Makan Land Dev.-Three, LLC v Prokopov
2006 NY Slip Op 30795(U)
July 10, 2006
Supreme Court, Orange County
Docket Number: 556/06
Judge: Lewis J. Lubell

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. LEWIS J. LUBELL, J.S.C.

SUPREME COURT : ORANGE COUNTY

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MAKAN LAND DEVELOPMENT-THREE, LLC,

Plaintiff,

-against-

GEORGINE O. PROKOPOV, as Trustee of PROKOPOV FAMILY TRUST,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 556/06
Motion Date: June 23, 2006

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The following papers numbered 1 to 5 were read on the motion by plaintiff to renew and reargue its motion for leave to file an amended complaint:

Notice of Motion-Affirmation-Exhibits 1-3

Affirmation in Opposition-Exhibits 4

Reply Affirmation 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff moves to renew and reargue its motion for leave to file and amended verified complaint in this action alleging fraudulent inducement into contract and unjust enrichment stemming from a contract pertaining to a parcel of undeveloped real estate located in Wallkill, New York. On its original motion, plaintiff's counsel failed to sign his affirmation in support of the cross-motion to amend the complaint. The Court pointed out the fact that the cross-motion itself was wholly defective and could not be considered due to counsel's missing signature and

therefore the cross-motion needed to be treated as a nullity. *See, In Matter of American Security Insurance Company v Austin*, 110 AD2d 697 (2nd Dept. 1985); s*ee, Macri v St. Agnes Cemetery, Inc.*, 44 Misc2d 702, 704 (Sup. Albany, 1965); *See, Fried v Caracappa*, 9 Misc3d 1115(A) *1 (Dist. Ct., Nassau 2005). Plaintiff argues that the Court failed to take into account the fact that the proposed amended verified complaint was signed and was therefore admissible evidence in support of the motion, however plaintiff failed to acknowledge that the vehicle for its submission, i.e. counsel's affirmation, and the supporting authority could not be considered due to plaintiff's counsel's own practice failure. The Court further notes that the plaintiff failed to supply all papers considered by the Court on the original motion, but merely supplied plaintiff's cross-motion itself.

Defendant notes the absence of the proper evidence on a motion to renew and reargue and claims that plaintiff's motion fails to raise any new facts or law unavailable at the time of the original motion, making the motion to renew a vacuous one. Defendant further claims that the motion to reargue is baseless as well considering the proposed amended complaint lacks any factually specific allegations. Moreover, defendant states that plaintiff's motion lacks the requisite paperwork for consideration, namely all of the papers considered on the original motion.

CPLR 2221 states in pertinent part as follows:

> (d) A motion for leave to reargue:
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> 1. shall be identified specifically as such;
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> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior

motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

In contravention of CPLR §2221(f), plaintiff failed to demonstrate what portions of its motion is to renew and which portion is to reargue. The Court is charged with separately deciding each component of such motions, but a condition precedent thereto is the identification of the new evidence or law, which was unavailable to the parties at the time of the original motion, which necessitated a motion to renew, as well as those points which the movant believes to have been misapprehended by the Court. Therefore, the Court is left to parse the motion and do the job which plaintiff's counsel in this matter failed to do.

This Court notes that once again, plaintiff's counsel failed to fulfill his obligation and

provide the Court will all materials necessary for proper consideration.

> At the outset, the Court notes that the respective submissions do not include the papers submitted on the motion for which reargument is sought. In the absence thereof and other relevant documents providing a context for the position advanced, reargument is not available. (see, generally, Gerhardt v. New York City Transit Authority, 8 AD3d 427) Moving counsel, as a seasoned lawyer, should be well aware and appreciate that the Court does not retain the papers following the disposition of an application "and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions." (Sheedy v. Pataki, 236 AD2d 92, 97, lv den 91 NY2d 805) On the contrary, it is the responsibility of the moving parties to assemble complete papers which document the procedural history of the application and provide a proper foundation for the relief requested. (see, generally, Fernald v. Vinci, 13 AD3d 333).

Lower Main Street v Thomas Re & Partners, NYLJ, April 5, 2005 at 19 col 3; *see also*, *McCarthy v 390 Tower Associates, LLC*, 9 Misc3d 219, 225 (Sup. Ct., NY 2005).

Plaintiff's motion is also substantively defective. A claim unsupported by any new evidence is not the proper subject of a motion to renew. *See, Ribadeneyra v Gap, Inc.* 287 AD2d 362, 363 (1st Dept. 2001). Renewing a request by submitting new motion and absent any additional facts unknown at time of prior motion warrants the denial of a motion to renew, as does the failure to provide any excuse for not presenting the facts at the time of the first motion. *See, Mangine v Keller,* 182 AD2d 476, 477 (1st Dept. 1992). A party is not entitled to renewal of a motion where it is based on the same facts asserted in opposition to earlier motions, although facts were contained in new documents. *See, William P. Pahl Equipment Corp. v Kassis* 182 AD2d 22, 27 (1st Dept. 1992); *Frascatore v Mione,* 97 AD2d 809, 810 (2nd Dept. 1983). The evidence defendant now claims to be "new" was available to have been discovered by defendant with due diligence since that evidence was in its own possession. *See, Elder v Elder*, 21 AD3d 1055 (2nd Dept. 2005); *Yarde v New York City Transit Authority*, 4 AD3d 352, 353 (2nd Dept.

2004); *Cooke Center for Learning and Development*, 19 AD3d 834 (3rd Dept. 2005). "A motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation . . .'" *Renna v Gullo*, 19 AD3d 472 (2nd Dept. 2005); *O'Dell v Caswell*, 12 AD3d 492 (2nd Dept. 2004). Plaintiff's motion offers no new evidence or law whatsoever, and therefore its request for renewal is denied.

Turning to the issue of plaintiff's motion to reargue, the Court of Appeals long ago pronounced the purpose behind a motion to reargue and criticized counsel for abusing the CPLR's provisions relating thereto. In *Fosdick v Town of Hempstead*, 126 NY 651 (1891) the Court stated:

> This is a motion for a reargument, and the moving papers do not show a single ground recognized by this court as a proper foundation for the motion. The learned counsel for the defendant argued orally every proposition in the case with zeal and ability. The court has decided against him not on account of his failure to properly present his views for the defendant, but because, after mature and careful deliberation, it has differed with the learned counsel in his contention as to the proper construction of the will. Many years ago the court announced the rule which should govern in this class of motions. In *Mount v. Mitchell*, 32 N. Y. 702, it was stated that a motion for reargument should be founded on papers showing that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with the statute, or a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel. In *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, at 73, the same rule was again alluded to, and announcement again made that the court would adhere to it, and that motions for a reargument would not be entertained unless counsel brought the case within the rule. Judging by the character of the papers upon which motions of this nature are now frequently made, we should assume that the profession has lost sight of the rule, for in most of the cases which have lately come under our notice there has been an entire failure to comply with its requirements, and the motion has been made simply because the unsuccessful counsel has thought that he would like to again argue the very questions he had already submitted to, and which had been expressly decided by, the court. While it is very possible that we err in many cases, yet the rule adopted in regard to reargruments is a proper one, considering the fact that there must be at some point an end of litigation; and after counsel has

> had his day in this court, and has been unsuccessful in his case, it is but fair to the court, and to other litigants who are pressing to be heard, that a case should be made such as the court has decided to be necessary before entertaining the question of the propriety of granting a reargument

Fosdick, 126 NY at 651-652 (emphasis supplied).

More recently in *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 (1st Dept. 1992), the Court held:

> A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v. Solowey*, 141 A.D.2d 813, 529 N.Y.S.2d 1017.) Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage, Inc. v. Home Insurance Co.*, 99 A.D.2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588.)

Pahl, 182 AD2d at 27; *Foley v Roche*, 68 AD2d 558, 567 (1st Dept. 1979); *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept. 1984).

The Court does not believe that it overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in deciding the motion in question. The fact remains that plaintiff's counsel seeks a judicial cure for his own practice failure, which is in and of itself an improper use of a motion to reargue. As plaintiff points out, even if its motion is denied, it can always file a new action with a new complaint. Since plaintiff's motion to reargue is denied, a

newly filed action will be plaintiff's option should plaintiff chose that avenue.

Dated: July 10, 2006 E N T E R
Goshen, New York

HON. LEWIS J. LUBELL, J.S.C.

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