Nix v Major League Baseball
2018 NY Slip Op 33373(U)
December 28, 2018
Supreme Court, New York County
Docket Number: 159953/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**

Justice

----------X

NEIMAN NIX, *et al.*,

Plaintiffs,

- v -

MAJOR LEAGUE BASEBALL, *et al.*,

Defendants.

----------X

INDEX NO. 159953/2016

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion for reargument.

Plaintiffs move for an order granting them leave to reargue a decision and order dated June 4, 2018, by which defendants' motion to dismiss the complaint was granted. Defendants oppose and cross-move for an order pursuant to 22 NYCRR § 130-1.1 imposing monetary sanctions on plaintiffs and enjoining them from filing additional frivolous actions without prior approval of the court. Plaintiffs oppose the cross motion.

I. MOTION TO REARGUE

Plaintiffs argue that in barring them from pleading an illegal hacking, I overlooked that they had not advanced that claim in their first federal complaint. Plaintiffs fail to acknowledge, however, that they had amended their first federal complaint to add the claim of illegal hacking. (NYSCEF 16). Thus, nothing of legal consequence was overlooked. Given that result, it is unnecessary to reach the issue of whether their tortious interference claim is time-barred.

Plaintiffs now attempt to reframe their defamation claim as "defamation by implication," a theory not advanced in their opposition to the original motion wherein they maintained that the

statement in issue was defamatory because patently false. Consequently, they improperly seek to reargue an issue that they did not raise. (*See Setters v AI Props. And Developments [USA] Corp.*, 139 AD3d 492 [1st Dept 2016] [re-argument does not afford unsuccessful party opportunity to present arguments different from those previously made]).

In maintaining that defendants' allegedly defamatory statement had been improperly found to be true in the June 4 decision, plaintiffs fail to acknowledge that the statement set forth in their complaint constitutes an admission that they used IGF-1. And, as defendants demonstrated that the substance appeared on defendants' banned list, there is a sufficient basis for having granted the motion to dismiss the cause of action for defamation based on the truth of the statement. Additionally, plaintiffs fail to acknowledge that the primary ground for granting defendants' motion to dismiss the defamation claim is that it constitutes a fair and accurate report of the first sentence of the fortieth paragraph of plaintiffs' complaint and is thus privileged and not actionable.

Plaintiffs' submission of new arguments and evidence is improper on a motion to reargue. (*Id.*).

II. CROSS MOTION FOR SANCTIONS

Defendants contend that sanctions are warranted as plaintiffs' motion is completely without merit, as they fail to set forth any matters of fact or law allegedly overlooked or misapprehended, and contains false assertions regarding the evidence that had been submitted on their original motion. They also allege that the motion constitutes another attempt by plaintiffs to harass them, observing that plaintiffs recently commenced two new actions in Florida against media outlets and defendants' attorneys based on their representation of defendants here. (NYSCEF 76).

In opposition, plaintiffs conclusorily argue that their arguments in support of reargument are legitimate and not intended to harass defendants or prolong the litigation. They assert that they inadvertently mis-cited evidence and inaccurately argued an issue. (NYSCEF 78).

In reply, defendants report that plaintiffs continue to harass them, and that on August 30, 2018, plaintiffs' Florida federal court lawsuit against the media outlets based on the same allegations advanced here was dismissed with prejudice. Thus, the other three lawsuits here and in Florida were either dismissed by court order or voluntarily discontinued by plaintiffs. (NYSCEF 87; 81). They submit evidence that during the pendency of this lawsuit, plaintiff Nix contacted a Major League Baseball (MLB) employee and asked about his lawsuit, and when the employee refused to answer, Nix threatened to depose him, demanded that he provide him with an affidavit for use in this litigation, and threatened to name the employee personally as a defendant in a future lawsuit. (NYSCEF 85). Defendants also allege that Nix improperly contacted other MLB employees or attempted to gain information from or about them in relation to this lawsuit. Thus, defendants seek, in addition to sanctions, an award of their attorney fees in opposing this motion and an order prohibiting Nix from contacting represented parties, including MLB employees, except through counsel during the pendency of this action. (NYSCEF 87).

Pursuant to 22 NYCRR § 130-1.1, costs may be awarded to reimburse actual expenses reasonably incurred and reasonable attorney fees. Sanctions may also be imposed against an attorney or party or both, resulting from frivolous conduct, which, as pertinent here, is undertaken: (1) although completely without merit in law; (2) primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) to assert material factual statements that are false.

Here, defendants establish that plaintiffs' conduct is frivolous under all three definitions. Plaintiffs' motion to reargue is completely without merit in law, and in fact, depends on a misleading citation to evidence and arguments. Counsel's claim of inadvertence is unavailing.

In light of the history of plaintiffs' continuous and numerous litigations here and in Florida against defendants based on the identical allegations and claims, the majority of which have either been voluntarily or judicially dismissed, defendants show that the motion to reargue is intended to prolong the resolution of this case and/or to harass them. (*See Breytman v Schechter*, 101 AD3d 783 [2d Dept 2012], *lv dismissed* 21 NY3d 974 [2013] [sanctions properly imposed as plaintiff's motion for leave to reargue completely without merit in law and designed primarily to harass defendant]; *Newman v Berkowitz*, 50 AD3d 479 [1st Dept 2008] [motion to reargue frivolous as defendant unable to articulate legal ground for it; court properly imposed sanction in form of party's costs including attorney fees]; *Gordon v Marrone*, 202 AD2d 104 [2d Dept 1994], *lv denied* 84 NY2d 813 [1995] [even if claim colorable, sanctions may be awarded if primary purpose of lawsuit to harass party]).

Thus, sanctions against plaintiffs and counsel are warranted in the form of defendants' costs and attorney fees incurred in opposing the instant motion. Defendants are directed to submit an affirmation and documentation in support of their costs and fees request.

Since defendants sought a no-contact order for the pendency of the action, and as the action has been dismissed, the request is academic. I decline to enjoin plaintiffs from commencing a new action here only upon prior permission of the appropriate Administrative Justice or Judge.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for leave to reargue is denied; and it is further

ORDERED, that defendants' cross motion for sanctions is granted, with the amount of the sanctions to be determined upon submission of defendants' proof related thereto.

12/28/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE