Glazier v Harris
2017 NY Slip Op 30316(U)
February 21, 2017
Supreme Court, New York County
Docket Number: 103482-2010
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
---X
WILLIAM GLAZIER and GEORGE REID,

Plaintiffs,

Index No. 103482-2010

-against-

DECISION/ORDER

Motion Sequence 007

LYNDON HARRIS and ST. JOHN'S LUTHERAN CHURCH,

Defendants.
---X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmations & Collective Exhibits Annexed..........................	1, 2, 3
Answering Affirmation & Exhibits Annexed..	4, 5
Reply Affirmation...	6

This action stems from, in part, plaintiffs William Glazier ("Glazier") and George Reid's ("Reid", collectively "Defendants") claims against defendants Lyndon Harris ("Harris") and St. John's Lutheran Church ("St. John's", collectively "Defendants") for damages sustained as a result of Harris allegedly making defamatory statements about Plaintiffs to members of St. John's Church Council in June of 2009.

In a prior motion, Defendants moved for an order granting them summary judgment and dismissing Plaintiffs' claims on the following grounds: Plaintiffs' claims for defamation were actually impermissible claims for wrongful termination, and since Plaintiffs' were at-will employees, those claims must be dismissed; Harris' allegedly defamatory statements were protected by the common-interest privilege and Plaintiffs did not sufficiently allege malice, either common-law or constitutional, sufficient to overcome the privilege.

In a decision and order dated June 17, 2016 (the "decision and order"), this Court denied Defendants' motion for summary judgment as to all issues except as to whether Plaintiffs had sufficiently demonstrated an issue of fact as to whether Harris had acted with common-law

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malice when making the allegedly defamatory statements. The prior decision and order provides the relevant factual background.

Defendants now move for an order, pursuant to CPLR § 2221(d), granting them leave to reargue that part of the decision and order which denied Defendants' motion for summary judgment on the grounds that Plaintiffs had demonstrated an issue of fact as to whether Harris acted with constitutional malice sufficient to overcome the common interest privilege. Defendants further move for an order, pursuant to CPLR § 2221(e), granting them leave to renew, or in the alternative, leave to reargue, that part of the decision and order which denied Defendant's motion for summary judgment on the grounds that Plaintiffs had demonstrated an issue of fact as to whether there was a contractual relationship between Plaintiffs and St. John's. Plaintiffs oppose the motion.

A motion to reargue pursuant to CPLR § 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221[d][2]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979] citing *Fosdick v Town of Hempstead*, 126 NY 651 [1891]). Conversely, a motion 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]). A motion to renew must "contain reasonable justification for the failure to present such facts on the prior motion" (*Id.* at [e][3]; *American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). However, this rule "is not inflexible and the court, in its discretion, may grant renewal, in the interest of justice, upon facts known to the movant at the time of the original motion" (*Rancho Santa Fe Ass'n v Dolan-King*, 36 AD3d 460, 461 [1s Dept 2007] citing *Wilder v May Department Stores Co.*, 23 AD3d 646, 648 [1st Dept 2005]; *Garner v Latimer*, 306 AD2d at 209 [1st Dept 2003]).

First, in support of their motion to reargue, Defendants assert that the Court misapprehended controlling law and overlooked relevant facts in holding that Plaintiffs met their burden in raising an issue of fact as to whether Harris acted with constitutional malice sufficient to overcome the common interest privilege. Here, Defendants have failed to sufficiently demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling law (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). To the contrary, Defendants are merely attempting "to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Therefore, Defendants' request for leave to reargue the issue of whether Plaintiffs, in opposition to Defendants prior motion, raised an issue of fact as to whether Harris acted with constitutional malice is denied (*Mangine v Keller*, 182 AD2d 476 [1st Dept 1992]).

Next, in support of their motion to renew, Defendants assert that the Court misapplied the law and overlooked relevant facts with regard to its decision that Plaintiffs had successfully

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raised an issue of fact as to whether Plaintiffs were at-will employees of the St. John's. Specifically, Defendants argue their motion to renew should be granted based on the affidavit of Mark E. Erson ("Erson affidavit"), the current pastor at St. John's. Annexed to the affidavit are what Erson claims are "minutes of all meetings of the Church Council which reference the employment of Plaintiffs William Glazier or George Reid" (Erson Aff. ¶ 2). In his affidavit, Erson states that he "personally reviewed the minutes and was unable to locate any minutes which provide any term of employment for either Plaintiff. This is consistent with my understanding that both Plaintiffs were at-will employees of the Church" (*Id.* at ¶ 3). Attached to the affidavit are excerpts from Church Council minutes totaling one page from 2005, two pages from 2006, three pages from 2007, and an additional half-page marked "Date ? Possible 2008/March" (Def. Ex. E).

