

Chiffert v Walsh

2019 NY Slip Op 34224(U)

June 27, 2019

Supreme Court, Suffolk County

Docket Number: 002259/2017

Judge: John H. Rouse

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INDEX NO. 002259/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 07/17/2018
ADJ. DATE: 11/15/2018
Mot. Seq. 001-MG.

MOTION DATE: 07/17/2018
ADJ. DATE: 11/15/2018
Mot. Seq. 003-MD

MOTION DATE: 07/17/2018
ADJ. DATE: 11/15/2018
Mot. Seq. 002-MD

MOTION DATE: 07/17/2018
ADJ. DATE: 11/15/2018
Mot. Seq. 004-MD
e-filed full participation

Marc A. Chiffert,

Plaintiff

-against-

DECISION & ORDER

Michael G. Walsh Esq. and Lawrence Praeger,

Defendants

TO:

MARC A CHIFFERT
53 HILL STREET #18
SOUTHAMPTON, NY 11968
631-353-3375

LAW OFFICE OF MICHAEL G. WALSH, ESQ.
BY: KELLY ANNE DOYLE, ESQ.
860 MONTAUK HWY, UNIT 4
WATER MILL, NY 11976
631-726-5900

Pursuant to Administrative Order 45-19 of the Suffolk County Administrative Judge dated June 25, 2019 this case has been reassigned to this court as there is an earlier and related case pending under Suffolk County Index 618252/2016: Lawrence Praeger -against- Aec Engineering Design & Construction Services Pllc, Chiffert Architectural Engineering P.C., Chiffert Engineering P.C., Chiffert Architectural Engineering Construction Services Pllc, Chiffert Architectural Engineering Construction, Chiffert Architectural Engineering Construction Services, Caec Engineering Construction Services, Chiffert Architectural Engineering Design, Chiffert Architectural Engineering.

This case is also related to an earlier special proceeding, Suffolk County Index Number 004808/2017 brought by Lawrence Praeger pursuant to CPLR Article 78 in the nature of a writ of mandamus to require the Southampton Licensing Review Board to hear and determine a complaint filed therein against Marc Chiffert. The members of that board each having previously recused themselves from consideration of that complaint upon the ground that Marc Chiffert, himself, was a member of the Licensing Review Board had declined to hear the complaint. This petition was discontinued upon a settlement wherein it was agreed by the parties that while Marc Chiffert would recuse from consideration of the complaint and the Chairman of that Board who had also done work on the subject premises owned by Praeger would also recuse from consideration of the complaint, the remaining quorum of three members would hear and render a determination on the complaint.

This case is also related to an action under Suffolk County Index 607807/2017 that had been brought by Lawrence Praeger to vacate a mechanic's lien that had been filed by an entity controlled by Plaintiff herein. In that action Praeger was successful and the lien was discharged for failure of the lienor to timely commence an action to foreclose that lien. See e-filed decision in that action, document 56.

And now there is also special proceeding brought pursuant to CPLR Article 78, Marc Chiffert v. Southampton Town Licensing Review Board, under Suffolk County Index Number 002732-2019 that has been assigned to this court with a return date of July 3, 2019.

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (Seq. 001) by Defendants for an Order Granting Defendants' Motion and Dismissing Plaintiffs Amended Complaint in its entirety pursuant to CPLR §§3211(a)(1) on the ground that a defense is founded on documentary evidence, 3211(a)(4) on the ground that there is a prior action pending, 3211(a)(7) for failure to state a cause of action and 3016(a) and (b) for failure to state a cause of action with particularity, 3211(g) for cases involving public petition and participation; and pursuant to 3212 upon the ground that communications made to a licensing agency in connection with a Licensing Review Board Complaint are entitled to absolute privilege and 3212(h) for cases;

(2) Notice of Motion by Plaintiff (Seq. 002) "Request that this Honorable Court grant this motion to issue a preliminary injunction and temporary restraining order to postpone any proceedings at the Town of Southampton Licensing Review Board until after the dispute has been resolved and reviewed through after mediation and arbitration in accordance with the contract provisions between Defendant Praeger and Plaintiff Chiffert; and granting such other and further relief as the Court may deem just and proper";

(3) Notice of Motion by Plaintiff (003) is incorrectly filed opposition to Defendants' Motion (001) to dismiss;

(4) Notice of Motion by Plaintiff (004) is also incorrectly filed opposition to Defendants' Motion (001) to dismiss; and (5) e-filed documents numbered 1-45; it is

ORDERED that the motion (Seq. #001) by Defendants is granted the causes of action in the Plaintiff's complaint are dismissed for failure to state a claim upon which relief can be granted; and it is further

ORDERED that the motion (Seq 002) by Marc Chiffert to stay the related proceedings pending before the Southampton Licensing Review Board is denied; and it is further

ORDERED that Defendants are directed to serve a copy of this decision and order with notice of entry as soon as practicable *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.*

<https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

and it is further

ORDERED that the parties, if they have not done so already, are directed to review the rules of this part found at: https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Rouse.pdf

DECISION

These related cases all arise from certain home improvement contracts that were to provide for the renovation of a home owned by Lawrence Praeger.

