Aprea v New York State Bd. of Elections
2012 NY Slip Op 30437(U)
February 28, 2012
Sup Ct, Albany County
Docket Number: 7215-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

GERARD APREA,
JOHN VIDUREK

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 7215-11
RJI NO. 01-11-105369

NEW YORK STATE BOARD OF ELECTIONS,
DUTCHESS COUNTY BOARD OF ELECTIONS,
GREEN COUNTY BOARD OF ELECTIONS,

Defendants.

Supreme Court Albany County All Purpose Term, February 16, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
John Vidurek
Plaintiff, Pro-Se
600 Violet Avenue, Suite 107
Hyde Park, New York 12538

Kimberly Galvin, Esq.
Special Counsel
Attorney for Defendant New York State Board of Elections
40 Steuben Street
Albany, New York 12207

TERESI, J.:

Plaintiffs commenced this action setting forth five causes of action, sounding in: "Breach of Contract," Breach of Fiduciary Duty," "Negligence," "Constructive Fraud," and "Conspiracy," all seeking declaratory relief. Before any Defendant answered, Plaintiffs moved for a default judgment. While this action has been voluntarily dismissed against the Dutchess County Board of Elections and Greene County Board of Elections, the New York State Board of Elections

(hereinafter "NYSBOE") moved to vacate its default. Plaintiffs oppose NYSBOE's motion.[1] Because, Plaintiffs have wholly failed to state any viable cause of action this matter is dismissed.

"A plaintiff's right to recover upon a defendant's default in answering is governed by CPLR 3215... which requires that the plaintiff state a viable cause of action... In evaluating whether plaintiff has fulfilled this obligation, defendant, as the defaulting party, is deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them... The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case... Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default... Under such circumstances, the court may sua sponte dismiss a plaintiff's complaint upon his or her motion for a default judgment." (Walley v Leatherstocking Healthcare, LLC, 79 AD3d 1236, 1238 [3d Dept 2010][quotation marks and citations omitted]).

Here, Plaintiffs' have set forth no factual allegations to establish a prima facie case on any cause of action.

Plaintiffs' breach of contract cause of action rests on their assumption that a contract was formed between the parties "through the purported constitutional oath's taken by defendant." Needless to say, such assumption is incorrect. Plaintiffs offered no factual allegations to establish the existence of a contract, i.e. "offer, acceptance, consideration, mutual assent, and intent to be bound." (Waverly Properties, LLC v KMG Waverly, LLC, 2011 WL 4472284

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[1] To the extent Plaintiffs sought to compel discovery, because they failed to give any notice of their motion this Court has no jurisdiction to entertain such request, which is denied. (Burstin v Public Service Mut. Ins. Co., 98 AD2d 928 [3d Dept 1983]; Hawkins v McCall, 278 AD2d 638 [3d Dept 2000]).

[SDNY 2011], quoting Williams v. Time Warner Inc., 2010 WL 846970 [SDNY 2010]).

Similarly, Plaintiffs failed to establish NYSBOE's breach of a fiduciary duty or constructive fraud. Both causes of action require, at a minimum, that Plaintiffs demonstrate the existence of a fiduciary relationship between the parties. However, Plaintiffs failed to show that "[s]uch a relationship exists [by proffering factual allegations or other proof that] one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge." (Sears v First Pioneer Farm Credit, ACA, 46 AD3d 1282, 1286 [3d Dept 2007], quoting Doe v. Holy See [State of Vatican City], 17 AD3d 793 [3d Dept 2005], lv. denied 6 NY3d 707 [2006]). The facts alleged herein establish nothing more than the relationship between a a citizen candidate and the NYSBOE.

Nor have Plaintiffs set forth a prima facie negligence cause of action. "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general." (McLean v. City of New York, 12 NY3d 194, 203 [2009]). Here, Plaintiffs established no special relationship because they did not allege facts that "the municipality violate[d] a statutory duty enacted for the benefit of a particular class of persons;... [that] it voluntarily assume[d] a duty that generates justifiable reliance by the person who benefits from the duty; or [that] the municipality assume[d] positive direction and control in the face of a known, blatant and dangerous safety violation." (Signature Health Ctr., LLC v State, 935 NYS2d 357, 359 [3d Dept 2011], quoting McLean v. City of New York, supra).

Lastly, because Plaintiffs failed to allege sufficient facts to establish an underlying tort, they have set forth no conspiracy cause of action. "Allegations of conspiracy are permitted only

to connect the actions of separate defendants with an otherwise actionable tort." (Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d 968, 969 [1986]; see also Ford v Snashall, 285 AD2d 881, 882 [3d Dept 2001][nor did Plaintiffs provide a detailed fact pleading]).

Accordingly, Plaintiffs' motion for a default judgment is denied, the complaint is dismissed, sua sponte, and NYSBOE's motion to vacate their default is denied as moot, all without costs.

This Decision and Order is being returned to the attorneys for the NYSBOE. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
February 28, 2012

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Summons, dated November 16, 2011; Complaint, dated November __, 2011; Affidavit of John Vidurek dated November 16, 2011; with Exhibits 101 - 118.
2. Notice of Motion, dated December 14, 2011, "Motion" of John Vidurek dated December 14, 2011, with attached unnumbered exhibit, Affidavit of John Vidurek dated December 14, 2011.
3. Notice of Motion, dated January 5, 2012, "Order to Show Cause" of John Vidurek dated January 5, 2012, "Notice" of John Vidurek dated January 5, 2012, with attached unnumbered exhibits.
4. Order to show Cause, dated January 23, 2012; Affirmation of Kimberly Galvin, dated January 20, 2012, with attached Exhibits A-B.
5. "Plaintiff's Support" of John Vidurek dated January 26, 2012, with attached unnumbered exhibits; "Plaintiff's Answer to Order to Show Cause" of John Vidurek, dated January 30, 2012, with attached unnumbered exhibits; "Plaintiff's Answer to Defendants Affirmation" of John Vidurek, dated January 30, 2012; "Plaintiff's Renewed Objection" of John Vidurek dated February 9, 2012.
6. Reply Letter of Kimberly Galvin, dated January 14, 2012.
7. Motion to Compel of John Vidurek, dated January 12, 2012.