally proper. see, Section 17.2 of the Contract requiring the Contractor to furnish the "VENDEX questionnaire if required, and any other information tending to prove that the proposed Subcontractor has the proper integrity to perform the Work. Plaintiffs' second cause of action for slander per se was dismissed for the reasons stated above and also because the letter from Nasdi to Plaintiffs fails to establish the time, place and manner of the alleged slander by Municipal Defendants as is by CPLR 3016. *Arsenault v Forquer,* 197 AD2d 554, 556 [2d Dept 1993]. With regard to the claim for tortious interference with contract, the Plaintiffs failed to allege the existence of a valid contract between the Plaintiffs and a third party, the defendant's knowledge of the contract, the defendant's intentional procurement of the third party's breach without justification and actual breach of the contract and resulting damages. *Lama Holding Co v Smith Barney, Inc.,* 88 NY2d 413 [1996]. Here, Plaintiffs did not have a valid contract to work on the project since Nasdi never gained approval from Parks to perform the Work with City as is required from Article 17 of the contract. Thus, without a valid contract, there could be no inducement to breach. Finally, plaintiffs' fourth

cause of action for violation of 42 USC § 1983, fails since the Municipal Defendants' actions have not foreclosed City Safety from obtaining work in the field generally. see, *Muson v Friske*, 754 F2d 683, 693 [7th Cir Wis. 1985].

For all of these reasons, the Plaintiffs have failed to demonstrate entitlement to re-argument. Accordingly, it is hereby

ORDERED, that the motion for leave to reargue is denied.

This constitutes the decision and order of the Court.

Dated: January 8, 2013

FILED

JAN 23 2013

NEW YORK
COUNTY CLERK'S OFFICE

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court