

**Gardner v Gotham Per Diem, Inc.**

2024 NY Slip Op 30131(U)

January 10, 2024

Supreme Court, New York County

Docket Number: Index No. 100710/2016

Judge: Leslie A. Stroth

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

**PRESENT: HON. LESLIE A. STROTH PART 12**

*Justice*

-----X  
GERARD GARDNER;  
Plaintiff,  
- v -  
GOTHAM PER DIEM, INC., ARIONN J. COPELAND,  
Defendant.  
-----X

INDEX NO. 100710/2016  
MOTION DATE 9/19/23  
MOTION SEQ. NO. 009 010 011

**DECISION AND ORDER  
ON MOTIONS**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 123, 124, 128, 130, 132, 133, 134, 135, 136, 144

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 010) 126, 127, 129, 131, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 011) 146, 147, 148, 149, 150, 151, 152, 153

were read on this motion to/for ATTORNEY -  
DISQUALIFY/RELIEVE/SUBSTITUTE/WITHDRAW

This is a defamation action brought by plaintiff Gerard Gardner (plaintiff) arising out of statements in his mother’s sleep study report prepared by defendant Arionn J. Copeland (Copeland), a licensed practical nurse. In the sleep study report, Copeland claimed to have observed a “safety issue” and indicated that plaintiff’s mother was residing in an “unsafe home environment.” NYSCEF doc. no. 57. Copeland also wrote that she feared for plaintiff’s mother and that plaintiff made derogatory comments to Copeland. *Id.*

Copeland subsequently submitted the sleep study report to defendant Gotham Per Diem, Inc. (Gotham), the on-demand healthcare staffing agency used by Medicaid to assign Copeland to plaintiff's mother, and Gotham shared the study with Healthfirst.<sup>1</sup>

In his complaint, plaintiff alleges that Copeland's report accuses plaintiff of neglecting his elderly mother, which statements are defamatory. He asserts that such statements were false and published with actual malice. Plaintiff further alleges that Gotham was negligent in its hiring of Copeland and is liable for her defamatory remarks.<sup>2</sup>

There are three motions before the Court, which are consolidated herein.

First, by notice of motion, defendant Copeland moves pursuant to CPLR 2221 (d) for an order granting her leave to renew and reargue her previously denied motion for summary judgment to dismiss plaintiff's defamation claim, and upon granting leave, granting Copeland's motion (motion sequence no. 009). Plaintiff opposes.

Second, Gotham moves pursuant to CPLR 2221 (d) for an order granting it leave to reargue its previously denied motion for summary judgment dismissing plaintiff's claims for defamation, vicarious liability, and negligent hiring, and upon granting leave, granting Gotham's motion (motion sequence no. 010). Plaintiff opposes.

Finally, by order to show cause, plaintiff's counsel, Jon L. Norinsberg, Esq. PLLC, seeks an order pursuant to CPLR 321 relieving him as counsel for plaintiffs based on an irrevocable breakdown between plaintiff and counsel (motion sequence no. 011).<sup>3</sup>

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<sup>1</sup> As noted in the prior order, Healthfirst is plaintiff's mother's Medicaid managed care organization who contracted with Gotham to perform the sleep study at issue.

<sup>2</sup> A full recitation of facts may be found in the decision and order of Justice Barbara Jaffe dated April 6, 2022.

<sup>3</sup> The parties fully briefed motion sequence nos. 009 and 010 prior to plaintiff's counsel filing his motion to withdraw.

## I. Copeland's Motion to Reargue and/or Reargue

In her decision and order dated April 6, 2022, Justice Barbara Jaffe<sup>4</sup> denied Copeland's motion for summary judgment seeking to dismiss plaintiff's libel claims against her.<sup>5</sup> See NYSCEF doc. no. 117 (the prior order). Justice Jaffe held that plaintiff raised an issue of fact as to whether Copeland was motivated by actual malice, basing her decision partly upon the nanny cam footage of the evening in question submitted by plaintiff, which depicted "...plaintiff as an attentive caregiver to his mother..." and did not demonstrate "...that the apartment was dirty or unsafe, as reported by Copeland." See NYSCEF doc. no. 117 at 7.

Justice Jaffe also held that Copeland failed to demonstrate that the statements at issue constituted non-actionable opinion, as her accusations were "...based, at least in part, on facts which are unknown to the reader and/or are conveying facts about plaintiff and the environment in which he cared for his mother." *Id.* at 8. Justice Jaffe further found that plaintiff need not plead special damages, as Copeland's statements may injure his reputation as his mother's home health aide and his business as a private investigator, thereby constituting defamation *per se*.

### A. Motion to Reargue

The purpose of reargument is to provide "a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law." See *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979); see also CPLR 2221 (d)(2). "To succeed on a motion to reargue, the moving party must demonstrate that the court overlooked *controlling* decisions or

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<sup>4</sup> With few exceptions, a motion for leave to reargue must be made to the judge who signed the underlying order unless they are unavailable. See CPLR 2221 (a). As this matter was reassigned upon Justice Jaffe's retirement to Justice Leslie A. Stroth, this motion is properly before this Court for determination. See *C & N Camera & Elecs. Inc. v Public Serv. Mut. Ins. Co.*, 210 AD2d 132, 133 (1st Dept 1994) (it was proper for new justice presiding in the part to hear reargument motion).

<sup>5</sup> In the prior order, Justice Jaffe partially granted Copeland's motion to the extent of dismissing plaintiff's intentional and negligent infliction of emotional distress claims against Copeland.

*material* factual matters that were before the court on the underlying motion.” *Richardson v Lindenbaum & Young*, 14 Misc 3d 1223(A) (Sup Ct 2007), *affd in part, appeal dismissed in part sub nom. Richardson v Lindenbaum & Young, Pollack & Assoc., PLLC*, 56 AD3d 645 (2d Dept 2008). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided,” (*id.*) nor is reargument a proper forum to present arguments different from those originally asserted. *See William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992) *lv. dismissed in part and denied in part* 80 NY2d 1005 (1992).

Copeland now argues that the Court overlooked and misapprehended law on essentially every issue reviewed by the Court in the prior order, such as the standard for common law and actual malice, defamation *per se*, qualified immunity, special damages, actionable opinion, and truth as a complete defense. In opposition, plaintiff argues that Copeland raises the same arguments that were previously made on the original summary judgment motion and rejected in the Court’s decision.

This Court finds that Copeland cites no new controlling authority to support her argument that the Court misapplied the law in the prior order. Rather, she reiterates her previous arguments at length, which were addressed by the Court in the prior order. The Court properly found that the video submitted by plaintiff raised an issue of fact as to the truth of Copeland’s statements in the sleep study and as to whether they were motivated by malice. The Court further found that Copeland’s statements had the potential to injure plaintiff’s reputation as a licensed home attendant and negatively impact his business as a private investigator. Copeland fails to demonstrate that the Court overlooked any controlling authority or material factual matters that were before it in rendering its determination on the underlying motion. *See Richardson*, 14 Misc 3d 1223(A).

Consequently, Copeland has failed to establish any ground upon which to grant leave to reargue, and the motion is denied. *See Mazinov v Rella*, 79 AD3d 979, 980 (2d Dept 2010) (trial court improvidently granted motion for leave to reargue as movant failed to show court overlooked or misapplied any applicable law and improperly advanced new arguments).

### **B. Motion to Renew**

A motion for leave to renew “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), (3). Further, “[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought.”

Copeland raises absolutely no new facts that would alter this Court’s analysis of and conclusions on the original summary judgment motion, nor has she demonstrated that there has been “a change in the law that would change the prior determination.” CPLR 2221 (e). Moreover, although Copeland moves to renew in her notice of motion, she does not separately identify the items of relief sought, nor does she address the motion to renew in her reply papers. Therefore, Copeland’s motion to renew is denied.

## **II. Gotham’s Motion to Reargue**

In the prior order, Justice Barbara Jaffe denied Gotham’s motion for summary judgment seeking to dismiss plaintiff’s libel and negligent hiring and retention claims against it. The Court found that there was an issue of fact as to whether Copeland was acting within the scope of her employment, since “Copeland wrote the report, at least in part, to explain why the sleep study had not been completed,” which was “in furtherance of Gotham’s business.” *See* NYSCEF doc. no. 117 at 11. The Court further found that it is “undisputed that Gotham shared [Copeland’s] report

with HealthFirst,” and that in reviewing or proving the element of publication, “publication to even one person other than the defamed is sufficient.” *Id.* at 12 (citation omitted).

