Amon v Drohan
2020 NY Slip Op 30299(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 654014/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD **PART** IAS MOTION 49EFM

Justice

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PATRICK AMON, LUIS FUNG, RONALDO CRUZ

Plaintiff,

- v -

JOHN DROHAN, RAPHAEL DOUADY, DATACORE INNOVATIONS, LLC,

Defendant.

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INDEX NO. 654014/2018

MOTION DATE 09/10/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiff moves for leave to reargue defendant John Drohan's motion to dismiss the fourth and fifth causes of action (Motion Sequence 001) and defendant Raphael Douady's motion to dismiss the same causes of action (Motion Sequence 002). Drohan and Douady oppose the motion separately. Plaintiffs did not file a reply.

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound

discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola,* 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.,* 40 AD3d 481, 482 [1st Dept 2007]).

Plaintiffs argue the court erred in its prior decision and the fourth and fifth claims should be reinstated against all defendants because: (1) the New York Labor Law claims under section 193 should apply to earned but unpaid wages of the plaintiffs; (2) the individual defendants are alleged to be employers, along with Datacore; (3) New York Labor Law section 198 provides a substantive right for relief for nonpayment of earned wages; (4) the properly-pled claim under New York Labor Law section 195(3) was overlooked by the court; (5) the court overlooked allegations of the fraud claim; and (6) the court should not have *sua sponte* dismissed claims against Datacore, which had not moved, as no extraordinary circumstances existed.

This court dismissed the labor law claims against the moving defendants because the individual defendants were acting in their capacities as employees/officers of Datacore. Plaintiffs argue the individual defendants were alleged to have sufficient control of Datacore that New York Labor Law allows them to be classified as employers (Rajsich Aff, NYSCEF Doc. No. 69, ¶¶ 17-18). Plaintiffs have not made allegations of fact to support this conclusion. The allegations in the Complaint were vague, conclusory, and did not differentiate between the actions of or control held by Datacore and the individual defendants. The court did not overlook or misapprehend the facts or law on this point.

The court dismissed the portion of the Labor Law claim against Datacore which was based on section 193, on the ground that a wholesale withholding of payment did not qualify as a deduction. Plaintiffs argue the court should have allowed the claim to proceed on the basis of sections 195(3) and 198 (Rajsich Aff, 10-11). Plaintiffs are correct, in that the intention of this court's Decision and Order was to dismiss the portion of the fourth cause of action alleging violation of Labor Law § 193 only, and the dismissal of the other portions of the fourth cause of action was in error.

Plaintiffs contend the fifth cause of action, for fraud, should not have been dismissed because defendants had made false statements of present facts about the vesting of plaintiffs and the availability of investor funding to pay the company's emergency needs (Rajsich Aff, ¶25). Plaintiffs fail to address the other fault found in this court's Decision and Order, the lack of reliance, since plaintiffs' alleged reliance was their performance under the contract. This argument, therefore, fails.

As far as plaintiffs contend this court should not have dismissed certain claims against Datacore *sua sponte*, plaintiffs rely on *U.S. Bank v Emmanuel,* in which the Second Department noted "[t]he Supreme Court improvidently exercised its discretion in, sua sponte, directing the dismissal of the complaint with prejudice and cancelling the notice of pendency" for lack of extraordinary circumstances (83 AD3d 1047, 1048 [2d Dept 2011]). The First Department has noted that the courts have the ability to dismiss a cause of action sua sponte for failure to state a cause of action (*see Fischer v Yaakov*, 176 AD2d 655, 656 [1st Dept 1991], *see also Wehringer v Brannigan*, 232 AD2d 206, 206 [1st Dept 1996]).

Accordingly, it is hereby ORDERED that this motion is denied, but the court will correct the error in its Decision and Order dated July 10, 2019, which is hereby amended in that the

portions of the fourth cause of action against Datacore based on Labor Law sections 195 and 198 survive the motion to dismiss.

1/6/2020
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	x DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE