SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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KENNY KRAMER and KRAMER'S REALITY TOURS, INC.,

Plaintiffs,

-against-

SKYHORSE PUBLISHING, INC. and FRED STOLLER,

Defendants.

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Index No. 161919/13

Mot. seq. no. 004

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff Kramer, self-represented:
Kenny Kramer
484 West 43rd St. #35N
New York, NY 10036
212-279-8383

For Stoller:
Francis X. Dehn, Esq.
Smith Dehn LLP
381 Park Avenue South, 7th fl.
New York, NY 10016
212–370-1843

David Albert Pierce. Esq.
Azita Mirzaian, Esq.
Pro Hac Vice
9100 Wilshire Blvd., Ste. 225
Beverly Hills, CA 90212-3415
310-274-9191

By notice of motion, plaintiff Kenny Kramer moves for an order granting him leave to reconsider, reargue, and/or renew a decision dated July 14, 2014 granting defendants' motion for an order dismissing the complaint. Defendant Stoller opposes. As an incorporated entity must be represented by an attorney (CPLR 321[a]; *see generally Michael Reilly Design, Inc. v Houraney,* 40 AD3d 592, 594 [2d Dept 2007]), this motion is considered only as to plaintiff Kramer.

I. PROCEDURAL BACKGROUND

In my decision, I granted defendants summary judgment dismissing the complaint, finding that the portions of defendant Stoller's book on which plaintiff relied in his complaint

were not defamatory as a matter of law. (*Kramer v Skyhorse Publ., Inc., et al.*, Misc 3d , 2014 NY Slip Op 24196 [Sup Ct, New York County 2014]).

II. CONTENTIONS

Plaintiff alleges in support of this motion that the lawyer who represented him was ineffective for failing to raise at oral argument on the motion "the most relevant content of the complaint (Defamation, Special Damages and Trade Disparagement)," and he has attached to his affidavit portions of Stoller's book that allegedly contain defamatory statements that are not referenced in the complaint. (NYSCEF 42).

In opposition, defendant Stoller argues that plaintiff has failed to allege that I overlooked or misapprehended anything or that there has been a change in law, and he alleges no new facts. He asks that Kramer be sanctioned for interposing a motion that is completely without merit. (NYSCEF 45).

In reply, plaintiff complains that "the hearing to dismiss my lawsuit was held without my presence or even knowledge that the hearing was being held." (NYSCEF 46).

III. ANALYSIS

Pursuant to CPLR 2221(d)(2), a motion for leave to reargue must be based on fact or law misapprehended or overlooked by the court in determining the prior motion, and shall not include facts not previously offered. A motion for leave to renew must be based on new facts not offered on the prior motion that would change the prior determination, and must contain a reasonable justification for the failure to present such facts. (CPLR 2221[e]). Absent extraordinary circumstances, ineffectiveness of counsel does not constitute a ground for a motion to reargue or renew. (*See Lewis v Lewis*, 70 AD3d 1432, 1434 [4th Dept 2010]; *Department of Social Servs. v*

Trustum C.D., 97 AD2d 831, 831-832 [2d Dept 1983]).

Here, plaintiff alleges no matter of fact or law that was misapprehended or overlooked, nor could he, as the additional alleged defamatory statements annexed to his motion are not part of his complaint and a motion to reargue or renew after a judgment has been rendered cannot serve to amend a complaint that has been dismissed. (*See North American Van Lines, Inc. v American Intern. Cos.*, 11 Misc 3d 1076[A], 2006 NY Slip Op 50576[U] [Sup Ct, New York County 2006], *affd on other grds* 38 AD3d 450 [1st Dept 2007] [complaint that was dismissed with prejudice may not be amended; motion for leave to reargue and renew motion to dismiss and to file an amended complaint denied]; *cf. Buckley & Co., Inc. v City of New York*, 121 AD2d 933, 935 [1st Dept 1986], *lv denied* 69 NY2d 742 [1987] [plaintiff may not replead or move to amend summarily dismissed causes of action, even on showing of merit]). To the extent that the portions of the book annexed to plaintiff's affidavit constitute new evidence, given his lawyer's apparent authority to represent plaintiff (*see infra*), plaintiff offers an insufficient explanation of his failure to offer such evidence in support of the underlying motion.

Plaintiff also fails to establish that his former attorney lacked actual or apparent authority to act on his behalf in arguing the motion. (*See Hallock v State*, 64 NY2d 224 [1984] [attorney vested with authority to manage conduct of litigation on behalf of client; when attorney represents and appears on behalf of client throughout litigation, he is clothed with apparent authority sufficient to bind client, even if he may have lacked actual authority]; *cf. Mason v Simmons*, 114 AD2d 622 [3d Dept 1985] [prior counsel, in stipulating to adjourn motion for preliminary injunction, agreed to allow site inspections of client's property; as it was clear that counsel appeared on client's behalf, and in absence of allegation of fraud, client bound by

agreement, notwithstanding claim that he was not informed of details of agreement]).

Moreover, like many who have not studied law, plaintiff confuses oral argument with a hearing. A hearing is a proceeding at which sworn testimony is taken and documents are offered, followed by a court's findings of fact and conclusions of law. (*See* Black's Law Dictionary, 9th ed 2009 [hearing is a judicial session, usually open to public, held for purpose of deciding issues of fact or law, sometimes with testimony]). Oral argument, by contrast, is an occasion for parties to argue the merits of their respective positions on a motion before the court; no testimony is taken, no evidence is offered. (*See* Black's Law Dictionary [oral argument is advocate's spoken presentation to court supporting or opposing legal relief at issue]). In any event oral argument need not be conducted (*see Niagara Venture v Niagara Falls Renewal Agency*, 56 AD3d 1150 [4th Dept 2008] [court not required to grant party's request for oral argument]), and given the legal issues addressed at oral argument, represented parties usually do not appear. Consequently, counsel's failure to apprise plaintiff of the oral argument or to address particular issues during argument neither evidences ineffectiveness nor constitutes an extraordinary circumstance warranting relief.

Given plaintiff's status as self-represented, I decline to impose sanctions.

In anticipation that plaintiff may believe it appropriate to bring another action based on the other portions of Stoller's book, it bears noting here that the law bars the bringing of another action for defamation based on the same publication. (*See Hoffman v Landers*, 146 AD2d 744, 747 [2d Dept 1989] ["[t]here can be only one cause of action for one publication of a libel no matter how many separate and distinct defamatory charges the plaintiff may claim it contains"; cause of action for defamation dismissed arising from single published article which gave rise to

only one cause of action even though it contained allegation of two defamatory statements]; *Kern v News Syndicate Co.*, 6 AD2d 404, 405 [1st Dept 1958] ["Each separate publication of defamatory matter gives rise to only a single cause of action. The person defamed may not make each distinct charge contained in the publication the subject of a separate cause of action. That would constitute an impermissible splitting of a cause of action. Thus, it has been held there can be only one cause of action for one publication of a libel."]; *Hartmann v American Mercury*, 12 Misc 2d 1045, 1047 [Sup Ct, New York County 1945] ["In the case of torts, each act gives rise to only one cause of action 'however numerous the items of wrong or damage may be.' Thus a cause of action for defamation arising out of one publication is single and indivisible."]; 1 NY Jur Actions § 45 ["Although a party may generally join two or more causes of action in one complaint, he or she may not split a single cause of action and maintain successive actions for different parts of it, such rule being intended to prevent expensive, vexatious, and oppressive litigation. A judgment on the merits in the first action will be a conclusive bar to the second, and this is true whether the action involves the whole or only part of the demand constituting the cause of action."]).

IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion to renew or reargue is denied.

ENTER:

Barbara Jaffe, JSC

DATED: September 30, 2014
New York, New York