

Roach v Mabry

2012 NY Slip Op 30219(U)

January 30, 2012

Sup Ct, NY County

Docket Number: 116193/06

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

MAXINE ROACH, Executrix for the estate
of MAX ROACH,

INDEX NO. 116193/06

Plaintiff
- v -

MOTION DATE 12-14-2011

MOTION SEQ. NO. 004

FRANK MABRY,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to 7 were read on this motion to renew/reargue this court's decision dated September 29, 2011.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2, 7

Answering Affidavits — Exhibits _____

FILED

3-4, 5, 6

Replying Affidavits _____

JAN 31 2012

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon a reading of the foregoing cited papers it is the decision and order of this court that this motion by the defendant, by order to Show Cause, for leave to renew and reargue, and upon renewal or reargument vacating this court's decision dated September 29, 2011 directing the clerk to enter judgment against the defendant Frank Mabry in the amount of \$98,790.93 is denied.

Plaintiff is the executrix of her father's estate and is seeking to recoup certain musical instruments that belonged to her father at the time of his death. The instruments which were being warehoused were removed by the defendant and taken to another location. When plaintiff learned that the instruments had been removed she requested that defendant return the instruments and when he failed to do so she commenced this action.

On May 4, 2009 Justice Sherwood held an inquest where he heard testimony from Plaintiff, her witnesses Anton Røld and from the defendant. The defendant stated that he had been in possession of the instruments but that some of them were destroyed in 2008 during a flood of his home; the remaining instruments were removed to Tennessee where they were being kept in a barn. Justice Sherwood rendered a decision ordering defendant to return all of the instruments belonging to the Estate in his possession.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Plaintiff and her attorney traveled to Tennessee to retrieve the instruments, incurring \$6,790.93 in expenses. Once there they proceeded to a barn located inside a farm property of Mr. Mabry. In the barn they found cases of instruments belonging to the Estate which they photographed and documented, comparing the pieces retrieved with an inventory list they possessed (the inventory list had been made by Mr. Anton Reid).. The comparison revealed that only about one-third of the instruments were retrieved, the remainder, which contained some of the most valuable pieces were unaccounted for.

After returning to New York defendant informed Justice Sherwood that "Mr. Harvey Mars missed a few boxes in Tennessee. I would like him to obtain them as soon as possible." Justice Sherwood forwarded that correspondence to Plaintiff's attorney. Plaintiff requested that the Sheriff inspect defendant's property in Tennessee in search of the missing items. The Sheriff inspected the premises but was unable to find any musical instruments or anything with the name of Max Roach. The belief that defendant is still in possession of property belonging to the Estate prompted the motion for contempt.

The motion was adjourned final to September 6, 2011 for a hearing. Although defendant Mabry appeared at the hearing he chose not to participate and left the courtroom despite the court's warning that if he left the courtroom and failed to participate he did so at his own peril (See transcript of hearing annexed to Plaintiff's affirmation Exhibit 4 Pg. 2 through 10). At the hearing Plaintiff presented the testimony of Maxine Roach, Regina Davis and Dara Roach. Ms. Maxine Roach testified as previously stated. Ms. Regina Davis stated she had seen cases of instruments in the Tennessee barn as early as December 13, 2006, thereby refuting defendant's allegation at the inquest that the instruments had been destroyed in the 2008 flood of his home. Ms. Dara Roach testified about a conversation she had with Mr. Mabry in October of 2010 wherein he stated that " he was not going to let one person get everything", and talked about how things would get distributed.

At the conclusion Plaintiff requested that Mr. Mabry be found in contempt and ordered to return the instruments under penalty of incarceration or award a monetary judgment. This court denied the motion to find Mr. Mabry in contempt but awarded a monetary judgment against him. Mr. Mabry now moves for leave to renew and/or reargue the motion and for an order vacating this court's previous decision.

Mr. Mabry, through new counsel moves pursuant to CPLR 2221 for renewal, submitting an affidavit of Mr. Anton Reid which tends to refute plaintiff's allegations regarding the property in defendant's possession and arguing that the court misapprehended the facts and misapplied the law. It is important to note that Mr. Anton Reid testified at the inquest before Justice Sherwood in 2009, was cross examined by the defendant and none of the information he proffers in his present affidavit was then elicited. It is also important to note that the motion to hold defendant in contempt was pending before Justice Sherwood as of April of 2010 and it was adjourned at defendant's request, by Justice Sherwood and this Court, at least seven (7) times over a period of one and a half years. This court marked the hearing final and on that date defendant again appeared to request an adjournment to obtain counsel. Despite being advised by the court that the hearing would go forward, defendant deliberately chose to absent himself and left the courtroom.

Although a trial court has discretion to grant renewal upon facts known to the movant at the time of the original motion, 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 (See *Huma v. Patel*, 68 A.D. 3d 821, 890 N.Y.S. 639 [2nd. Dept. 2009], denying motion for leave to renew summary judgment motion where new evidence consisted of copies of general releases in settlement of a prior action which allegedly extinguished the underlying debt where the appellant was aware of the existence of these releases at the time summary judgment motion was made and failed to demonstrate that he could not have obtained copies of the release with the exercise of due diligence; *Ramirez v. Khan*, 60 A.D. 3d 748, 874 N.Y.S. 2d 257 [2nd. Dept. 2009], denying leave to renew summary judgment motion where party failed to provide reasonable justification for failure to include affirmation of Doctor on prior motion).

A Motion for leave to renew shall be based upon new 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 (See *Guerrero v. Marable*, 30 Misc. 3d 144 (A), 927 N.Y.S. 2d 816 [App. Term 2nd., 11th & 13th Jud. Dist. [2011]; *Cuccia v. City of New York*, 306 A.D. 3d 2 [1st. Dept. 2003]). Although a court has discretion to grant renewal, in the interest of justice, upon facts that were known to the movants at the time the original motion was made, it may not exercise that discretion unless the movants establish a reasonable justification for the failure to present such facts on the prior motion (*Kirby v. Suburban Electrical Engineers contractors, Inc.*, 83 A.D. 3d 1380, 919 N.Y.S. 2d 698 [4th Dept. 2011]).

Defendant has failed to show that the evidence he now proffers in the form of Mr. Reid's affidavit was not available at the time of the motion. Actually the facts are to the contrary as Mr. Reid was one of the witnesses that testified at the Inquest before Justice Sherwood. Defendant was afforded every opportunity to cross examine Mr. Reid at the inquest and to present him as a witness at the contempt hearing on September 6, 2011. Defendant failed to avail himself of this opportunity or to provide the court with Mr. Reid's affidavit at the time the motion was made. He has provided no justification for failing to present this evidence. He appears to be seeking a second chance to make his factual presentation, this is not the purpose of a motion to renew. Accordingly, the motion to renew is denied.

A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*Ul Haque v. Daddazio*, 84 A.D. 3d 940, 922 N.Y.S. 2d 548 [2nd. Dept. 2011]). A motion for leave to reargue 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 (CPLR 2221(d)(2)), it is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented (*Mazlnov v. Rella*, 79 A.D. 3d 979, 912 N.Y.S. 2d 896 [2nd. Dept. 2010]; *Carter DDS, P.C., v. Carter* 81 A.D. 3d 819, 916 N.Y.S. 2d 821 [2nd. Dept. 2011]).

This court has neither misapprehended the facts or the law. Defendant was ordered to turn over property in his possession that belongs to the plaintiff. A hearing was held at which defendant chose to absent himself. Unrefuted evidence was submitted at this hearing conclusively establishing that defendant was in possession of certain property belonging to the plaintiff and the value thereof. This court, instead of holding defendant in contempt, with its concomitant consequences, chose to grant plaintiff a judgment for the value of the property. Defendant now wants this court to vacate its decision by arguing matters of fact that were not before the court at the time of the hearing when the motion was decided. Accordingly, the motion for leave to reargue is denied.

Accordingly, it is ORDERED and Adjudged that the motion seeking renewal and/or reargument of this court's decision, following a hearing, dated September 29, 2011 awarding plaintiff a judgment for the value of the Estate Property in possession of the defendant, is denied.

This constitutes the decision, order and judgment of this court.

ENTER

MANUEL J. MENDEZ
J.S.C.

Dated: January 30, 2012


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

JAN 31 2012

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