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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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7-1979

## Plaintiff's Reply Memo in Support of Plaintiff's Motion for an Order Granting Leave to Reargue and for Dismissal of Counterclaims

Lewis M. Steel '63

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFFS' MOTION FOR AN ORDER  
GRANTING LEAVE TO REARGUE AND  
FOR DISMISSAL OF COUNTERCLAIMS

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Of Counsel  
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PRELIMINARY STATEMENT

Defendant in its Memorandum in Opposition attacks plaintiffs for including an affidavit in support of the present motion which violates Rule 9(m) of the General Rules of this Court. The affidavit in question was not filed to infuse new factual material into the record, but merely to inform the Court of counsel's reasons for filing the motion. In any event, the material in the affidavit is essentially restated in the supporting memorandum of law, and it is difficult to see how defendant is prejudiced thereby.

This Reply Memorandum is being filed to inform the Court that plaintiffs adopt the arguments contained in the memorandum submitted by the Equal Employment Opportunity Commission as amicus curiae in support of plaintiffs' motions for reconsideration or for permission to appeal. Contrary to defendant's suggestion in its opposition memorandum, plaintiffs continue to assert that the Court's decision in regard to the counterclaims was wrongly decided for all the reasons set forth in plaintiffs' original argument. The EEOC memorandum, dated July 3, 1979, underscores these contentions.

ARGUMENT

I.

HARRIS v. STEINEM, 571 F.2d 119  
(2d CIR. 1978) MANDATES THE DIS-  
MISSAL OF THE COUNTERCLAIMS

In Harris v. Steinem, 571 F.2d 119 (2d Cir. 1978), a complaint alleging violation of federal securities laws was responded to by an answer including counterclaim for libel based on the complaint itself, which was alleged to have been brought maliciously, and several subsequent published statements of the plaintiff. The Court dismissed the counterclaim on the ground that it was permissive and not supported by independent jurisdictional grounds. The Court's analysis in Harris indicates that the counterclaims in this matter are also permissive and not supported by independent jurisdictional grounds.

Counterclaims are compulsory pursuant to Rule 13(a) of the Federal Rules of Civil Procedure if they arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Plaintiffs in this Title VII action attack the defendant's policies and practices with regard to the hiring, training and promotion of women. Defendant's counterclaims, on the other hand, focus on an alleged conspiracy between the plaintiffs to wrongfully commence administrative and legal actions against defendant. See, Amended Answer and

Counterclaims, ¶19-26, said allegations providing the factual basis for all counterclaims. Thus, these counterclaims attempt to shift the focus of the proceedings away from the defendant's employment practices and toward the plaintiffs' state of mind and their activities leading up to the commencement of legal action. As in Harris, it is true that success on the main claim would probably defeat the counterclaims. But, it is equally true, as in Harris, that the counterclaims raise issues well beyond the scope of the complaint.

Moreover, the Harris court pointed out that the district judge in that case, "correctly observed that 'the counterclaim, while artfully drafted, in essence is a claim for malicious prosecution' and it is well settled that [a] claim in the nature of malicious prosecution, which arises out of the bringing of the main action, generally cannot be asserted either as a compulsory or a permissive counterclaim, since such a claim is premature prior to the determination of the main action." 571 F.2d at 124.

In this case, of course, the defendant also used artful drafting, and in fact amended its counterclaims to escape the malicious prosecution label. Nonetheless, it is clear that the Sumitomo counterclaims are, in essence, claims for malicious prosecution.

Harris v. Steinem immeasurably strengthens the arguments that plaintiffs have advanced in light of Knapp Engraving Co. v.

Keystone Photoengraving Corp., 1 A.D.2d 170, 148 N.Y.S.2d 365  
(1st Dept. 1956). Harris and Knapp clearly establish that de-  
fendant's counterclaims must be dismissed at this time.

Respectfully submitted,

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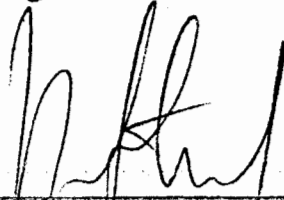
Of Counsel  
LEWIS M. STEEL

CERTIFICATE OF SERVICE

This is to certify that copies of plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motion for an Order Granting Leave to Reargue and For Dismissal of Counterclaims were served, this 13th day of July, 1979, via first-class mail, postage prepaid, upon:

Wender, Murase & White  
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New York, New York 10022

Equal Employment Opportunity Commission  
Attn.: Lutz Alexander Prager  
2401 E Street, N.W.  
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