

Wallert v Ballance

2012 NY Slip Op 33290(U)

January 19, 2012

Sup Ct, NY County

Docket Number: 102834/2010

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Shirley Werner Kornreich
Justice

PART 54

Index Number : 102834/2010
WALLERT, CHARLES
vs
BALLANCE JR., DR. WILLIAM
Sequence Number : 005
REARGUMENT/RECONSIDERATION

INDEX NO.
MOTION DATE 1/17/12
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for E-Filed Docs

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 44-46
Answering Affidavits — Exhibits No(s) 49-50
Replying Affidavits No(s) 55

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/19/12

JUSTICE SHIRLEY WERNER KORNEICHS
[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CHARLES WALLERT,

Plaintiff,

-against-

**DECISION
& ORDER**

Index No.: 102834/2010

DR. WILLIAM BALLANCE, JR., BLUEWATER
RECORDINGS, INC., and BOBBY TOMLINSON,
d/b/a THE EMBERS,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Defendants Ballance and Bluewater (collectively, Movants), move to reargue, pursuant to CPLR 2221, their motion to dismiss the amended complaint (Seq. 002), which was decided by this court's decision and order dated October 26, 2011 (Prior Order).¹ The reader's familiarity with the Prior Order is assumed. The grounds for the motion are as follows: 1) the court incorrectly declined to consider the 2nd and 6th causes of action against Ballance, based upon the single motion rule, CPLR 3211(e); 2) the court failed to address the 9th cause of action against Ballance for corporate waste; and 3) the court erred in not dismissing the first cause of action alleging breach of contract against Bluewater for failure to state a claim and based upon documentary evidence, CPLR 3211(a)(1) and (7).

Plaintiff opposes the motion on the merits and on the ground of untimeliness.

I. Untimeliness

This is an e-filed case. Thus, plaintiff argued that the motion to reargue was untimely

¹Defined terms in the Prior Order have the same meanings in this opinion.

because it was served 32 days after the Prior Order was issued. Plaintiff is incorrect.

A motion to reargue must be made within 30 days of service of a copy of the order disposing of the motion with notice of entry. CPLR 2221(d)(3). In an e-filed case, the entry of an order does not constitute service of notice of entry. 22 NYCRR 202.5-b(h)(3). A party must serve notice of entry of an order by serving a copy of the notification received from the NYSCEF site, a copy of the order, and an express statement that the transmittal constitutes notice of entry. *Id.* Service of the order with notice of entry may be by e-filing. *Id.*

Here, Movants served the Prior Order with notice of entry on the same day that they served this motion to reargue. Both were served on December 2, 2011 by e-filing. Therefore, the motion was timely.

II. Single Motion Rule

On the prior motions, Ballance moved (Mot. Seq. 001), to dismiss the complaint for lack of personal jurisdiction, CPLR 3211(a)(8), and Bluewater and Ballance moved (Mot. Seq. 002) to dismiss the amended complaint, dated June 28, 2010 (AC), based on documentary evidence, the statute of frauds and for failure to state a cause of action, CPLR 3211(a)(1), (5) and (7), respectively. CPLR 3211 (e) provides that “a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted.” This court considered the second motion by Ballance to the extent that it sought to dismiss for failure to state a claim because CPLR 3211(e) contains the following exception to the single motion rule: “[a] motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) ... made at any subsequent time or in a later pleading.” The court declined to consider Ballance’s motion insofar as it was premised upon CPLR 3211(a)(1) and (5), reasoning that it violated the single motion rule.

Ballance now argues that the single motion rule does not apply because he served both motions simultaneously on November 12, 2010, in one Federal Express envelope, and subsequently filed them electronically, together with proof of service by Federal Express.² It is undisputed that plaintiff's counsel had not consented to e-filing when the motions were served by Federal Express. The court erroneously assumed that the motions were served when they were e-filed.

Ballance claims that because the purpose of the single motion rule is to prevent successive motions that burden the court system and harass the plaintiff, the court has discretion to ignore the rule where simultaneous motions are served. He cites *Ultramar Energy v Chase Manhattan Bank*, N.A., 191 AD2d 86, 92 (1st Dep't 1993)(second 3211(a) motion allowed because it did not assert alternative or repetitive ground but rather supplied documents appellate court had said were necessary); *Rivera v Board of Educ. of the City of New York*, 82 AD3d 614 (1st Dep't 2011)(second motion for failure to state cause of action permitted where prior motion was not decided on merits); *Ghee v Washington Mut. Bank*, 13 Misc.3d 577 (Sup Ct Kings Co 2006)(single motion rule barred second motion for failure to state claim).