In this particular case Plaintiff Chiffert in his amended complaint asserts causes of action for: Injurious Falsehood (1st Cause of Action); Libel and Slander (2nd Cause of Action); Services Disparagement (3rd Cause of Action); Negligent Misrepresentation Causing Harm (4th Cause of Action); Negligence (5th Cause of Action); Fraud and Deceit (6th Cause of Action); Intentional Infliction of Emotional Distress (7th Cause of Action); Intentional or Malicious Harm to Another (8th Cause of Action); Invasion of Privacy (9th Cause of Action); Filing of False Documents with a Governmental Agency (10th Cause of Action); Lack of Insurance Coverage and Insurance Fraud (11th Cause of Action); Malicious Interference with Contract Rights (12th Cause of Action); Attorney Malpractice and Judiciary Law 487 (13th Cause of Action). Defendants move to dismiss Plaintiff's complaint in its entirety pursuant to CPLR 3211 for failure to state a claim upon which relief may be granted.

In this case Plaintiff contends that causes of action 1-8, 10, and 12 are supported by the fact that Defendant Lawrence Praeger, by his counsel Michael G. Walsh, Esq. also named as a defendant in this action, filed a complaint against Plaintiff with the Southampton Town Licensing Review Board. The Southampton Town Licensing Review Board has jurisdiction to suspend or revoke licenses issued to home improvement contractors, electricians, and plumbers in the Town of Southampton. *See Southampton Town Code Chapter 143, Article II.* The Defendants Praeger and Walsh, Praeger's counsel, had the right to file such a complaint and doing so were absolutely privileged and the allegations in that complaint cannot form the basis of an action in defamation, or the other theories advanced by Plaintiff in this action. *See Raparathi v Clarke, 98 N.Y.S.3d 742 (1st Dept. 2019); and see Kilcoin v. Wolansky, 52 N.Y.2d 995 (1981).* Accordingly Plaintiff's causes of Action number 1-8, 10 and 12 are dismissed.

Plaintiff alleges cause of action nine for invasion of privacy in which Plaintiff makes the singular assertion that Defendant Praeger used the name of Plaintiff Chiffert for his own commercial purposes without Plaintiff's consent. There are no allegations of fact to support such conclusions or to put the Defendant on notice of the acts of which Plaintiff complains. Accordingly, the complaint fails to allege facts sufficient to make a claim of invasion of privacy and count nine is dismissed.

Plaintiff alleges in count eleven that Defendant Praeger breached a contract with Chiffert for failing to have homeowner's insurance in place, and that Chiffert was damaged when flooding occurred at the Defendant's home and Defendant Praeger filed an insurance claim against Plaintiff's insurance. The Plaintiff fails to identify any contract between him personally and Defendant Praeger. Accordingly, this cause of action is dismissed with leave to further to file and serve an amend the amended complaint should there be such facts to support contractual privity between Marc Chiffert and the Defendant on this claim.

Plaintiff alleges in count twelve that Defendant Michael Walsh committed attorney malpractice in his representation of the co-defendant Lawrence Praeger. Walsh had no duty of representation or care with respect to Plaintiff and was not in privity of contract with him. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582 (2005). This cause of action is dismissed.

Plaintiff's motion (Seq. 002) for a preliminary injunction to stay proceedings before Southampton Town Licensing Review Board is denied. This court has issued this date a default judgment against Marc A. Chiffert and related entities in the action under Suffolk County Index 618252/2016. The only issue remaining in the related Supreme Court case pertains to the actual damages caused by the Defendants therein.

The question of whether the Southampton Licensing Review Board applies the principles of collateral estoppel as to such issues as already determined in this court on default, *see Pace v. Perk*, 81 A.D.2d 444 (2nd Dept. 1981), or stays its own proceedings pending complete resolution of the counterclaims in this action is a matter subject to the reasonable exercise of that Board's discretion. Plaintiff's motion (Seq. 002) for a stay of the proceedings before the Southampton Town Licensing Review Board is denied.

The foregoing shall constitute the decision and order of the court.

Dated: June 27, 2019



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION