

ERL Partners LLC v Pelletier
2017 NY Slip Op 33264(U)
September 13, 2017
Supreme Court, Nassau County
Docket Number: 602710/2017
Judge: John M. Galasso
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
ERL PARTNERS LLC and ERIC LEARNER,

Plaintiffs,

- against -

JESSICA PELLETIER,

Defendant.

Index No. 602710/2017
Sequence #s 005, 006

Part 22
8/30/17

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The motion brought by the plaintiffs, in the above captioned action, for leave, pursuant to Rule 2221(d) of the CPLR, to reargue the defendant’s prior motion (sequence #2) to the extent that it resulted in an order of this court, pursuant to CPLR Section 510, changing the venue of the instant action to the Supreme Court, New York County and consolidated the instant action with an action pending in the Supreme Court, New York County, under Index No. 158407/2016 and upon reargument, vacating the said prior order of this court is granted.

Before this court, with respect to the hereinabove described motion, were the motion of plaintiffs ERL Partners, LLC and Eric Learner, for an order pursuant to CPLR 602(a), declaring that the depositions of the parties or non-parties in the instant matter and the matter pending before Justice Robert R. Reed, in Supreme Court, New York County, (Index No. 158407/2016) be conducted in a consolidated fashion to prevent duplication of effort; and pursuant to Rule 3.7 of the N.Y. Rules of Professional Conduct (hereinafter “RPC”), disqualifying members of the law firm of Kaiser, Saurborn & Mair, P.C., from representing the defendant in this action; and a finding that the attorney-client privilege has been waived between defendant and her counsel in this action, (sequence #2), and the motion of defendant Jessica N. Pelletier, for an order pursuant

to CPLR 3211(a)(4) dismissing plaintiffs' verified complaint in its entirety and consolidating it with the prior filed action; and pursuant to CPLR 510, changing the venue of this action to Supreme Court, New York County and consolidating it with the prior filed action (sequence #3) and defendant's cross-motion (sequence #4) for an order, pursuant to Administrative Rule 130-1.1(a), (b), (c) and (d); and dismissing plaintiffs' verified complaint in its entirety; and seeking the award of attorney fees and costs.

The plaintiffs' verified complaint in the instant action sets forth six (6) causes of action to wit: Libel, Slander, Tortious Interference with Contractual/Prospective Contractual Relations; Prima Facie Tort; Declaratory Relief; and Injunctive Relief.

The complaint of Jessica Pelletier, in the hereinabove described action in the Supreme Court, New York County, against named defendants, T.O. Global d/b/a Tikun Olan and/or Tikun Olam, Inc., Eric Lerner, Barry Farkas, Glen Lerner, Bernard Sucher and Harold Markowitz sets forth four (4) causes of action to wit: a violation of Executive Law Section 296, a violation of New York City Administrative Code Section 8-502(a), a violation of New York Labor Law Section 191(1)(c) and breach of contract.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221[d][2]). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]; *Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2d Dept 2001]). Instead, in moving to reargue, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked (*Hoffman v Debello-Teheny*, 27 AD3d 743 [2d Dept 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v Jeannot*, 18 AD3d 679 [2d Dept 2005]). Further, a motion to reargue is based solely upon the papers submitted in connection

with the prior motion. New facts may not be submitted or considered by the court (James v Nestor, 120 AD2d 442 [1st Dept 1986]; Phillips v Village of Oriskany, 57 AD2d 110 [4th Dept 1997]).

Initially, the court must note that the plaintiff, ERL Partners LLC, in the instant action, is not a party in the New York County action and the defendants, T. O. Global d/b/a Tikun Olan and/or Tikun Olam, Inc., Barry Farkas, Glen Lerner, Bernard Sucher and Harold Markowitz, in the New York County action are not a party in the instant action.

Prima facie, there is no unity of the aforesaid parties with ERL Partners, LLC, one of the plaintiffs in the instant action.

With the moving parties' detailed guidance, this court's further review of the hereinabove described pleadings, the plaintiffs' verified complaint in the instant action consisting of seventy-two (72) pages containing two hundred eighty-five (285) paragraphs and the plaintiff's complaint in the New York County action consisting of nineteen (19) pages containing one hundred fifty-six (156) paragraphs finds that this court confused pertinent facts which resulted in a misapprehension of the ultimate fact that the two (2) actions involved completely distinct contracts, employment agreements and legal and equitable claims. Additionally, on further review, this court finds that the principle legal and equitable claims in both actions rely on different legal principles.

Specifically, the employment agreement in the instant action is Eric Lerner's alleged employment with TO Holding Group LLC while the employment in the New York County action involves Jessica Pelletier's alleged at-will employment with T.O. Global LLC which is not a party in the instant action.

The claims of Jessica Pelletier as plaintiff in the New York County action are founded on employment discrimination, retaliation, breach of contract and violations of New York City and New York State Civil Rights Laws whereas the claims of the plaintiffs in the Nassau County action relate solely to allegations of Jessica N. Pelletier's tortious interference with Eric Lerner's employment with non-party TO Holding Group LLC which is not related to any of Jessica Pelletier's claims of protected activities under New York City and New York State Civil Rights

Laws, employment discrimination, retaliation and breach of contract, all of which relate to her alleged at-will employment with T.O. Global LLC.

Based upon all of the above and upon re-argument, this court finds and determines that the hereinabove described actions are not woven with common questions of law or fact and do not emanate from the same transaction or occurrence or series of transactions or occurrences.

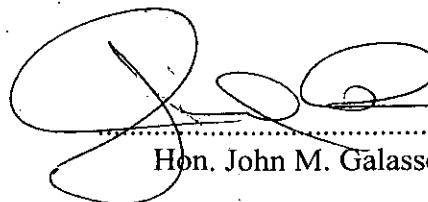
Therefore, this court herewith vacates its decision dated June 27, 2017 in the instant action in its entirety and denies so much of the defendant's motion (motion Sequence #3) which sought a consolidation of the two (2) subject actions and a change of venue of the action brought before this court to the Supreme Court, New York County.

Accordingly, both parties are directed to resubmit their motions not addressed in this decision.

The defendant's cross-motion for the imposition of sanctions, pursuant to 22 NYCRR 130-1.1(c) is denied.

This constitutes the Decision and Order of this court.

September 13, 2017



Hon. John M. Galasso, J.S.C.

ENTERED

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