

Schneebalg v Conway
2022 NY Slip Op 33350(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 161568/2021
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM FRANC PERRY PART 23

Justice

-----X

SCHNEEBALG, SIMON

Plaintiff,

- v -

CONWAY, PAUL DANIEL

Defendant.

-----X

INDEX NO. 161568/2021

MOTION DATE 02/18/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10 were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 were read on this motion to/for DISMISSAL.

Plaintiff Simon Schneebalg brings this action against Defendant Paul Conway seeking to recover \$36,695.00 in attorney’s fees arising out of a prior action, *Paul Conway v Congregation Beth Hachsidim de Polen*,¹ Index No. 161318/2020, which was voluntarily discontinued by Defendant-herein on August 16, 2021 during oral argument before the Hon. Lucy Billings. In that action, Conway alleged that Schneebalg, among others, tortiously interfered with a contract² by informing the New York Attorney General that non-party Avrohom Stern, a member of the Congregation, lacked authority to unilaterally sell the air rights of the Congregation’s synagogue, located at 233 East Broadway, New York, NY.

¹ Conway attempts to distinguish “Congregation Beth Hachsidim De Polen” and “Beth Chasadim De Poland” as being separate entities. (*See generally* NYSCEF Doc No. 12, Ms002 Memo, at 1.) However, this issue appears to have been resolved in the other proceeding, and it is apparent that the two names are used interchangeably because of the “transliterati[on] of Hebrew into different letters.” (NYSCEF Doc No. 25, Transcript, at 42:17.)

² The contract, executed on August 22, 2017, pertained to the Congregation of Beth Chasidam’s purported selling of its air rights to Defendant Conway.

The August 16, 2021 transcript demonstrates that the parties stipulated to Plaintiff-herein reserving his right to bring an action seeking to recover attorneys' fees pursuant to New York's anti-SLAPP ("strategic litigation against public participation") law, codified at Civil Rights Law § 70-a[1] ["A defendant in an action involving public petition and participation ... may maintain an action ... to recover damages, including costs and attorney's fees, from any person who commenced or continued such action"]. (NYSCEF Doc No. 25, Transcript, at 48:21-49:04.) Accordingly, Plaintiff commenced this action on December 28, 2021. (NYSCEF Doc No. 1, Complaint.)

In motion sequence 001, which is unopposed by Plaintiff (NYSCEF Doc No. 10), Defendant moves for an extension of time to answer or respond to the complaint. (NYSCEF Doc No. 4.) Motion sequence 001 is granted as unopposed, in this court's discretion.

In motion sequence 002, Defendant moves to dismiss the complaint, pursuant to CPLR 3211[a][1], on the grounds that documentary evidence utterly refutes Plaintiff's factual allegations. (NYSCEF Doc No. 12, Ms002 Memo.) Specifically, Defendant argues that paragraphs 39-46 of the complaint are false. (*Id.* at 5-9.) Those paragraphs state that:

39. At oral argument, the Court instructed Defendant to withdraw the claims against Mr. Schneebalg, as they were patently meritless.

40. Defendant's claims against Mr. Schneebalg related to his public petition and participation.

41. Defendant's claims against Mr. Schneebalg were effectively dismissed pursuant to CPLR 3211(g).

42. Defendant's claims against Mr. Schneebalg were commenced without a substantial basis in fact and law.

43. Defendant's claims against Mr. Schneebalg were continued without a substantial basis in fact and law.

44. Defendant's claims against Mr. Schneeberg could not be supported by a substantial argument for the extension, modification or reversal of existing law.

45. Defendant's claims against Mr. Schneeberg were commenced and continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

46. Defendant's claims against Mr. Schneeberg were commenced and continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights

(*Id.*, citing NYSCEF Doc No. 1, Complaint.) Defendant argues that each of the above paragraphs are demonstrably false, for varying reasons, based on the August 16, 2021 oral argument transcript.

(Ms002 Memo at 5-9; NYSCEF Doc No. 25, Transcript.)

Discussion

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim."

(*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995].)

Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]) and "conclusively establishes a defense to the asserted claims as a matter of law."

(*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].)

Defendant's motion is denied, as the oral argument transcript in the prior proceeding fails "utterly refute plaintiff's factual allegations." (*Goshen*, 98 NY2d at 326.) The transcript does not refute Plaintiff's claims that the underlying action was an action against public participation and that Plaintiff is entitled to attorney's fees as a result. Accordingly, Defendant fails to meet his burden for dismissal, and it is hereby

ORDERED that motion sequence 001 is granted as unopposed; and it is further

ORDERED that motion sequence 002 is denied in its entirety; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order for the court’s review and signature, within thirty (30) days.

<u>10/04/2022</u>			<u>WILLIAM FRANC PERRY, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE