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Avagliano v. Sumitomo: District Court  
Proceedings

Sumitomo Shoji America, Inc. v. Avagliano, 457  
US 176 - Supreme Court 1982

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7-11-1978

## **Affidavit of Hicks in Opposition to Plaintiff's Motion for an Order Dismissing Defendant's Counterclaims**

Lewis M. Steel '63

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SO DIST OF N.Y.

AVIGLIANO-v- SUMITOMO

77 civ- 5641 CHT

vs.

Civil Action No.

OPINION # 48679

There was entered on the docket

6/6/79

, 19

an order (judgment)

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FOR THE

*Arigliano*

vs.

*Sumitomo*

Civil Action No. 77-5641

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an ~~order~~ (judgment)

11-02-78, 19

ALL INQUIRIES TO BE MADE IN PERSON, ROOM 10  
RAYMOND F. BURGHARDT,

, CLERK

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AVIGLIANO

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77 civ 5641 CHT

vs.

Civil Action No.

SUMITOMO

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There was entered on the docket

7/28/78

, 19

an order (judgment)

**ALL INQUIRIES TO BE MADE IN PERSON, ROOM 10.**  
**RAYMOND F. BURGHARDT,**

**, CLERK**

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X  
LISA M. AVIGLIANO, et al., :  
 :  
 Plaintiffs, : 77 Civ. 5641 (CHT)  
 :  
 - against - :  
 : AFFIDAVIT  
 SUMITOMO SHOJI AMERICA, INC., :  
 :  
 Defendants. :  
-----X

STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

J. PORTIS HICKS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and a partner of Wender, Murase & White, attorneys in this action for defendant Sumitomo Shoji America, Inc. ("Sumitomo"). I submit this affidavit in opposition to plaintiffs' motion for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing counterclaims interposed in this action by defendant Sumitomo.

2. Most of the facts relevant to this action are set forth in my affidavit sworn to May 18, 1978, submitted in support of Sumitomo's motion to dismiss the complaint, and need not be restated herein. However, some supplementation of said facts may aid the Court in connection with plaintiffs' instant motion to dismiss Sumitomo's counterclaims.



3. In its original response to the complaint, Sumitomo asserted a one-count counterclaim which sought redress for plaintiffs' malicious abuse of legal process and tortious interference with Sumitomo's business activities. Although that counterclaim was clear and legally sufficient, the EEOC and plaintiffs in their motion papers have confused and misapprehended the nature of Sumitomo's claims against plaintiffs. To simplify matters, on June 16, 1978, Sumitomo amended its counterclaim as of right to spell out exactly what is in issue, should there actually be doubt. The amended counterclaims (the "counterclaims") work no real change in substance but should allay the purported doubts expressed by plaintiffs and the EEOC.

4. Each of the plaintiffs herein applied for a job with Sumitomo as a secretary, and was hired as such. Their personnel records reveal no executive, managerial or international sales experience. However, several of the plaintiffs decided they were entitled to promotion to such positions, or equivalent pay. Sumitomo did not promote such employees or give them additional compensation because they were not qualified for such positions and not entitled as a matter of right to any such additional compensation. Because their demands were refused, plaintiffs embarked on a course of retaliatory activity.

5. Sumitomo has not yet had discovery of plaintiffs. However, the counterclaims herein are based on facts actually

known to Sumitomo, as well as information and belief giving Sumitomo good reason to believe that its claims have merit.

6. Plaintiffs' motion to dismiss the counterclaims does not require that Sumitomo present proof of its claims at this time. What Sumitomo will be able to show, at the appropriate time, is that these plaintiffs engaged in a concerted course of activity to injure Sumitomo and to harass and coerce other employees of Sumitomo who did not join in their campaign. In furtherance of their campaign to coerce Sumitomo into yielding to their demands, plaintiffs caused the commencement of proceedings before the Equal Employment Opportunity Commission and the New York State Division of Human Rights. The EEOC apparently deferred, as it is required by law to do, to the New York State Division of Human Rights, which could have determined plaintiffs' claim fully on the merits. However, plaintiffs' attorney then requested the State Division to take no action on plaintiffs' claims. Plaintiffs' complaints were then reactivated by the EEOC and, once the matter was back before the EEOC, plaintiffs then also terminated that proceeding and started the instant lawsuit. All this maneuvering by plaintiffs placed great financial expense on Sumitomo, and forced it to devote many hours of company time to defend against plaintiffs' purported claims. Sumitomo believes that such claims are nothing more than a thinly disguised effort to cause expense to Sumitomo until it gives in to plaintiffs' demands.

7. Plaintiffs' campaign did not stop there. Sumitomo has recently been advised that the EEOC has issued a determination



which modifies but upholds the validity of a subpoena it issued during the EEOC proceedings, despite the fact that the EEOC terminated such proceedings as to these plaintiffs, at their request, over eight months ago. Sumitomo has reason to believe that plaintiffs, or their counsel, influenced the EEOC to issue such determination to further harass Sumitomo and cause expense to it. There appears no other reason why the EEOC would have bothered to issue such a determination, requiring that Sumitomo produce voluminous books, records, and other documents, and compile massive statistical data for the EEOC, in respect of a proceeding it knows full well was terminated.

8. To illustrate further plaintiffs' motivations, one need look no further than the face of plaintiffs' complaint. There, at para. 1, plaintiffs purport to claim against Sumitomo pursuant to the Thirteenth Amendment to the United States Constitution. Plaintiffs' counsel has orally conceded to counsel for Sumitomo that such claim has no merit. Counsel for plaintiff went so far as to prepare a stipulation "withdrawing" such claim. He has refused, however, to discontinue such claim with prejudice, asserting that the law on the subject may change at a later date and that he wishes to be free to reassert that claim. Such reasoning would, of course, support the assertion of any claim, however ridiculous, on a theory that it might later have some basis in law. Such reasoning has, in fact, forced Sumitomo to address a motion

against the Thirteenth Amendment "claim," thereby causing further expense, in the form of attorneys' fees, to Sumitomo. This, Sumitomo submits, is precisely what plaintiffs want to do. It is, as well, a wrong which should be redressed by this Court.

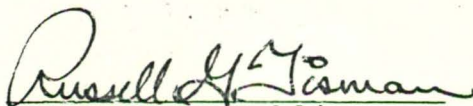
9. Plaintiffs have not restricted their wrongful conduct to judicial and administrative proceedings. Plaintiffs have repeatedly violated Sumitomo office policies, endeavored to sabotage its business, been disruptive in the office, engaged in calculated acts of insubordination, harassed and coerced employees who would not join in their conspiracy, urged other employees to violate the fiduciary duties owed by them to Sumitomo, attempted to purloin confidential corporate documents, and committed other wrongful acts in their effort to force Sumitomo to capitulate.

10. As appears more fully in Sumitomo's memorandum of law submitted in opposition to plaintiffs' motion, Sumitomo has validly stated claims for relief in its counterclaims. Plaintiffs' motion to dismiss those counterclaims should be denied.

  
J. PORTIS HICKS

Sworn to before me this

11th day of July, 1978

  
Notary Public

RUSSELL G. TISMAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 41-4066519  
Qualified in Queens County  
Commission Expires March 30, 1980



RECEIVED JUL 13 1978

STATE OF NEW YORK, COUNTY OF

SS.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is

Check Applicable Box

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Individual Verification the foregoing deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of in the within action; deponent has read the foregoing a corporation, and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

☐ Affidavit of Service By Mail On 19 deponent served the within attorney(s) for in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at upon deponent served the within

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

The name signed must be printed beneath



NOTICE OF ENTRY

Sir-Please take notice that the within is a (certified)  
true copy of a  
duly entered in the office of the clerk of the within  
named court on 19

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE  
NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir-Please take notice that an order

of which the within is a true copy will be presented  
for settlement to the Hon.

one of the judges of the within named Court, at

19

M.

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE  
NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 77 Civ. 5641 Year 1977  
(CHT)

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NY

LISA M. AVIGLIANO, et al.,

Plaintiffs,

- against -

SUMITOMO SHOJI AMERICA, INC.,

Defendants.

AFFIDAVIT

WENDER, MURASE & WHITE

Attorneys for Defendants.

Office and Post Office Address, Telephone

400 PARK AVENUE  
NEW YORK, N. Y. 10022

(212) 832-3333

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for