Rodriguez and *Ghee* are of limited precedential value because in those cases the second motion was for failure to state a cause of action, CPLR 3211(a)(7), an exception to the rule. However, in *Rivera*, the First Department gave as a second reason that the prior decision was not on the merits. In *Ultramar*, the trial court dismissed the complaint pursuant to CPLR 3211(a)(1) [documentary evidence]. The Appellate Division reinstated the plaintiff's unjust enrichment claim, stating that it could not be disposed of without documentary evidence that was not in the record. A

²In an e-filed case, a party may utilize other service methods permitted by the CPLR provided that proof of service is filed electronically. 22 NYCRR 202.5-b(f)(2)(ii).

second motion was made to dismiss pursuant to (a)(1) and (7), and denied pursuant to the single motion rule. On a second appeal, the Appellate Division reversed holding that the second motion rule was not violated because the plaintiff had not made the motion on alternate grounds, but merely supplied dispositive documentary evidence, thus saving the court's time by resolving the case.

Here, plaintiff did make motions on alternate grounds, but they were made simultaneously, not successively, which is different from the situation in *Ultramar*. In addition, there has been no appellate court invitation to submit documents. The issue is whether despite the mandatory statutory language that there "shall" be but a single motion, the court should permit two when they are served simultaneously because the purpose of the statute is not implicated.

The court grants reargument of the Prior Order insofar as it denied Ballance's motions based upon the single motion rule. The CPLR provides that it "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." Although there were two sets of paper, they were served in the same envelope. Consequently, the purpose of 3211(e) was not implicated. Reargument should be granted where the movant demonstrates that the court "misconstrued relevant facts or misapplied governing law." *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 (1st Dept 2005). Here, the court inadvertently overlooked the simultaneous service of the motions due to the e-filed record.

III. Breach of Agreement to Promote Against Ballance - 6th Cause of Action

The court grants the motion to reargue this prong of Ballance's motion because it was denied based upon the single motion rule. Upon reargument, the court dismisses the 6th cause of action against Ballance. As noted in the Prior Order, the 2nd amended complaint alleges that "pursuant to The Contract," Ballance failed to promote two albums plaintiff produced. The Contract, however,

does not mention an obligation to promote two albums. Hence, there was no breach.

IV. Derivative Claim against Ballance - 9th Cause of Action

The motion to reargue is granted because the court inadvertently failed to address this aspect of Ballance's motion. Upon reargument, the motion to dismiss the claim for corporate waste against Ballance is denied for the same reasons stated in the Prior Order denying Tomlinson's motion to dismiss the 8th cause of action. As noted in the Prior Order, the court must accept as true plaintiff's allegations that Ballance diverted \$250,000 of Bluewater funds for non-corporate purposes.

V. Breach of Contract Against BlueWater and Ballance Guaranty - 1st and 2nd Causes of Action

Bluewater's motion to reargue the first cause of action is denied. This motion was not denied based upon the single motion rule, and Bluewater has not demonstrated that the court overlooked controlling principles of law when it determined that it could not rule, as a matter of law, that the founding officers exercised their discretion to accrue, rather than pay, Wallert's salary. The contract provided that:

As prescribed by the Board of Directors' Resolution of April 28, 2003, compensation for each officer will be \$3,750...retroactive commencing on January 1, 2004, payable at the beginning of each month for the preceding month. It is understood that the founding officers will use their discretion in distributing or accruing funds depending on the financial condition of the COMPANY and the participation and fair distribution of individual officer's [sic] needs and requirements due to compensation from other sources.

Bluewater argues that this clause was equivalent to discretionary compensation, which cannot be reviewed. However, the compensation is not discretionary. Only the decision whether to accrue or pay compensation is discretionary, and there was no showing that Bluewater's officers considered the financial condition of the company and the participation and fair distribution of

Wallert's "needs and requirements due to compensation from other sources." For purposes of this motion, the court must accept as true plaintiff's uncontradicted statement that he is owed compensation and that there were funds available to pay it that were improperly diverted.

V. Enforcement of Guaranty against Ballance - 2nd Cause of Action

The motion to reargue the second cause of action is granted, since denial was based upon the single motion rule. Ballance argues for dismissal based upon the statute of frauds. Upon reargument, the motion is denied. As noted in the Prior Order, plaintiff and Ballance dispute whether there is a written guaranty. Plaintiff alleges that his computer crashed and the guaranty is contained in an e-mail sent by Ballance. Therefore, the court ruled that disclosure was warranted. Accordingly, it is

ORDERED that the motion by Bluewater Recordings, Inc., and Dr. William Ballance, Jr., to reargue the Decision and Order dated October 26, 2011, is granted in part and denied in part, and upon reargument, the court grants the motion by Dr. William Ballance, Jr., to dismiss the 6th cause of action against him for failure to promote two albums, and in all other respects the motion is denied.

Dated: January 19, 2012

ENTER:



J.S.C.