

**Kerns v Ishida**

2022 NY Slip Op 33381(U)

October 7, 2022

Supreme Court, New York County

Docket Number: Index No. 161364/2020

Judge: William Franc Perry

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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. WILLIAM FRANC PERRY PART 23

*Justice*

-----X

ROXANA KERNS,

Plaintiff,

- v -

MIMI ISHIDA, POLA HAM

Defendants.

-----X

INDEX NO. 161364/2020

MOTION DATE 11/29/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for ATTORNEY - FEES.

By decision and order dated October 25, 2021, this court granted Defendants’ motion sequence 001, dismissing the complaint in its entirety and granting Defendants costs and disbursements. (NYSCEF Doc No. 35.)<sup>1</sup> However, the court did not address a portion of motion sequence 001 which sought to recover Defendants’ attorney’s fees pursuant to New York’s anti-SLAPP provisions, codified at Civil Rights Law § 70-a and § 76-a. (NYSCEF Doc No. 8, Ms001 Memo, at 23.)

Now, in motion sequence 002, Defendants move, pursuant to CPLR 2221[d], for leave to reargue motion sequence 001, and upon the granting of such leave, for attorney’s fees, pursuant to the anti-SLAPP law, in the amount of \$7,760.00. (NYSCEF Doc No. 39, Ms002 Memo; NYSCEF Doc No. 42, Invoice 1; NYSCEF Doc No. 50, Invoice 2.) The motion is fully submitted.

<sup>1</sup> The court’s decision and order was unanimously affirmed by the Appellate Division, First Department on September 27, 2022. (*Kerns v Ishida*, 2022 WL 4474589 [1st Dept, Sept 27, 2022].)

### Discussion

“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].)

Here, Defendants meet their burden for reargument, as the court overlooked the portion of their prior motion seeking attorney’s fees pursuant to the anti-SLAPP law. (NYSCEF Doc No. 35, Ms001 Decision.) Upon reargument, the court modifies its prior determination by granting Defendants’ attorney’s fees pursuant to Civil Rights Law § 70-a[1]. (*See Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 29 [1st Dept, May 19, 2022] [reversing order of dismissal only to the extent that order denied request for attorney’s fees pursuant to anti-SLAPP law in defamation action pertaining to defendant’s online reviews of surgeon].) That provision states that

“costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to [CPLR 3211(g)], that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law[.]”

(Civil Rights Law § 70-a[1][a].) Further, an “‘action involving public petition and participation’ is a claim based upon any communication in a place open to the public or a public forum in connection with an issue of public interest[.]” (Civil Rights Law § 76-a[1][a][1].) “New York courts have generally applied a broad interpretation to what constitutes a matter of public concern.” (*Aristocrat Plastic Surgery, P.C.*, 206 AD3d at 29.) This court finds that the online reviews posted on Google and Yelp (detailed in this court’s prior decision) pertaining to Plaintiff’s business, Orchid Aesthetics Medical Spa, constitute a matter of public concern. (*See Great Wall Medical PC v Levine*, 74 Misc 3d 1224[A] [Sup Ct, NY County, Mar. 8, 2022] [allegedly

defamatory online reviews posted on Yelp, Zocdoc, and Facebook concerning defendant's experience at plaintiff's medical practice constituted a matter of public concern; complaint dismissed and attorney's fees granted to defendant pursuant to anti-SLAPP law]; *see also Aristocrat Plastic Surgery, P.C.*, 206 AD3d at 31 [citing to California courts' application of their "similar" anti-SLAPP law to defamation cases involving online reviews of law firm, dentist, and plastic surgeon].)


Having already found that Plaintiff failed to state a cause of action pursuant to CPLR 3211[a][7], and now finding that the complaint involves "public petition and participation," Defendants' request for attorney's fees is granted, as the anti-SLAPP law directs that costs and attorney's fees "*shall be recovered* upon a demonstration ... that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law[.]" (Civil Rights Law § 70-a[1][a].)

In opposition, Plaintiff fails to raise an issue of material fact or dispute the amount of fees sought and, instead, seeks a stay, pursuant to CPLR 5519. (NYSCEF Doc No. 45, Opposition, at 3-4.) However, Plaintiff erroneously states that the court has already, in its prior decision, "directed the payment of Attorney fees," and has not filed a notice of cross-motion for such relief (CPLR 2215[a]). In addition to the procedural defects of plaintiff's request for a stay, the court finds that plaintiff is not entitled to a stay pursuant to CPLR 5519, and otherwise fails to cite case law demonstrating such entitlement. (Opposition at 3-4.) As such, it is hereby

ORDERED that Defendants' motion sequence 002 for leave to reargue its motion for costs and attorney's fees pursuant to Civil Rights Law § 70-a and § 76-a. is granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior Order, dated October 25, 2021, and grants Defendants’ motion in all respects; and it is further

ORDERED that the motion of Defendants to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said Defendants, and that Defendants Mimi Ishida and Pola Ham have judgment and recover against Plaintiff Roxana Kerns in the amount of \$7,760.00 for their reasonable attorney’s fees, plus costs and disbursements in the amount of \$185.00, for a total of \$7,945.00 to said Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendants.

<u>10/07/2022</u> DATE		 WILLIAM FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE