

Gottbetter v Crone Kline Rinde, LLP

2019 NY Slip Op 30873(U)

March 26, 2019

Supreme Court, New York County

Docket Number: 652715/2015

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 43

-----X
PAUL B. GOTTBETTER and
GOTTBETTER & PARTNERS, LLP,

Plaintiffs,

-against-

Index No. 652715/2015

CRONE KLINE RINDE, LLP & CKR LAW LLP,

Defendants.

-----X
CKR LAW LLP f/k/a CRONE KLINE RINDE, LLP,

Third-Party Plaintiff,

-against-

ADAM GOTTBETTER, VENTURINI & ASSOCIATES
and AUGUST VENTURINI,

Third-Party Defendants.

-----X
Robert R. Reed, J.

Defendants Crone Kline Rinde, LLP and CKR Law LLP (both, CKR) move, pursuant to CPLR 2221 (d), (e), and (f), 3103, and 3211, for an order granting leave to reargue and renew certain branches of its prior motion to dismiss the wrongful eviction claim asserted in the amended complaint and to stay or compel discovery which were decided by this court's order dated October 9, 2018 (prior order), protective relief, sanctions, and other, related relief. Plaintiffs Paul B. Gottbetter and Gottbetter & Partners, LLP (G&P) cross move, pursuant to CPLR article 31 and 5104, 22 NYCRR §

130-1.1, and Judiciary Law §§ 753 and 773, for an order holding CKR in contempt of court, or, in the alternative, striking CKR's answer and defenses, and imposing sanctions for failing to comply with the prior order and for making a frivolous motion, and other, related relief.

The relevant underlying facts and procedural history are set forth in the prior order, and will not be repeated here, except as is necessary for clarification.

In the prior order, this court granted in part CKR's prior motion and dismissed the second cause of action for unjust enrichment as duplicative of the breach of contract claim and quashed on procedural grounds eight nonparty subpoenas duces tecum and ad testificandum issued by plaintiffs. The court denied the branches of CKR's motion to dismiss the third cause of action for wrongful eviction, to stay discovery until plaintiffs complied with certain discovery demands, and to impose sanctions against plaintiffs and their counsel.

In that order, the court also granted in part plaintiffs' motion and directed CKR to answer plaintiffs' first set of interrogatories and to produce all documents requested in plaintiffs' first notice for discovery and inspection. The court denied that branch of plaintiffs' motion to impose sanctions against CKR and its counsel.

CKR contends that, in the prior order, this court overlooked or misunderstood significant underlying facts and applicable law and should have dismissed the wrongful eviction claim on the grounds that its termination of Paul Gottbetter's security access

through the lobby of the building where CKR's new offices are located does not constitute wrongful eviction and that the claim is duplicative of the contract claim.

Leave to reargue is denied.

In the prior order, the court considered and rejected CKR's relevant arguments regarding whether the wrongful eviction claim was legally cognizable.

"A motion for reargument, 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"

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR 2221 [d]).

In the prior motion, CKR did not argue that the wrongful eviction claim was duplicative of the contracts claim. Reargument does not "serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion" (*Foley v Roche*, 68 AD2d at 567-568).

Similarly, CKR did not argue that plaintiffs lacked legal capacity to assert the wrongful eviction claim, and, therefore, CKR may not do so now.

Further, the court notes in passing that plaintiffs have legal capacity to assert the wrongful eviction claim. A dissolved corporation may maintain an action that is part of

its winding up process (*see Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 246 [2007]; Business Corp. Law §§ 1005, 1006), even where, as here, only one of the partners remains in the partnership. "Unless otherwise agreed[,] the remaining partners . . . [have] the right to wind up partnership affairs" (Partnership Law § 68). In addition, G&P distributed by assignment to Paul Gottbetter its rights under the Letter Agreement and to prosecute this action. Thus, Paul Gottbetter has the right to wind up G&P's affairs, including the collection of G&P's assets and G&P's right to enforce the July 1, 2014 Letter Agreement by prosecuting this action.

Next, CKR seeks renewal of the branches of the prior motions regarding plaintiffs' first set of interrogatories and first notice for discovery and inspection, both dated March 2, 2015, on the grounds that the dismissal in the prior order of the second cause of action for unjust enrichment constitutes a new fact and a change of circumstance. CKR further contends that, therefore, its present objections to those demands and refusal to comply with any demand relevant to the unjust enrichment claim were justified and proper. On that ground as well, CKR seeks a protective order.

In opposition to the motion and in support of the cross motion, plaintiffs contend that discovery regarding any revenue that CKR realized from its purchase of plaintiffs' business is not sought in connection with the dismissed unjust enrichment claim, but is, instead, sought on the ground that it is material and necessary to defend against CKR's second affirmative defense for fraudulent inducement to contract.

Leave to renew is denied. "An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (*Foley v Roche*, 68 AD2d at 568; *see* CPLR 2221 [e]).

In the second affirmative defense and the second counterclaim, CKR alleges that it would not have entered into the Letter Agreement to purchase plaintiffs' law firm and provide Paul Gottbetter with offices had plaintiffs informed it that Adam Gottbetter, the other of the two G&P partners, was under a criminal indictment and expected to be disbarred and incarcerated, resulting in a diminution of the value and goodwill of the business, and a need for CKR to distance itself from G&P. Thus, there was a failure of consideration, rendering the Letter Agreement unenforceable.

In holding that CKR must comply with plaintiffs' first set of interrogatories and demands for discovery and inspection, the court reviewed those interrogatories and demands and determined that they were properly served and that the discovery sought was material and necessary to this action. Clearly, the court knew of the purported "new fact," and took the dismissal of the unjust enrichment claim into consideration when directing CKR to comply with plaintiffs' discovery demands¹.

For that reason as well, that branch of CKR's motion for a protective order

¹The court notes that plaintiffs voluntarily accepted CKR's objection to document request number 51 of plaintiffs' first set of discovery demands and agree that CKR need to comply with that demand (*see* August C. Venturini Dec. 13, 2018 affirm. ¶ 30).

regarding discovery into CKR's billings and revenue received from clients who were previously represented by G&P is denied.

The branches of CKR's motion for the imposition of sanctions against plaintiffs and their counsel, and plaintiffs' cross motion to hold CKR in contempt of court and striking CKR's answer and defenses and to impose sanctions against CKR and its attorneys for willfully failing to comply with the prior order and making a frivolous motion for leave to renew and reargue are denied. Neither side has demonstrated that the other's conduct rose to the egregious level required for the imposition of sanctions, pursuant to CPLR 3126, 22 NYCRR § 130-1.1, or Judiciary Law § 753.

That branch of plaintiffs' cross motion to amend the caption to omit the dismissed third-party action, to reflect Paul Gottbetter as the sole plaintiff, and to reflect CKR's proper name, is granted in part.

That branch of the cross motion in which plaintiffs seek leave to amend the caption is granted without opposition.

With regard to plaintiffs' request to substitute CKR's correct name, corrections are permitted where, as here, no substantial right of a party is prejudiced (*see* CPLR 2001). Here, CKR does not oppose the requested correction of its name (*see* CKR Reply Memorandum of Law at 11).

Plaintiffs' request to omit the third-party action from the caption is granted inasmuch as that action was dismissed in a previous order in this action (*see* Sept. 23,

2016 order, Wright, J.).

Plaintiffs' request to omit G&P from the caption, leaving Paul Gottbetter as the sole plaintiff, is granted on the ground that G&P unconditionally assigned its rights under the Letter Agreement and to prosecute this action to Paul Gottbetter by assignment agreement dated December 30, 2016.

The court has considered each side's remaining arguments and finds them to be unavailing.

Accordingly, it is

ORDERED that the motion is denied in all respects; and it is further

ORDERED that the cross motion is granted in part and denied in part; and it is further

ORDERED that the cross motion is granted to the limited extent that plaintiffs are granted leave to amend the caption to reflect defendant Crone Kline Rinde LLP's correct name and the previous dismissal of the third-party action, and to omit plaintiff Gottbetter & Partners, LLP as plaintiff; and it is further

ORDERED that all papers, pleadings and proceeding in this action be amended to reflect the amended caption ordered herein, without prejudice to the proceedings heretofore; and it is further

ORDERED that the amended caption shall read:

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

-----X
PAUL B. GOTTBETTER,

Plaintiff,

-against-

Index No. 652715/2015

CKR LAW LLP f/k/a CRONE CLINE RINDE LLP,

Defendant.
-----X;

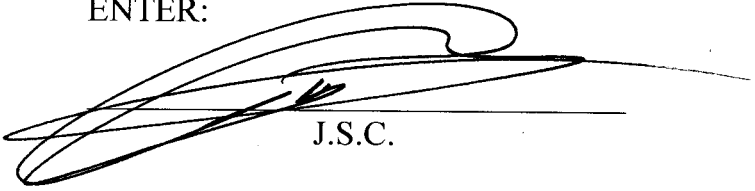
and it is further

ORDERED that counsel for the cross-moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page of the court's website at this address -- www.nycourts.gov/supctmanh).

Dated: March 26, 2019

ENTER:



J.S.C.