Here, leaving aside the sufficiency of the Erson affidavit, Defendants have not demonstrated their motion to renew was based on any new facts not known to them at the time of the original motion (*Grafov v Chelsea Bicycles Corp.*, 134 AD3d 492, 493 [1st Dept 2015]). It is undisputed that at the time of the prior motion, Defendants were aware of the existence of the Church Council minutes. Indeed, the Church Council minutes were in Defendants' exclusive possession and control.

Further, Defendants fail to state a reasonable justification for failing to submit the Church Council minutes in reply to Plaintiffs opposition to the prior motion, even though "that evidence had been in their possession for years" (CPLR 2221[e][3]; *Kopicel v Schnaier*, 145 AD3d 599 [1st Dept 2016] citing *Queens Unit Venture, LLC v Tyson Ct. Owners Corp.*, 111 AD3d 552, 552-553 [1st Dept.2013]; *see also Jones v City of N.Y.*, No. 24222/14, 2017 WL 366264, at *1 (NY App Div Jan. 26, 2017] citing *300 W. Realty Co. v City of New York*, 99 AD2d 708, 709 [1st Dept 1984], *appeal dismissed* 63 NY2d 952 [1984]). Defendants argue that they are justified in failing to provide evidence of the Church Council minutes for several reasons. First, Defendants claim that because Plaintiffs' allegation that they had contracts with the Church was not raised until the Plaintiffs' opposition to Defendants' motion for summary judgment, Defendants are reasonably justified in failing to submit the Church Council minutes on the prior motion. This justification fails however, because Defendants had an opportunity to reply to Plaintiffs' opposition. Indeed, not only did Defendants reply to Plaintiffs' opposition to the prior motion, Defendants addressed Plaintiffs' arguments on this very issue, albeit without submitting evidence of the Church Council minutes even though they were readily available at the time (*NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 577 [1st Dept 2007]). Defendants reliance on *Arce v 1681 Realty Holding Corp.*, for this proposition is misguided. (265 AD2d 157 [1st Dept 1999]). In *Arce*, the motion to renew was granted to give a party the opportunity to address arguments first made in reply, where said party otherwise would not have had an opportunity to address those argument (*Id.*). Presently, the arguments were first made in opposition, thereby giving Defendants an opportunity to address those arguments in reply. Defendants further argue their failure to provide evidence is justified because the allegation was not pled in the Complaint and Plaintiffs sought no discovery on the issue. These too, fail to reasonably justify Defendants' failure to include the minutes in their reply to Plaintiffs'

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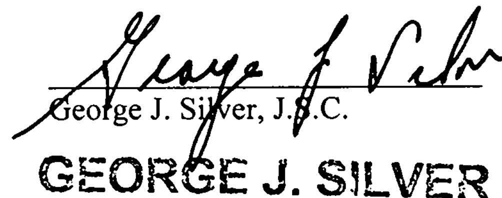
opposition to the prior motion (*see Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]).

Even were this Court to put aside Defendants lack of reasonable justification and the fact that the new evidence was previously known and available to movant, in the interest of justice, and grant renewal (*People v De Jesus*, 34 Misc 3d 748 (Sup Ct, NY County 2011); citing *Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487, 487-488 [1st Dept 2010]), the Erson affidavit would fail to entitle Defendants to summary judgment. In the affidavit, Erson testified that he "personally reviewed the minutes and was unable to locate any minutes which provide any term of employment for either Plaintiff." Attached to the affidavit are excerpts from Church Council minutes dated 2005, 2006, 2007, and one possibly from 2008. However, the affirmant fails to specifically note that he reviewed all Church Council minutes, including those dated from the 1970s, which Plaintiffs claim espoused their contract terms. Plaintiff Reid specifically testified that "in 1976, due to loss of our full-time pastor and secretary as well as budgetary restrictions, The Church Council voted to have all terms of employment and agreements for lay employees documented in the Minutes of the Church Council rather than in lengthy contracts" (Plaintiff Opp. at Ex. J). Nowhere in Defendants' memorandum or in the Erson Affidavit is any mention of the Church Council minutes from 1976. Such an insufficient and conclusory affidavit cannot foreclose issues of fact, and the motion to renew is denied. Further, Defendants' plea that this Court consider their motion to renew, in the alternative, as a motion to reargue, is similarly denied, and it is hereby

ORDERED that Defendants' motion for leave to reargue its motion for summary judgment and for leave to renew its motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a status conference on April 18, 2017 at 9:30 a.m. at Part 32, 80 Centre St. New York, NY 10007; and it is further

ORDERED that movant is to serve a copy of this order, with notice of entry, upon Plaintiffs within 20 days of entry.



George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: February 21, 2017
New York County

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