Long Is. Minimally Invasive Surgery, P.C. v Outsource Mktg. Solutions, Inc.
2012 NY Slip Op 33751(U)
March 5, 2012
Supreme Court, Nassau County
Docket Number: 5709-10
Judge: Steven M. Jaeger

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

LONG ISLAND MINIMALLY INVASIVE SURGERY, P.C.,	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 5709-10
Plaintiff,	MOTION SUBMISSION DATE: 1-20-12
-against-	MOTION SEQUENCE NO. 003
OUTSOURCE MARKETING SOLUTIONS, INC., and BRUCE SAFRAN,	
Defendants.	

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition to Defendants' Motion	X
Reply Affirmation	X

Motion by defendants Outsource Marketing Solutions, Inc. and Bruce Safran pursuant to CPLR 2221(d) and (3) to renew/reargue that branch of defendants' prior cross motion which sought to dismiss the complaint as to defendant Bruce Safran individually pursuant to CPLR 3211(a)(7) and (a)(3) is denied.

For the reasons which follow, the moving defendants have failed to proffer a viable basis for either reargument or renewal. On a motion to dismiss, pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in the light most

favorable to plaintiff, accepting the facts as alleged to be true. *Kats v East 13th Street Tifereth Place, LLC*, 73 AD3d 706, 707 [2nd Dept 2010]. On such a motion, the court must determine only whether the facts as alleged fit within any cognizable legal theory. The question is, therefore, whether plaintiff has stated a cause of action, not whether plaintiff will ultimately prevail in the litigation. *Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110, 1111 [2nd Dept 2011]. Under CPLR 3211(a)(3), a party may move for dismissal of causes of action asserted against him on the ground that the party asserting the cause of action does not have legal capacity to sue. The provision is not applicable under the circumstances at issue.

Defendants seek reargument of that branch of their prior cross motion which sought to dismiss the action as to defendant Bruce Safran as a party defendant predicated on the contention that the court mistakenly interpreted the e-mail correspondence between plaintiff and defendants as personal, rather than as correspondence between the parties through their corporate entities and not by defendant Bruce Safran individually. Defendants make much of the fact that the subject e-mail communications from Bruce Safran to Shawn Garber, M.D., the president of plaintiff Long Island Minimally Invasive Surgery, P.C. emanated

from the corporate e-mail address of defendant Outsource Marketing Solutions, Inc. (Outsource).

While defendants argue that defendant Bruce Safran acted at all times in his corporate capacity, and was not a party to the alleged oral agreement pursuant to which defendant Outsource agreed to create a new website for plaintiff's professional practice, the fact that e-mail from "Bruce" to "Shawn" allegedly came from defendant Bruce Safran's corporate e-mail address does not serve to prove the theory. According to plaintiff, the oral agreement on which it sues was between plaintiff and both defendants. The claim is viable. Defendant has offered no basis to drop defendant Bruce Safran as a party defendant. CPLR 1003. Since the website which defendants agreed to create for plaintiff's professional practice was not completed on or before the promised completion date, both defendants may be found liable for the breach. Nothing contained in defendants' moving papers warrants a contrary decision.

A motion to reargue is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or applicable law and mistakenly arrived at its earlier decision. *Hague v Daddazio*, 84 AD3d 940, 942 [2nd Dept 2011]; *Mudgett v Long Is. R.R.*, 81 AD3d 614 [2nd Dept 2011]; *Viola v City of New*

York, 13 AD3d 439, 440 [2nd Dept 2004]. A motion to reargue, however, is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted. *Matter of Anthony J. Carter, D.D.S., P.C. v Carter*, 81 AD3d 819, 820 [2nd Dept 2011] (citations and internal quotation marks omitted).

On the present state of the record, there is no basis to conclude that the court misconstrued the facts and mistakenly found that "the oral agreement regarding creation of a website as alleged by plaintiff, and referenced in a series of e-mail communications, was between plaintiff and defendants."

While a motion to renew is generally based upon the discovery of material facts which were unknown to the movant at the time the original motion was made (*Lardo v Rivlab Transp. Corp.*, 46 AD3d 759 [2nd Dept 2007], the court has discretion to grant renewal, in the interest of justice, even upon facts known to the movant at the time the original motion was made, where the movant offers a reasonable justification for failing to submit such facts on the earlier motion. *Gonzalez v Vigo Const. Corp.*, 69 AD3d 565, 566 [2nd Dept 2010].

Review of the record confirms that moving defendants have failed to present any new facts which were unknown to them at the time they submitted their original papers that would have changed the decision at issue nor have they shown

that there has been a change in the law that would require a different decision. A motion for leave to renew is not a second chance, freely given to parties who have not exercised due diligence in making their original factual presentation. *Huma v Patel*, 68 AD3d 821, 822 [2nd Dept 2009].

In the present case, the purported "new" evidence defendants now proffer is plaintiff's alleged admission in paragraph 3[1] of its Bill of Particulars that the parties' oral agreement was reduced to writing on October 9, 2009, superseded any prior oral agreement. Notwithstanding defendants' assertions to the contrary, the evidence is not "new" nor does the language contained therein support defendants' theory.

The complaint alleges that this litigation is premised on two agreements: one written and one oral. Pursuant to the oral agreement, defendant Bruce Safran agreed, in both his individual and corporate capacities, to develop a new website for plaintiff's professional practice. A fair reading of paragraph 3 establishes that the part of the oral agreement that was reduced to writing on October 9, 2009 was

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[1]Paragraph 3 of the Bill of Particulars states as follows:
"Defendants offered to develop a new website for plaintiff at 'cost'. Defendants promised to redesign plaintiff's current website and to add features such as a virtual spokesperson, an interactive video and a shopping cart. The initial estimated cost was between $2,500 and $3;000. As the process went on, the parties agreed that defendants would complete the website for $10,000. Said agreement was reduced to writing on October 9, 2009."

that the cost of the services was $10,000 and the project was to be completed on or before January 31, 2010. The written agreement does not incorporate the specific terms orally agreed upon by the parties on July 16, 2009, which governed defendants' obligation to create a website for plaintiff.

The alleged "new" facts, offered by defendants, are not "new" facts and, in any event, would not have changed the prior determination. Defendants have offered no basis to support renewal.

This is not a situation in which defendant Bruce Safran demonstrated that the plaintiff contracted exclusively with defendant Outsource and that, in dealing with plaintiff, he acted only in his capacity as the president of defendant Outsource.

Dated: March 5, 2012

STEVEN M. JAEGER, A.J.S.C.