

**Conway v Kaplan**

2020 NY Slip Op 30939(U)

April 13, 2020

Supreme Court, New York County

Docket Number: 160607/2016

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM**

*Justice*

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INDEX NO. 160607/2016

LISA CONWAY, ALLURE PROPERTY PARTNERS, LLC.

MOTION DATE \_\_\_\_\_

Plaintiffs,

MOTION SEQ. NO. (MS) 009

- v -

HOWARD KAPLAN

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 154,155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 169

were read on this motion to/for REARGUE/RENEW.

In this libel action, plaintiffs Lisa Conway and Allure Property Partners, LLC move in MS 009 for: (1) leave to reargue this court’s December 23, 2019 Decision and Order (“December 23 Order”) pursuant to CPLR 2221(d); (2) leave to renew the same pursuant to CPLR 2221(e); and (3) leave to amend the complaint pursuant to CPLR 3025. The December 23 Order dismissed the entirety of plaintiffs’ action. Defendant opposes the instant motion. The Decision and Order is as follows:

**BACKGROUND**

Plaintiffs initiated this action on December 16, 2016, by summons and complaint. Plaintiffs claimed that defendant created a website entitled “LisaConwayAllure.com – The Worst Broker Ever!” – a five-page running narrative regarding defendant’s negative experience using plaintiffs’ real estate services. Plaintiffs alleged causes of action for libel, and intentional and negligent infliction of emotional distress.

Plaintiffs moved for summary judgment on their libel claim in February 2018. This court decided and denied the motion by order dated July 25, 2018, finding that plaintiffs’ libel claim was not actionable because defendant’s website, as a whole, was “pure opinion” (NYSCEF #97 – July 2018 Order at 3). The July 2018 Order found that defendant’s opinion about Conway being the “worst broker ever” was based on so-called “facts” – such as Conway failing to appear for a property closing (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986] [“A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based”]). In particular, this court found defendant’s website, as a

whole, to be a consumer criticism, which is not subject to libel claims (*see Themed Restaurants, Inc. v Zagat Survey, LLC*, 21 AD3d 826, 827 [1st Dept 2005] [highly critical comments from reviewers in the Zagat guide of a female impersonators cabaret were mere opinion and thus protected]).

Subsequently, defendant filed a motion to dismiss on the eve of trial on October 2, 2019, on the basis that the law of the case doctrine required dismissal of plaintiffs' action (NYSCEF #140). This court granted the motion and dismissed plaintiffs' action in the December 2019 Order based on the law of the case doctrine as predicated on the legal and factual findings from the July 2018 Order, namely that plaintiffs' libel claim was not actionable. The December 2019 Order also found that, as a matter of law, plaintiffs failed to make out the remaining causes of action for intentional and negligent infliction of emotional distress.

Plaintiffs thereafter timely filed the instant motion for reargument and renewal on January 22, 2020. In support of the renewal portion of their motion, plaintiffs attach the affidavit of Joie Muettner for the proposition that plaintiffs were actually damaged by defendant's conduct (NYSCEF #156 – Muettner Aff). Muettner claims in the affidavit that she did not utilize Conway's real estate services on the basis of defendant's website (*id.* at ¶ 3).

#### STANDARDS FOR REARGUMENT AND RENEWAL

A motion for CPLR 2221(d) reargument “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion”. The movant bears the burden of demonstrating that “the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*id.*). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present argument different from those originally asserted” (*id.*). Thus, the motion is not intended as a vehicle to rehash what has already been argued or for raising new questions (*see Simpson v Loehmann*, 21 NY2d 990, 990 [1968]).

A motion for CPLR 2221(e) renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination”. CPLR 2221(e)(3) states that the motion “shall contain reasonable justification for the failure to present such facts on the prior motion”. A motion for renewal “is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention” (*William P. Pahl v Kassiss*, 182 AD2d 22, 27 [1st Dept 1992]).

## DISCUSSION

In moving for reargument, plaintiffs contend that this court's December 2019 Order improperly incorporated the factual findings of the July 2018 Order into its determination of a CPLR 3211(a)(7) motion to dismiss. Plaintiffs argue that because the court "incorporated a prior decision and order that analyzed fact evidence, this Court did not accept as true all of the fact allegations in the Complaint" (NYSCEF #155, ¶ 24).

Plaintiffs are incorrect; reargument is denied. The July 2018 Order was determined on the merits in finding defendant's website to be pure opinion and plaintiffs' libel claim to be unactionable. The July 2018 Order found that plaintiffs' allegations failed as a matter of law. Thus, based on the doctrine of law of the case, plaintiffs' libel cause of action was dismissed in the December 2019 Order. "[T]he doctrine of law of the case applies only to legal determinations resolved on the merits" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). In other words, plaintiffs' allegations cannot be sustained as a matter of law. The December 2019 dismissal followed the law of the case and did not improperly incorporate factual analysis into the motion to dismiss.

As for the intentional and negligent infliction of emotional distress claims, plaintiffs do not argue that this court misapprehended law or fact, and thus, there is no need to rehash this court's dismissal of those claims.

Turning to the renewal branch of plaintiffs' motion, it too is denied. Plaintiffs argue that the Muettner affidavit was not previously offered "because the facts alleged therein had not yet fully developed at the time" the July 2018 motion was filed and that the Muettner affidavit establishes that plaintiffs were actually harmed by defendant's conduct. (NYSCEF #155, ¶ 33). Plaintiffs also argue that it was inappropriate to include it in the December 2019 motion.

However, the Muettner affidavit fails to indicate when, exactly, Muettner considered using plaintiffs' services. Without this fact, a determination cannot be made as to whether the Muettner affidavit was reasonably and timely available to plaintiffs. As such, plaintiffs fail to carry their burden on a renewal motion to show a reasonable justification for failure to present facts on the prior motion.

In any event, even if the Muettner affidavit were considered, it would not affect the prior determination. Given the prior finding that the libel claim was not actionable as a matter of law, this additional evidence alleging damage does not address the larger infirmity in plaintiffs' action. Therefore, the renewal branch is denied.

Accordingly, it is ORDERED that plaintiffs Lisa Conway and Allure Property Partners LLC's motion for reargument, renewal, and to amend the complaint is denied in its entirety.

This constitutes the Decision and Order of the court.



MARGARET A. CHAN, J.S.C.

4/13/2020

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE  
DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION

SETTLE  
ORDER  
INCLUDES  
TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF  
APPROPRIATE