With respect to Plaintiff’s negligent hiring and retention claims, the Court found that since “Copeland indicated a prior conviction on her application (NYSCEF 38), whether Gotham’s failure to inquire about it and/or conduct a fingerprint-based background check constitutes negligent hiring or retention is a jury question, especially since she was seeking employment that required her to care for vulnerable people in their homes.” *Id.* (citation omitted). Further, the Court found that since “a triable issue remains as to whether Copeland was acting within the scope of her employment,” it would be “premature to dismiss the negligent hiring cause of action.” *Id.* at 12. Thus, the Court denied Gotham’s motion for summary judgment on Plaintiff’s libel and negligent hiring and retention claims.<sup>6</sup>

The thrust of Gotham’s motion for leave to reargue is that the Court misapplied the applicable standard for reckless disregard and misapprehended the facts and law as they pertained to plaintiff’s negligent hiring claim. First, Gotham argues that there is no evidence in the record that it acted with reckless disregard because it did not have any reason to know that Copeland would fail to perform a sleep study or other task she was assigned and/or that she would prepare a false report in an attempt to exculpate herself. However, as with Copeland’s motions, Gotham’s argument is merely a recitation of previous arguments made on the underlying motion and rejected by Justice Jaffe.

The Court expressly held that:

As plaintiff testified that he had informed Gotham immediately after the incident that Copeland had slept through the sleep study and that he had a video of the entire visit, Gotham had reason to review the report before signing off on it. Plaintiff thereby demonstrates that Gotham at least recklessly disregarded the video... NYSCEF doc. no. 117 at 11.

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<sup>6</sup> In the prior order, Justice Jaffe partially granted Gotham’s motion for summary judgment and dismissed plaintiff’s negligent supervision claims against it.

Clearly, the Court based its finding that Gotham acted with reckless disregard upon the evidence provided in the record. Further, the Court held that plaintiff's communications with Gotham regarding the video raise an issue of fact as to whether Gotham acted recklessly in disclosing Copeland's report to Healthfirst. *See* NYSCEF doc. no. 117 at 11. The Court based its finding on plaintiff's deposition testimony, in which he stated that Gotham declined his repeated requests to have someone view the video. Gotham has not demonstrated that the Court misapprehended any facts or law in reaching the conclusion in its decision that Gotham acted recklessly.

Gotham further maintains that it had no reason to suspect that Ms. Copeland had or used any aliases or that she failed to disclose a prior conviction. However, in the prior order, the Court notes that Copeland indicated that she had a prior conviction on her application, and Gotham failed to inquire about it or conduct a background check. As such, the Court appropriately held that a question of fact exists for the jury to decide whether Gotham acted negligently in failing to properly investigate her, and Gotham does not establish that the Court overlooked or misapprehended any law or facts in rendering its decision.

With respect to special damages, as noted herein, upon this Court's review, Justice Jaffe properly found that Copeland's statements constitute defamation *per se*, and that plaintiff need not plead same. Further, Gotham's argument that plaintiff failed to adequately plead a defamation claim in his complaint is improper, as it was not argued in its original motion papers. *See DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 (1st Dept 2005). Thus, Gotham's motion to renew is denied.

### **III. Motion to Be Relieved as Counsel**

Following the briefing of the motions to reargue brought by Gotham and Copeland, plaintiffs' counsel, Jon L. Norinsberg, Esq. PLLC, filed an order to show cause seeking an order

pursuant to CPLR 321 to be relieved as counsel for plaintiff. Plaintiff's counsel based his motion on an irrevocable breakdown between plaintiff and his counsel. Plaintiff opposes the motion, and Gotham and Copeland take no position.

An attorney may withdraw as counsel of record upon a showing of good and sufficient cause for withdrawal and where reasonable notice has been provided to plaintiffs. *See Genn v Ratnathicam*, 187 AD3d 539 (1st Dept 2020). Deterioration of the attorney-client relationship is a commonly recognized ground for a withdrawal motion. Good and sufficient cause exists where there are "...irreconcilable differences between the attorney and the client with respect to the proper course to be pursued in litigation." *Winters v Rise Steel Erection Corp.*, 231 AD2d 626 (2d Dept 1996).

In support of his motion, attorney Jon L. Norinsberg affirms that due to the irrevocable breakdown between attorney and client in this matter, Attorney Norinsberg cannot continue to prosecute this matter. However, Norinsberg's affirmation does not contain details as to his dealings with plaintiff, claiming in his affirmation that this omission was to avoid prejudicing plaintiff's rights.

The matter was heard on July 25, 2023, at which counsel for Attorney Norinsberg, plaintiff, and Gotham appeared. Plaintiff indicated that he may consent to the withdrawal, pending certain conditions. As the per diem counsel for Attorney Norinsberg did not have personal knowledge of the alleged breakdown in communications with plaintiff, the Court directed counsel to provide a confidential supplemental affirmation describing his communications with plaintiff for *in camera* review. *See* NYSCEF doc. no. 156. Subsequently, Attorney Norinsberg provided a supplemental affirmation in support of his motion to withdraw as directed by the Court.

The Court also permitted plaintiff Gerard Gardner to file an affidavit detailing his position, which he timely submitted. Mr. Gardner opposes counsel's contention that there has been a breakdown in the attorney-client privilege. Alternatively, if the Court grants counsel's motion to withdraw, Mr. Gardner requests that the Court require counsel to take measures to minimize the prejudice potentially resulting from any transition, such as providing an accounting of the costs due and owing, providing copies of counsel's case file and e-mails communications with defense counsel, and allowing ample time to obtain new counsel.<sup>7</sup>

Upon receipt of the confidential affirmation in further support of the order to show cause, the Court now finds that Jon L. Norinsberg, Esq. PLLC has demonstrated good and sufficient cause to be relieved as counsel. As the additional information provided in the supplemental affirmation would be prejudicial to plaintiff if detailed herein, the Court declines to reiterate the particulars in the within motion.

Furthermore, as Attorney Norinsberg noted that he will not be asserting a lien for the work done in this case, the Court will allow his application to withdraw contingent upon the release to plaintiff and his new counsel of the case file and e-mail communications with defense counsel. Any application for reimbursement for case costs may be made upon plaintiff's retention of new counsel and/or resolution of this matter.

#### IV. Conclusion

Accordingly, it is

ORDERED that the motion of defendant Arionn J. Copeland for leave to reargue and/or renew its motion for summary judgment is denied (motion seq. no. 009); and it is further

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<sup>7</sup> Any requests made by plaintiff that do not pertain to the withdrawal of counsel, such as allowing for additional briefing on motion sequence nos. 009 and 010, are not before the Court and will not be considered in the absence of a motion.

ORDERED that the motion of defendant Gotham Per Diem, Inc. for leave to reargue its motion for summary judgment is denied (motion seq. no. 010); and it is further

ORDERED that the motion of Jon L. Norinsberg, Esq. PLLC. to be relieved as attorney for Gerard Gardner is granted upon filing of proof of compliance with the following conditions (motion seq. no. 011); and it is further

ORDERED that the Jon L. Norinsberg, Esq. PLLC shall provide to plaintiff and his new counsel the case file and any e-mail communications with defense counsel within 20 days of the date of this decision and order; and it is further

ORDERED that, within 10 days from entry, said attorney shall serve a copy of this order with notice of entry upon the former client at their last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by posting to the New York State Courts Electronic Filing System; and it is further

ORDERED that, together with the copy of this order with notice of entry served upon the former client, moving counsel shall forward a notice directing the former client to appoint a substitute attorney within 60 days from the date of the mailing of the notice and the client shall comply therewith, except that, in the event plaintiff intends instead to represent himself, he shall notify the Clerk of the Part of this decision in writing within said 60-day period; and it is further

ORDERED that any new attorney retained by plaintiff shall file a notice of appearance with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Part within 60 days from the date the notice to retain new counsel is mailed; and it is further

ORDERED that no further proceedings may be taken against the former client without leave of this court for a period of 60 days after service on the former client of the aforesaid notice to appoint a substitute attorney; and it is further

ORDERED that the departing attorney shall, within 10 days from entry, serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office, the filing of a notice of appearance as provided herein, and the filing of papers as aforesaid shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)); and it is further ordered that

The foregoing constitutes the decision and order of the Court.

  
LESLIE A. STROTH, J.S.C.

1/10/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE