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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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6-14-1979

## **Plaintiff's Notice of Motion for Reargument and Dismissal of Counterclaims 2, 3, & 4**

Lewis M. Steel '63

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*Cert. of  
Service  
Attached*

-----x  
LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.  
-----x

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:  
: 77 Civ. 5641 (CHT)  
:  
:

: NOTICE OF MOTION FOR REARGU-  
: MENT AND DISMISSAL OF COUNTER-  
: CLAIMS 2, 3 AND 4  
:

S I R S:

PLEASE TAKE NOTICE that upon all of the prior proceedings had herein, and the affidavit of Lewis M. Steel, dated June 14, 1979, the plaintiffs will move before the Hon. Charles H. Tenney, on June 29, 1979, at 9:30 a.m., or as soon thereafter as counsel may be heard at the United States Courthouse, Foley Square, New York, New York, for an order granting reargument on plaintiff's motions to dismiss defendant's second, third and fourth counterclaims, and for an order dismissing said counterclaims after reargument and for such other and further relief as may be just and equitable under the circumstances.

Dated: New York, New York Yours, etc.,  
June 14, 1979

EISNER, LEVY, STEEL & BELLMAN, P.C.  
Attorneys for Plaintiffs  
351 Broadway  
New York, New York 10013  
(212) 966-9620

by

  
LEWIS M. STEEL

TO: Wender, Murase & White  
400 Park Avenue  
New York, New York 10022

Equal Employment Opportunity Commission  
Attn.: Lutz Alexander Prager  
2401 E Street, N.W.  
Washington, D.C. 20506



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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: 77 Civ. 5641 (CHT)  
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:

: AFFIDAVIT IN SUPPORT OF MOTION  
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:

STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK)

LEWIS M. STEEL, being duly sworn, deposes and says:

1. I am a member of the firm of Eisner, Levy, Steel & Bellman, P.C., attorneys for plaintiffs, and submit this affidavit in support of the attached motion.

2. On June 6, 1979, this Court decided a series of motions presented to the Court by both parties. In its opinion, the Court declined to dismiss counterclaims numbers 2, 3 and 4. In deciding not to dismiss these counterclaims, the Court determined that each stated a cause of action under State law. The Court, however, did not consider in its opinion the rule which has been applied in New York that counterclaims of the nature of those alleged here must be dismissed as contrary to public policy pending the outcome of the action in chief. See, Knapp Engraving Co. v. Keystone Photoengraving Corp., 1 A.D.2d 170, 148 N.Y.S.2d 635 (1st Dept. 1956). 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 through 10. For the convenience of the Court, plaintiffs attach a copy of this memorandum to the present papers.

3. This motion for reargument is being submitted for precisely the reasons set forth in the Knapp case. The counterclaims may well have a chilling effect on the plaintiffs as they proceed to litigate this case on the merits. On the other hand,



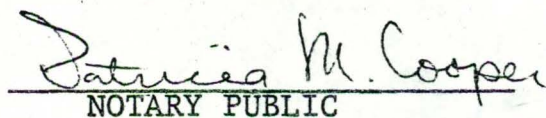
if the plaintiffs are unable to present evidence in support of their Title VII claims, defendant may then reinstitute its counter-claims and obtain any relief to which it may be entitled.

4. Counsel believes the Court should accept reargument on this matter because the Court's opinion appears to stray from precedent in employment discrimination cases. Similar counter-claims have been dismissed by the courts in Cooper v. Pic-Walsh Freight Co., F.Supp. (E.D. Mo., No. 75-403-C-(1), decided January 23, 1976), submitted to this Court by letter dated February 8, 1979 and Moran v. Simpson, 80 Misc.2d 437, 362 N.Y.S. 2d 666 (Sup.Ct. Livingston Co. 1974). Plaintiffs are aware of no Title VII cases where the courts have entertained such counter-claims as have been filed in the present action, nor has defendant alluded to any such precedent.

  
LEWIS M. STEEL

Sworn to before me this

14th day of June, 1979.

  
NOTARY PUBLIC

PATRICIA M. COOPER  
Notary Public, State of New York  
No. 31-4628957  
Qualified in New York County  
Commission Expires March 30, 1979-1980

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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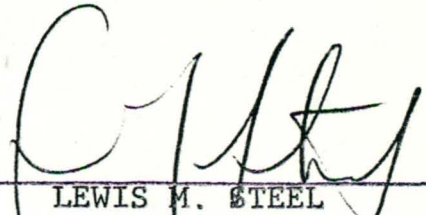
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77 Civ. 5641 (CHT)

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CERTIFICATE OF SERVICE

This is to certify that copies of plaintiffs' Notice of Motion for Reargument and Dismissal of Counterclaims 2, 3 and 4 and supporting Affidavit were served, this 14th day of June, 1979, via first-class mail, postage prepaid, upon:

Wender, Murase & White  
400 Park Avenue  
New York, New York 10022

Equal Employment Opportunity Commission  
Attn.: Lutz Alexander Prager  
2401 E. Street, N.W.  
Washington, D.C. 20506

  
LEWIS M. STEEL