

12 A.D.3d 496, 784 N.Y.S.2d 633, 2004 N.Y. Slip Op. 08202
(Cite as: 12 A.D.3d 496, 784 N.Y.S.2d 633)

H Supreme Court, Appellate Division, Second Department, New York.
George SIMPSON, et al., appellants,
v.
COOK PONY FARM REAL ESTATE, INC., et al.,
respondents.
Nov. 15, 2004.

Background: Software installers sued real estate company and its employees, alleging defamation and breach of contract. The Supreme Court, Suffolk County, Henry, J., denied installers' motion for leave to renew their motion to amend complaint, and entered summary judgment for defendants. Installers appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) employees' alleged statements expressing dissatisfaction with software program, if proven, enjoyed qualified privilege from defamation claim;
- (2) company was not liable for breach of software licensing agreement; and
- (3) denial of motion to renew was warranted by installers' failure to proffer new facts.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪110

30 Appeal and Error
30III Decisions Reviewable
30III(E) Nature, Scope, and Effect of Decision
30k110 k. On Motion for New Trial. Most Cited Cases
No appeal lies from an order denying reargument.

[2] Libel and Slander 237 ↪85

237 Libel and Slander
237IV Actions
237IV(B) Parties, Preliminary Proceedings, and Pleading

237k79 Declaration, Complaint, or Petition
237k85 k. Setting Out Defamatory Matter. Most Cited Cases
A cause of action sounding in defamation which fails to comply with the applicable rule's special pleading requirement that the complaint set forth the particular words complained of mandates dismissal. McKinney's CPLR 3016(a).

[3] Libel and Slander 237 ↪84

237 Libel and Slander
237IV Actions
237IV(B) Parties, Preliminary Proceedings, and Pleading
237k79 Declaration, Complaint, or Petition
237k84 k. Publication. Most Cited Cases
Failure to state the particular person or persons to whom the allegedly defamatory statements were made warrants dismissal of a cause of action sounding in defamation.

[4] Libel and Slander 237 ↪41

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k40 Qualified Privilege
237k41 k. In General. Most Cited Cases

Libel and Slander 237 ↪51(I)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k51 Existence and Effect of Malice
237k51(1) k. In General. Most Cited Cases
Alleged statements of real estate company's employees, expressing to colleagues in the real estate industry dissatisfaction with software installers' software program and their alleged stealing of company's listings, if proven, were made in discharge of employees' duties, and thus enjoyed qualified privilege from defamation claim, against which plaintiffs failed to demonstrate malice sufficient to defeat privilege.

[5] Libel and Slander 237 ↪41

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237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k40 Qualified Privilege

237k41 k. In General. Most Cited Cases

Protection from defamation is afforded where the person making the statements does so fairly in the discharge of a public or private duty in which the person has an interest and where the statement is made to a person or persons with a corresponding interest or duty.

161 Copyrights and Intellectual Property 99

↪107

99 Copyrights and Intellectual Property

99II Intellectual Property

99k107 k. Contracts. Most Cited Cases

Real estate company was not liable to software installers for breach of software licensing agreement, where parties never signed such an agreement, and installers installed their software at company's offices, billed company for those services, and were duly paid.

171 Motions 267 ↪42

267 Motions

267k41 Renewal

267k42 k. In General. Most Cited Cases

The requirement that a motion for leave to renew a prior motion be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion. McKinney's CPLR 2221(e), pars. 2, 3.

181 Motions 267 ↪42

267 Motions

267k41 Renewal

267k42 k. In General. Most Cited Cases

A motion for leave to renew a prior motion should be denied where the moving party failed to offer a reasonable justification as to why the new facts were not submitted on the prior motion. McKinney's CPLR 2221(e), pars. 2, 3.

191 Motions 267 ↪42

267 Motions

267k41 Renewal

267k42 k. In General. Most Cited Cases

Denial of plaintiffs' motion to renew their motion to amend complaint was warranted by their failed to proffer any new facts not submitted on their prior motion for leave to amend complaint. McKinney's CPLR 2221(e), pars. 2, 3.

**635 Lawrence J. Koncelik, Jr., East Hampton, N.Y., for appellants.

Quirk and Bakalor, P.C., New York, N.Y. (H. Nicholas Goodman and Charles M. Henderson III of counsel), for respondents.

SONDRA MILLER, J.P., ROBERT W. SCHMIDT, WILLIAM F. MASTRO, and STEVEN W. FISHER, JJ.

*496 In an action, inter alia, to recover damages for defamation and breach of contract, the plaintiffs appeal from (1) an order of the Supreme Court, Suffolk County (Henry, J.), dated March 20, 2003, which denied their motion for leave to renew and reargue their motion for leave to amend the complaint, which was denied in an order dated September 23, 2002, and (2) an order of the same court dated March 21, 2003, which granted the defendants' motion for summary judgment dismissing the complaint.

[1] ORDERED that the appeal from so much of the order dated March 20, 2003, as denied that branch of the plaintiffs' motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated March 20, 2003, is affirmed insofar as reviewed; and it is further,

ORDERED that the order dated March 21, 2003, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

The plaintiffs commenced this action claiming, inter alia, that the defendant Cook Pony Farm Real Estate, Inc. (hereinafter **CookPony Farm**), wrongfully terminated George **Simpson** and breached a software licensing agreement allegedly existing between*497

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the plaintiffs and Cook Pony Farm. The plaintiffs further alleged that Cook Pony Farm's employees published defamatory statements to colleagues in the real estate industry regarding their dissatisfaction with the plaintiffs' software and indicating that the plaintiffs had stolen listings from Cook Pony Farm. However, the plaintiffs did not set forth the actual words complained of, nor did they specify the persons to whom Cook Pony Farm and its agents allegedly published the statements.

[2][3] A cause of action sounding in defamation which fails to comply with the special pleading requirements contained in CPLR 3016(a) that the complaint set forth "the particular words complained of," mandates dismissal (see *Gill v. Pathmark Stores*, 237 A.D.2d 563, 655 N.Y.S.2d 623; *Sirianni v. Rafaloff*, 284 A.D.2d 447, 727 N.Y.S.2d 452). Failure to state the particular person or persons to whom the allegedly defamatory statements were made also warrants dismissal (see *Gill v. Pathmark Stores*, *supra*; *Sirianni v. Rafaloff*, *supra*).

[4][5] In any event, the Supreme Court properly determined that the allegedly defamatory statements enjoyed a qualified privilege. Protection from defamation is afforded where the person making the statements does so fairly in the discharge of a public or private duty in which the person has an interest and where the statement is made to a person or persons with a corresponding interest or duty (see *Jung Hee Lee Han v. State of New York*, 186 A.D.2d 536, 537, 588 N.Y.S.2d 358; see also *Lieberman v. Gelstein*, 80 N.Y.2d 429, 437, 590 N.Y.S.2d 857, 605 N.E.2d 344). Here, the statements expressing dissatisfaction with the plaintiffs' software program and regarding their alleged stealing of Cook Pony Farm's listings were done so **636 in the discharge of Cook Pony Farm's employees' duties. The plaintiffs failed to demonstrate malice to defeat this privilege (see *Wyllie v. District Attorney of County of Kings*, 2 A.D.3d 714, 719, 770 N.Y.S.2d 110). Thus, the allegedly defamatory statements were protected by a qualified privilege and the first cause of action was properly dismissed for this reason as well.

[6] The defendants were entitled to summary judgment dismissing the remaining causes of action sounding in breach of contract. The parties never signed a licensing agreement. The plaintiffs installed their software at two of Cook Pony Farm's six offices,

billed \$5,412.50 for those services, and were duly paid that amount. Consequently, the plaintiffs failed to rebut the defendants' showing of entitlement to summary judgment dismissing the breach of contract causes of action (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718).

[7][8][9] A motion for leave to renew must be supported by new or additional*498 facts "not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; see *Rizzotto v. Allstate Ins. Co.*, 300 A.D.2d 562, 752 N.Y.S.2d 538; *Williams v. Fitzsimmons*, 295 A.D.2d 342, 742 N.Y.S.2d 907). The requirement that a motion for leave to renew be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion (see *Daniel Perla Assocs. v. Ginsberg*, 256 A.D.2d 303, 681 N.Y.S.2d 316). However, a motion for leave to renew should be denied where the moving party failed to offer a reasonable justification as to why these new facts were not submitted on the prior motion (see *Daria v. Beacon Capital Co.*, 299 A.D.2d 312, 749 N.Y.S.2d 79; *Malik v. Campbell*, 289 A.D.2d 540, 735 N.Y.S.2d 793). The plaintiffs failed to proffer any "new" facts which were not submitted on the prior motion for leave to amend the complaint. Consequently, the Supreme Court properly denied that branch of their motion which was for leave to renew.

The plaintiffs' remaining contentions are without merit.

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