

**Wilkow v Araque**

2019 NY Slip Op 30588(U)

March 11, 2019

Supreme Court, New York County

Docket Number: 154300/2014

Judge: William Franc Perry

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

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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NICOLE WILKOW,

Plaintiff,

- v -

CARLOS ARAQUE, ESSENTIAL THERAPY INC., ESSENTIAL  
THERAPY L&Y SPA, INC.

Defendant.

INDEX NO. 154300/2014

MOTION DATE 02/26/2019

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT and SANCTIONS

Defendant Essential Therapy L&Y Spa, Inc., (“ETL&Y”) seeks an order pursuant to CPLR §3212 for summary judgment, dismissing the complaint, and seeks sanctions and attorney’s fees against plaintiff’s attorneys for having knowingly filed and continuing to litigate a frivolous complaint. Defendant Carlos Araque (“Araque) takes no position on the motion and plaintiff, Nicole Wilkow opposes the motion.

**BACKGROUND/CONTENTIONS**

Defendant Araque operated a spa as defendant Essential Therapy, Inc. (“ETI”). He hired plaintiff as a part-time masseuse/massage therapist. On May 6, 2013, it is alleged Araque sexually assaulted plaintiff at his place of business, ETI. (NYSCEF Doc. No. 36, ¶¶26-42).

On November 20, 2013, Yan Yankovsky and Elena Pantchenko formed ETL&Y. (NYSCEF Doc. No. 39). On November 27, 2013, their newly formed corporation purchased the business, including the name “Essential Therapy,” from Araque and ETI and set forth the terms

and conditions of the transaction in an asset purchase agreement and bill of sale. (NYSCEF Doc. Nos. 40 and 41).

Defendant argues that when the acts of wrongdoing allegedly took place on May 6, 2013, between plaintiff and defendant Araque, ETL&Y did not exist and has submitted documentary evidence in support of this motion which demonstrates that ETL&Y was formed on November 20, 2013. (NYSCEF Doc. Nos. 39-41). In addition, defendant has submitted the affidavits of Yan Yankovsky and Elena Pantchenko wherein they state that ETL&Y and its principals have no relationship with either Araque or ETI. Additionally, ETL&Y and its principals contend that they have no relationship with plaintiff. (NYSCEF Doc. Nos. 33 and 34). Accordingly, ETL&Y is seeking summary judgment and dismissal of the complaint as the documentary evidence conclusively demonstrates that there is no legal basis to establish liability against ETL&Y for the wrongful acts alleged in the complaint.

In addition, ETL&Y is seeking sanctions and costs against plaintiff's attorneys claiming that even after plaintiff's attorneys were furnished with documentary evidence that ETL&Y is not responsible for plaintiff's injuries, they refused to discontinue this action against ETL&Y. (NYSCEF Doc. Nos. 42-47).<sup>1</sup>

In opposition to the motion, plaintiff contends that the motion is premature and should be denied as discovery may demonstrate that the transaction between ETI and ETL&Y, as memorialized by the asset purchase agreement, was an effort by defendant Araque to divest himself of any interest in the business while criminal and civil liability existed. Additionally, plaintiff alleges that the asset purchase agreement lists defendant Araque as the buyer in the first paragraph of the agreement, and as such, moving defendant cannot make out a prima facie

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<sup>1</sup> Defendant ETL&Y initially sought sanctions and costs against plaintiff and her attorneys, however, ETL&Y withdraws its request for sanctions as against plaintiff. (NYSCEF Doc. No. 53, ¶26).

showing of a right to summary judgment. This argument is advanced by plaintiff's attorney, even though the asset purchase agreement is signed by Carols Araque and ETI as Sellers and the bill of sale names ETI and Araque as Transferors and Yankovsky, Pantchenko, and ETL&Y as Transferees. (NYSCEF Doc. Nos. 40 and 41).

### STANDARD OF REVIEW/ANALYSIS

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*Id.*). When deciding a summary judgment motion, the court must view the alleged facts in a light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept. 2012]).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Tobron Office Furniture Corp. v King World Productions*, 161 AD2d 355, 357, 555 NYS2d 315 (1st Dept. 1990) (the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient); *Polanco v. City of New York* 244 AD2d 322, 665 NYS2d 534 (2d Dept. 1997) ("a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"). The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (see, *Zuckerman v. City of New York*, 49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 [1980]).

Here, defendant ETL&Y has submitted documentary evidence in support of its motion demonstrating that the entity did not exist on the date that the wrongful acts alleged in the complaint occurred. (NYSCEF Doc. Nos. 40 and 41). In addition, defendant has submitted the affidavits of the principal owners of ETL&Y attesting to the fact that they formed the corporation to purchase a spa from ETI and that defendant Araque never had an interest in ETL&Y as a principal, owner, director, officer, shareholder or employee. (NYSCEF Doc. No. 33, ¶4).

Moreover, the affidavits submitted in support of this motion demonstrate that prior to November 27, 2013, ETL&Y, the owners of ETL&Y did not operate the spa, work at the spa, or exercise any control over the premises occupied by the spa. In addition, the owners attest to the fact that they never had an interest in ETI as a principal, owner, director, officer, shareholder or employee, noting that “[o]nce we purchased the business in the name of ETL&Y, ETI and Araque no longer were involved in the operation of the Spa.” (NYSCEF Doc. No. 33, ¶5).

It is well settled that a party opposing a motion for summary judgment must present evidentiary facts sufficient to raise a triable issue of fact and not merely rely on conjecture or bald conclusory allegations. *Tobron Office Furniture Corp. v King World Productions*, 161 A.D.2d at 356. In opposing the motion, plaintiff submitted an attorney’s affirmation and two exhibits which include a stipulation adjourning a motion and a preliminary conference order. (NYSCEF Doc. Nos. 48-50).

Based on pure conjecture, plaintiff argues that the motion should be denied and discovery should proceed to determine whether “the defendants continued to operate the business under the name Essential Therapy and did so out of the same location”. (NYSCEF Doc. No. 48 ¶10). This allegation is meritless and is directly contradicted by the statements set forth in the affidavits of

Yan Yankovsky and Elena Pantchenko wherein they state that ETL&Y and its principals have no relationship with either Araque or ETI, and that once they purchased the business in the name of ETL&Y, ETI and Araque were no longer involved in the operation of the spa. (NYSCEF Doc. Nos. 33, 34). Moreover, the asset purchase agreement indicates that “Buyer [ETL&Y] shall not assume or be responsible for any liability, obligation, debt or commitment of the Seller [ETI] not specifically set forth above”. (NYSCEF Doc. No. 40. ¶4).

Although the remedy of summary judgment is a drastic one, it is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. (*Vamattam v. Thomas*, 205 AD2d 615, 613 NYS2d 220 [2nd Dept. 1994]). A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. *Zuckerman v. City of New York*, 49 NY2d at 562.

Plaintiff’s contention that summary judgment should be denied because discovery may demonstrate facts to support the allegations against ETL&Y, is belied by the documentary evidence that shows ETL&Y did not exist when the acts alleged in the complaint took place; ETL&Y and its principals have no relationship with either Araque or ETI; and ETL&Y and its principals have no relationship with plaintiff. In opposing the motion, plaintiff has not set forth a scintilla of evidence to refute the documentary evidence submitted by defendant and has failed to demonstrate the existence of facts sufficient to defeat summary judgment. (see *Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 843 NYS2d 630 [2007]).

Finally, defendant’s ETL&Y application for sanctions is granted. 22 NYCRR 130-1.1[c] defines conduct as frivolous if it is completely without merit in law and cannot be supported by a

reasonable argument for an extension, modification or reversal of existing law; or it is undertaken to harass or maliciously injure another; or it asserts material factual statements that are false.

22 NYCRR 130-1.1 allows the court to exercise its discretion to impose costs and sanctions under circumstances particularly applicable here. Among the factors the court must consider is “whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous, or when such was brought to the attention of the parties or to counsel (22 NYCRR 130-1.1 [c])”. (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34, 698 NYS2d 226 [1st Dept 1999]).

Defendant ETL&Y has set forth in chronological order the many attempts its attorneys made to avoid motion practice, going as far as providing plaintiff’s attorneys with draft copies of this motion, before it was filed with the court, along with documentary proof demonstrating that ETL&Y did not exist when the wrongful acts alleged in the complaint occurred and documenting the fact that defendant Araque does not have and never has had an interest in ETL&Y. (NYSCEF Doc. Nos. 32, 39-47).

The court finds that filing the patently meritless complaint against defendant ETL&Y and refusing to discontinue the action after receiving documentary evidence demonstrating that ETL&Y did not exist at the time of the alleged wrongful conduct, is the very type of frivolous conduct contemplated by Part 130. Accordingly, it is hereby

**ORDERED** that the motion for summary judgment of defendant Essential Therapy L&Y Spa, Inc., is granted and the complaint is dismissed against said defendant; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment in favor of defendant

Essential Therapy L&Y Spa, Inc., dismissing the claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that defendant Essential Therapy L&Y Spa, Inc. is awarded sanctions in the amount of \$2,500 against plaintiff's attorneys, Molod, Spitz & DeSantis, P.C., by, David B. Owens, Esq., for engaging in frivolous conduct as defined by 22 NYCRR 130-1.2; and it is further

**ORDERED** that the remaining parties shall appear for a status conference on May 14, 2019 at 80 Centre Street, Room 307, at 9:30 a.m.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

3/11/2019  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE