7-9-1979

Defendant's Memo in Opposition to Plaintiff's Motion for Order Granting Leave to Reargue and for Dismissal of Counterclaims

Sumitomo Shoji America, Inc.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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MEMORANDUM OF LAW OF DEFENDANT SUMITOMO SHOJI AMERICA, INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER GRANTING LEAVE TO REARGUE AND FOR DISMISSAL OF COUNTERCLAIMS

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INTRODUCTION

Defendant Sumitomo Shoji America, Inc. ("Sumitomo"), submits this memorandum of law in opposition to plaintiffs' motion for an order granting them leave to reargue this Court's denial of their motion to dismiss Sumitomo's second, third and fourth counterclaims.

STATEMENT

By opinion and order dated June 5, 1979 (the "Order"), this Court among other things denied plaintiffs' motion for an order dismissing Sumitomo's second, third and fourth counterclaims against plaintiffs. As the Court's Order notes, those counterclaims sound in abuse of state and federal administrative and judicial processes, and prima facie tort (Order at 15).

By notice of motion dated June 14, 1979, plaintiffs have moved this Court for an order granting them leave to reargue their motion and for an order dismissing Sumitomo's counterclaims.*

Plaintiffs' motion for reargument is made in violation of Rule 9(m) of the General Rules of this Court. First, plaintiffs seek to file papers expressly forbidden by the Rule. Second, plaintiffs fail to specify how this Court overlooked any matter or controlling decision, and instead merely refer in their motion papers to decisional law already called to this Court's attention in their original motion papers. Finally, even if considered on its merits, plaintiffs' motion falls far short of the showing required for an order which would dismiss Sumitomo's counterclaims on the basis of arguments already considered and rejected by this Court.

All plaintiffs are trying to do on this motion is to resurrect their argument that no matter what they have done to injure Sumitomo, their conduct is privileged or immunized from any claim because they are plaintiffs in a Title VII litigation. In this latest effort, plaintiffs concede that

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*Although plaintiffs purport to move for leave to reargue, they also appear to believe such leave is a foregone conclusion, and thus in their memorandum argue the merits of their motion to dismiss. To avoid any contention by plaintiffs that Sumitomo has waived its rights, Sumitomo herein answers plaintiffs' motion both as to whether reargument should be granted, and as to the merits of the issue they seek to reargue.

Sumitomo has validly stated counterclaims against them, but argue that there is a "policy" under state law, applicable in this Court, which mandates dismissal of Sumitomo's counterclaims. This argument has already been considered and rejected by the Court. Accordingly, plaintiffs' motion for reargument should be denied.

ARGUMENT

POINT I

PLAINTIFFS' MOTION FOR REARGUMENT SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS OF RULE 9(m) OF THIS COURT.

Because they devolve into nothing more than a time-wasting vehicle for a disgruntled advocate to reassert over and over again the precise issues, authorities and arguments a court has already considered and rejected, strict adherence to procedural rules is required before a motion styled as one for leave to reargue will be entertained. United States v. International Business Machines, 79 F.R.D. 412 (S.D.N.Y. 1978); United States v. N.V. Nederlandsche Combinatie, etc., 75 F.R.D. 473 (S.D.N.Y. 1977). In this District, the governing standards for a motion for reargument are spelled out by Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York, which provides:

> "A notice of motion for reargument shall be served within ten (10) days after the filing of the court's determination of the original motion and shall be made returnable within the same period of time as required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court." [Emphasis added.]

The Rule thus expressly proscribes the filing of affidavits on motions for reargument. However, as plaintiffs' notice of motion for leave to reargue recites, their motion purports to be made on "...the affidavit of Lewis Steel, Esq.", in blatant defiance of the Rule. The affidavit submitted by Mr. Steel violates a mandatory provision of Rule 9(m), is improperly filed, and is not properly before the Court.

Rule 9(m) also provides that the memorandum of law filed in support of a motion for reargument shall set forth concisely the matters or controlling decisions overlooked by the Court. Despite this mandate, plaintiffs' motion papers contain no statement as to how, why, or in what manner this Court overlooked any such matter or controlling decision. On the contrary, plaintiffs merely cite once again the principal New York State authority on which they heavily relied in their initial moving papers (Knapp Engraving Co. v. Keystone Photographing Corp., 1 A.D.2d 170, 148 N.Y.S.2d 635 (1956)), without

any explanation whatsoever of how, or why, or in what manner, that state court's decision on a discretionary procedural question of state law was overlooked, or controls to the contrary what this Court decided in its Order of June 5.

That plaintiffs have presented on this motion no matter or controlling decision overlooked by this Court is also demonstrated in plaintiffs' own motion papers, where the following statements are found in the improperly submitted affidavit of Lewis Steel, Esq.:

> "...Plaintiffs presented this argument to the Court in their memorandum of law in support of motion to dismiss dated May 8, 1978, at pages 5 thorugh [sic] 10."
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> * * *
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> "This motion for reargument is being submitted for precisely the reasons set forth in the Knapp case."

(Steel affidavit of June 14, 1979 at paras. 2 and 3).

Mr. Steel's affidavit actually understates the case. In their original motion papers arguing for dismissal of Sumitomo's counterclaims, plaintiffs expended over half of the argument section of their brief arguing the merits of their reliance on the Knapp decision. They also expended a substantial portion of their reply brief arguing against Sumitomo's demonstration, in its answering papers, that the Knapp decision does not affect Sumitomo's right to assert and

be heard on its counterclaims. Despite this minute dissection of the Knapp decision for the Court, plaintiffs now assert once again that their view of Knapp should be adopted by the Court, conceding that their present argument is made on the same basis and for precisely the same reasons set forth in their original briefs. What the Court stated in United States v. N.V. Nederlandsche, supra, therefore applies on all fours here:

> "The ...motion for reconsideration sets forth absolutely no facts or controlling decisions which the court has overlooked. ....counsel merely resubmits positions already rejected by the court under papers styled Notice of Motion for Reconsideration. Such total disregard for the procedures of this court is disheartening. The .... motion for reconsideration is denied." [Footnote omitted]. 75 F.R.D. at 475.

A motion for reargument has a serious purpose. It is intended to point out to the Court matters of law or fact which the Court overlooked, not merely to repeat and discuss what has been already cited, considered and determined against a party, on the basis of arguments already made. United States v. International Business Machines, supra; United States v. N.V. Nederlandsche Combinatie, supra; Rule 9(m), General Rules, S.D.N.Y. Plaintiffs' motion is therefore not truly a motion for leave to reargue. It is nothing more than a redundancy, and it should be denied.

POINT II

EVEN IF CONSIDERED ON ITS MERITS, PLAINTIFFS' MOTION FOR REARGUMENT AND DISMISSAL OF SUMITOMO"S COUNTERCLAIMS SHOULD BE DENIED

Plaintiffs' contention -- now briefed and asserted by them for the third time -- that the state court decision in Knapp creates a mandate that this Court should dismiss Sumitomo's counterclaims -- is unyielding but incorrect.

In Knapp, the court dismissed a counterclaim, which was expressly cast as a claim in "malicious prosecution", until the termination of the principal action therein. The Knapp decision was by its terms simply a discretionary procedural determination (148 N.Y.S. 2d at 638).*

However, construing Knapp as a matter of substantive law as plaintiffs insist must be done, it is plain that all the court did was to apply the well established rule in New York in respect of prima facie tort claims, that such a tort cannot be asserted when the most closely analagous formal tort could not then be interposed because of an affirmative procedural bar such as the statute of limitations. See,

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*R. 21 and 42 of the Fed.R.Civ.P., rather than Knapp, govern as to when such a deferral or severance should be ordered, and as set forth infra, provide that same should not be done here.

e.g., Smith v. Fidelity Mutual Life Insurance Co., 444 F.Supp. 594, 598 (S.D.N.Y. 1978); Williams v. Williams, 23 N.Y.2d 592, 298 N.Y.S. 2d 473 (1969).

Since defendant in Knapp cast its counterclaim as one in malicious prosecution, and since it is settled law under New York practice that a malicious prosecution claim cannot be interposed as a counterclaim, or prior to the termination of the action giving rise to it, see, e.g., Ivey v. Davy, 17 F.R.D. 319 (S.D.N.Y. 1955), 5 Carmody Wait 2d, N.Y. Practice § 29:855 at 359-60, the Knapp Court at most, applied the kind of analysis explained in Smith v. Fidelity, supra, and treated the cognizable prima facie tort claim as if it were its closest formal analogue, i.e., malicious prosecution.

Thus, only if Sumitomo were pleading that plaintiffs were maliciously prosecuting herein, could Knapp have even arguable applicability. But the gist of Sumitomo's claim is that this action involves an attempt to coerce Sumitomo by improper use of process and, as this Court correctly held, Sumitomo has thus properly pleaded a claim for abuse of process. (Order at 16). On the facts of this case, then, contra to Knapp, the closest analogue to Sumitomo's prima facie tort claim is not malicious prosecution but the separate and distinct tort of abuse of process. Smith, supra, 444 F.Supp. at 597-98, Board of Education v. Farmingdale Classroom, Teachers Local 1889, 38 N.Y. 2d 397, 380 N.Y.S.2d 635,

343 N.E.2d 278 (1975). Under New York law, abuse of process claims are different from those in malicious prosecution in that, inter alia, they need not await the outcome of the proceeding giving rise to the abuse but can be, and are, interposed as counterclaims therein. See, e.g., Station Associates, Inc. v. Long Island Railroad Co., 18 Misc. 2d 1092, 188 N.Y.S. 2d 435 (Sup. Ct. Kings 1959); Judo, Inc. v. Peet, 68 Misc. 281, 326 N.Y.S. 2d 441 (Civ. Ct. N.Y. 1971); 5 Carmody Wait, supra § 29:868 at 384.

As such, if there is a substantive rule in Knapp applicable here, its application is limited to Sumitomo's fourth counterclaim which lies in prima facie tort, and leads to the conclusion that since under Smith, supra, and Farmingdale, supra, Sumitomo's prima facie tort claim is closest to abuse of process, a claim which can be interposed now, the prima facie tort claim also should not be deferred.*

The foregoing analysis indulges, and refutes, plaintiffs thrice-repeated effort to force the square peg of the discretionary severance granted in Knapp into the round hole of mandatory substantive law.

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*Since Sumitomo's second counterclaim is not predicated on State law, but is, rather, a federal common law claim for abuse of federal judicial and administrative processes (see Sumitomo's answer to complaint at paras. 31 and 32; see also this Court's Order of June 5, 1979 at 15-16). Thus the rule in Knapp, even if there were such a rule, would be simply inapplicable to the second counterclaim, which would survive irrespective of the outcome of this motion.

However, it is erroneous to treat Knapp as any kind of substantive decision except to the extent that it shows plaintiffs' conduct herein as alleged by Sumitomo is actionable. The Knapp court did nothing more than merely exercise its discretion under the Civil Practice Act so as to require the separate trial of a counterclaim which raised different issues of law and fact which would complicate further an already complex litigation (Knapp, supra, 148 N.Y.S.2d at 637-38).

It is worthy to note that the state court's exercise of discretion in ordering a separate trial of defendant's counterclaim in Knapp was sound since, unlike the instant case, in Knapp the counterclaim was made by but one of several defendants and raised different issues of fact and law. Moreover, that case arose in a procedural system which shows a preference for interlocutory appeals, eschews assignment of cases to an individual judge, and does not recognize the concept of compulsory counterclaims present in the federal system.

While this Court, of course, has full power similarly to defer or dismiss if appropriate, herein the legal and factual differences from Knapp militate against such a result. In the action before this Court, there is but a single defendant claiming for the same operative facts as are plaintiffs; and, of course, in the federal system,

a strong preference is shown for a single trial of all related issues at one time. As Professor Moore succinctly states the rule in respect of whether claims should be severed and tried separately from the principal action:

> "...a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that separate trials should not be ordered unless such a disposition is clearly necessary." 5 Moore's Federal Practice, ¶42.03 at 42-25 (1978).

Accord, Collins v. Metro Goldwyn Pictures Corporation, 106 F.2d 83, 86 (2d Cir. 1939), Klein v. Spear, Leads & Kellogg, et al., 306 F.Supp. 743, 752 (S.D.N.Y. 1969).

The fallacy of plaintiffs' position can best be seen by the fact that although they repeat over and over and over that they will be prejudiced because Sumitomo in its counterclaims seeks to inject "new issues" into this litigation, they are less than specific as to how prejudice will inure or what new issues will be involved in the counterclaims.

No substantial new issues are involved on the counterclaims. In fact, the commonality of issues on the two claims is not only pronounced but is apparent on the record. Plaintiffs, all concedely hired in secretarial positons, say they were qualified for promotion to managerial and executive positons which they did not receive and hence commenced this litigation to vindicate their rights. Defendant says that

plaintiffs were not qualified for promotion to executive or managerial positions, nor for additional payments they demanded, knew it, and commenced a program of harassment against Sumitomo including baseless state and federal administrative proceedings and litigation, as well as interference with Sumitomo's business, to coerce Sumitomo into giving in to their demands. Obviously, many facts and proofs will be common to both plaintiffs' and defendant's claims. Under the circumstances, separate trials and judgments on plaintiffs' Title VII claim and defendant's counterclaims should not be favored under Rules 21 and 42(b). See 3A Moore's Federal Practice, 21.05[2] at 21-48 (1978).*

If there be any doubt that plaintiffs merely seek to create problems where none exist, it is resolved by the realization that these same facts as to motive and bad faith will have to be shown to support Sumitomo's unquestioned right to claim attorneys' fees herein. (Order at 14-15). This would be true even if the counterclaims were deferred. Plaintiffs do not show how it will create any greater burden

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*This is particularly true where, as here, what plaintiffs seek is to effectively deny Sumitomo its right to a trial by jury on its counterclaims. Since plaintiffs' Title VII claim will be tried by the court (Slack, et al. v. Havens, et al., 522 F.2d 1091, 1094 (9th Cir, 1975), many determinations made by the Court at trial would collaterally estop Sumitomo from retrying those issues if its claims were heard separately. As a Constitutional imperative, this result could not be countenanced. Rule 42(b) Fed.R.Civ.P.; Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 508 (1959).

to permit discovery on these same matters for purposes of showing at trial affirmative liability on plaintiffs' part.

Finally, to the extent that plaintiffs seek to press their theory of absolute immunity for civil rights plaintiffs on this Court once again, this time by the back door, (Steel Affidavit at 2), suffice it to say that common law tort claims arising out of, or closely related to, the same operative acts giving rise to federal civil rights actions have been asserted as counterclaims without the dire, albeit unspecified, prejudicial results predicted by plaintiffs. See, e.g., Grant v. Smith, 574 F.2d 252 (5th Cir. 1978); Scheriff v Beck, 452 F.Supp. 1254 (D.Col. 1978); Lightfoot, et al. v. Gallo Sales Company, Inc., 15 FEP Cas. 615 (N.D. Cal. 1977).

Similarly, as to plaintiffs' contention that no claim may be interposed based in whole or in part upon the wrongful, abusive or malicious commencement of purported civil rights proceedings, relying on the decision in Moran v. Simpson, 80 Misc.2d 437, 362 N.Y.S.2d 666 (Sup. Ct. Livingston Co. 1974, Steel Affidavit at 2), later decisions from New York State are to the contrary. Only recently the court in Capuano v. LaMelle, N.Y.L.J. 8/11/78 at 12-13 (Sup. Ct. West.), expressly rejected Moran, holding:

> "In the opinion of this court such argument is without merit....
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"Neither law nor reason supports the view that one who maliciously institutes a human rights complaint knowing such a complaint to be unfounded is insulated from all legal liability for such action." Id. at 13.

CONCLUSION

In sum then, Sumitomo asserts counterclaims that even plaintiffs' own authority (Knapp, supra), holds to be legally sufficient. The counterclaims are of the kind that both state and federal courts permit to be interposed and tried as counterclaims, both in civil rights and other types of litigation. The counterclaims at the least in large part grow out of the same nucleus of operative facts allegedly giving rise to plaintiffs' claim. The same proof Sumitomo will adduce to overcome plaintiffs' claim herein will also prove material aspects of Sumitomo's counterclaims and will remain in the case in any event if Sumitomo's statutory right to claim attorneys' fees is to be preserved. Plaintiffs have failed to make any showing of prejudice sufficient to justify a separate trial of their claim herein, let alone a showing that Sumitomo's counterclaims should for any reason cognizable at law be dismissed. Accordingly, plaintiffs' motion should be denied.

For the reasons set forth herein, plaintiffs' motion for reargument and for dismissal of Sumitomo's

second, third and fourth counterclaims should be denied in all respects.

Respectfully submitted,

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