

Hey Jude Prods., Inc. v Simon
2020 NY Slip Op 31454(U)
May 18, 2020
Supreme Court, New York County
Docket Number: 150464/2018
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

INDEX NO. 150464/2018

HEY JUDE PRODUCTIONS, INC.,

Plaintiff,

MOTION SEQ. NO. 004 and 005

- v -

TAMAR SIMON,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 158, 159, 168, 169, 178, 179, 180, 181, 185, 186, 187, 188, 189, 190

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 161, 162, 163, 164, 165, 170, 171, 172, 173, 174, 175, 176, 177

were read on this motion to/for DISCOVERY.

In this action by plaintiff Hey Jude Productions, Inc. seeking damages for conversion against defendant Tamar Simon, defendant moves (motion sequence 004), in effect, pursuant to CPLR 2221, to renew that branch of plaintiff's prior motion to dismiss defendant's counterclaims for defamation and punitive damages and, in effect, pursuant to CPLR 3025, to amend her answer and counterclaims. Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3211(a)(7), to dismiss defendant's amended counterclaims for defamation, tortious interference with contract, and punitive damages. Defendant also moves (motion sequence 005) to hold nonparties Israel Bonds and Zeev Rubinstein in contempt for failing to comply with a so-ordered subpoena duces tecum dated September 9, 2019.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the decision and order of this Court entered April 17, 2019 (Doc. 51), which order dismissed plaintiff's claim for punitive damages and all claims against defendant Mean Streets Management, as well as in the decision and order of this Court entered September 4, 2019 (Doc. 97), which dismissed defendants counterclaims sounding in quantum meruit (second counterclaim), breach of fiduciary duty (third counterclaim), tortious interference with economic advantage (fourth counterclaim), promissory estoppel (fifth counterclaim), defamation (sixth counterclaim), and constructive trust (seventh counterclaim), as well as defendant's claim against plaintiff for punitive damages. Additional relevant facts are set forth below.

On September 11, 2019, defendant served a subpoena duces tecum so-ordered on September 9, 2019 on nonparties Zeev Rubinstein and Israel Bonds in an attempt to obtain information allegedly relevant to her counterclaims. Docs. 162-164.

On September 13, 2019, defendant moved, in effect (motion sequence 004), pursuant to CPLR 2221(d), to renew that branch of plaintiff's motion seeking to dismiss defendant's counterclaims for defamation and punitive damages and, in effect, to vacate the branch of the September 4, 2019 order of this Court dismissing said counterclaims. Doc. 108-109. Defendant also moved, in effect, pursuant to CPLR 3025, for leave to amend her answer and counterclaims to reassert her claims for breach of contract, defamation, and tortious interference with economic advantage. Docs. 108-109. In support of the motion, defendant submitted a memorandum of law asserting that she was entitled to renewal based on records unsealed by the District Attorney's office which she received on August 29, 2019, which records, she claimed, warranted reinstatement of her claims for defamation and punitive damages. She further asserted that she

was entitled to amend her answer pursuant to Federal Rule of Civil Procedure (“FRCP”) 15(a)(1) to provide additional details regarding the said claims.

Plaintiff opposed defendant’s motion to amend the answer and, on September 19, 2019, cross-moved, pursuant to CPLR 3211(a)(7), to dismiss the amended counterclaims for tortious interference with contract and punitive damages on the ground that they had no merit and that the defamation claim was time barred. Doc. 158. Plaintiff also argues that the amended answer could not be considered by this Court since it was filed on NYSCEF as a stand alone document and not as a proposed amended answer annexed as an exhibit to the motion. Doc. 159.

In a reply “affirmation” in further support of her motion and in opposition to the cross motion, defendant reiterated that her counterclaims were meritorious.

On September 23, 2019, counsel for Israel Bonds advised defendant that it would not respond to her subpoena since discovery in this action was automatically stayed, pursuant to CPLR 3214(b), by plaintiff’s motion to dismiss the proposed amended counterclaims. Doc. 165. This prompted defendant to move the following day, by order to show cause returnable October 8, 2019 (motion sequence 005), to hold Israel Bonds and Rubinstein in contempt. Doc. 177.

LEGAL CONCLUSIONS:

Defendant’s Motion to Renew/Vacate (Motion Sequence 004)

A motion to renew pursuant to CPLR 2221(e) “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) (2). Such motion “shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR 2221 (e) (3).

Here, defendant claims that, on August 29, 2019, she received certain information released by the District Attorney's office which warrants renewal of plaintiff's motion to dismiss her counterclaims. However, despite representing when she received the materials, she does not state when the materials were made available. Since defendant has failed to provide a thorough explanation of why the materials could not be submitted in opposition to plaintiff's initial motion to dismiss her counterclaims, the motion to renew must be denied. *See McCabe v Consulate Gen. of Canada*, 170 AD3d 449 (1st Dept 2019).

As plaintiff asserts, defendant has technically failed to comply with CPLR 3025(b) by submitting a proposed amended answer. Instead, she filed a stand alone amended answer on NYSCEF without court leave. Additionally, defendant failed to comply with the requirement of CPLR 3025(b) that "the proposed amended . . . pleading clearly show[] the changes or additions to be made to the pleading." Thus, this Court is constrained to deny defendant's motion to amend her answer. This Court disregards defendant's argument regarding FRCP 15(a)(1) since that statute is clearly inapplicable in this state court action.

Further, although not raised by plaintiff, defendant's motion to renew must be denied since she fails to submit the affidavit of an individual with personal knowledge of the facts. *See Suon Luong v 173 Lafayette Corp.*, 266 AD2d 26 (1st Dept 1999) (affirmation in support of renewal motion deemed deficient). Defendant merely submits an unsworn memorandum of law. Doc. 109. Even assuming, arguendo, that this application were deemed a motion to vacate the order of this Court dismissing defendant's counterclaims on the basis of newly discovered evidence pursuant to CPLR 5015 (a)(2), her failure to submit an affidavit by someone with personal knowledge would also warrant denial of the motion. Nor may this Court consider defendant's reply "affirmation", which is also unsworn. Doc. 185.

Finally, as plaintiff asserts, even if the new evidence proffered by defendant had been considered by this Court, it “would not have warranted a different result” as required by CPLR 2221(e)(2). *See Koplowitz v King*, 159 AD3d 580, 581 (1st Dept 2018).

Defendant’s Motion for Contempt (Motion Sequence 005)

As the facts above demonstrate, defendant served a subpoena duces tecum on Israel Bonds and Rubinstein on September 11, 2019. Doc. 164. Two days later, defendant filed her motion to renew and/or vacate the order of this Court dismissing her counterclaims. Doc. 108. Plaintiff then cross-moved, on September 19, 2019, to dismiss the defendant’s amended counterclaims. Doc. 158. Thus, as plaintiff correctly asserts, as of October 8, 2019, when defendant’s contempt motion was filed, all discovery in this action was automatically stayed by plaintiff’s cross motion to dismiss pursuant to CPLR 3214(b) unless this Court directed otherwise, which it did not. Therefore, there is no basis on which to hold Israel Bonds or Rubinstein in contempt.

Therefore, in light of the foregoing, it is hereby:

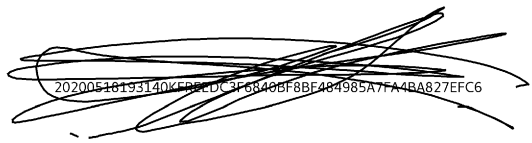
ORDERED that the motion by defendant Tamar Simon (motion sequence 004), seeking, in effect, an order, pursuant to CPLR 2221(d), to renew defendant’s motion to dismiss and, in effect, pursuant to CPLR 5015(a)(2), to vacate that branch of the September 4, 2019 order dismissing her counterclaims for defamation and punitive damages, is denied in all respects; and it is further

ORDERED that the motion by defendant Tamar Simon (motion sequence 005) seeking to hold nonparties Israel Bonds and Zeev Rubinstein in contempt is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 4, 2020 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/18/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: