

Bernard v Brewster

2012 NY Slip Op 30479(U)

February 21, 2012

Sup Ct, Nassau County

Docket Number: 1920/10

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

JOAN BERNARD and HINSLEY D. BERNARD,

TRIAL/IAS PART 5

Petitioners,

INDEX NO. 1920/10

- against -

**MOTION SEQUENCE
NO. 2**

TROY H. CHARLES BREWSTER, et al.,

**MOTION SUBMISSION
DATE: December 5, 2011**

Respondents.

The following papers read on this motion:

**Order to Show Cause
Affirmation in Opposition**

**X
XX**

Upon the foregoing papers, the motion by Petitioners brought by Order to Show Cause for an Order allowing the Plaintiff's to re-argue and re-submit for decision the within motion in which application was previously made on January 28, fully submitted for decision on March 12, 2010 and decided on March 17, 2010 by the Hon. Roy S. Mahon, who dismissed the motion based on Plaintiff's alleged failure to submit an affidavit of service attesting to service upon the respective parties as directed in the Order to Show Cause. The Plaintiff's can prove by way of the annexed exhibit "A" that the affidavit of service was in fact filed with the court on February 16, 2010 which attests to service upon the respective parties as directed in the Order to Show Cause. The Affidavit of Service was recorded in the Nassau County Clerk's Office on February 17, 2010 (See Proof of the filing with court annexed hereto in "Exhibit A"). The Attorney's office copy was also stamped by the Clerk's office. (See copy of attorney's office copy annexed hereto as "Exhibit B"); consolidating this action with an action pending in the District Court of the County fo Nassau First District Landlord-Tenant Part, under the caption, Troy Charles Brewster, Plaintiff -against- Joan Bernard, et al., Respondents, Index No: SP2018/2009 concerning the subject premises located at 1181 Bernard Street, Valley Stream, NY 11580; consolidating this action with a foreclosure action currently pending in Nassau Supreme Court; consolidating this action with a foreclosure action currently pending in Nassau Supreme Court, Nassau County under the Caption GMAC Mortgage, LLC -against- Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster; American General Finance, Inc., American General Home Equity, Inc., Argent Mortgage Company, LLC, New York State Department of Taxation and Finance. "John Does" and "Jane Does" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises, under Index No. 22176/09; pending the hearing of this motion, let all proceedings on the part of the Plaintiff, its attorneys, agents and any Marshal or Sheriff of the County of Nassau, including but not limited to the

execution of the warrant of eviction be stayed in the County of Nassau First District Landlord-Tenant Part under the caption, Troy Charles Brewster, Plaintiff -against- Joan Bernard, et al., Defendant's, Index No. SP2018.2009; staying all proceedings pertaining to the foreclosure of the subject property located at 1181 Bernard Street, Valley Stream, New York Section 35 Block 632 Lot 24; enjoining and restraining GMAC Mortgage, LLC from foreclosing on the subject property located at 1181 Bernard Street, Valley Stream, New York, 11580 Section 35 Block 632 Lot 24 currently pending in Nassau Supreme Court Nassau County under the Caption GMAC Mortgage, LLC -against- Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster; American General Finance, Inc., American General Home Equity, Inc., Argent Mortgage Company, LLC, New York State Department of Taxation and Finance. "John Does" and "Jane Does" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises, under Index No. 22176/09; enjoining and restraining respondent Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster, residing at 620 E. 54th Street, Brooklyn, NY 11203 from selling and/or encumbering the subject property located at 1181 Bernard Street, Valley Stream, New York 11580 Section 35 Block 632 Lot 24; Directing the Nassau County Clerk's Office to void and cancel the deed created for 1181 Bernard Street, Valley Stream, NY Section 35 Block 00632-00 Lot 24 on March 19, 2008 and recorded on May 22, 2008 for fraudulent inducement by the Defendant's, Bar code #2008052201170, Liber Book: D 12395 Pages from:782 to 785 Control #1170 Ref #RE 019740 and transfer the subject property located at 1181 Bernard Street, Valley Stream, NY back into the name of the Plaintiff, Hinsley D. Bernard the original titled owner of the subject property (see copy of deed annexed hereto as "Exhibit A"); directing the Nassau County Clerk's Office to void and cancel the mortgage for \$412,250.00 for 1181 Bernard Street, Valley Stream, NY Section 35 Block 00632-00 Lot 24 on March 19, 2008 and recorded on May 22, 2008 for fraudulent inducement by the Defendant's, Bar code #2008052201171, Liber Book: M 32997, Pages from 104 to 119, Control #: 1171, Ref. #CZ 008780. (See copy annexed hereto as "Exhibit B"); ordering the Defendant's to produce a copy of all closing documents including but not limited to copies of checks paid out at the closing pertaining to the sale of the subject property dated March 18, 2008; holding the Defendant, Venetta Johnson, liable for contributing to fraudulently induce the Plaintiff's into transferring the subject property to the Defendant, Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster; order Defendant, Eric S. Finger, Esq. to produce all closing documents including but not limited to copies of checks paid out at the closing pertaining to the closing of the subject premises on March 19, 2008 and allowing the Plaintiff's to subpoena the address of the Notary Public from the Nassau County Clerk's office, who notarized the deed transfer and all closing documents at the sale of the subject property on March 19, 2008, is determined as hereinafter provided:

In **Foley v. Roche, 68 AD2d 558, 418 NYS2d 588 (First Dept., 1979)** the Court addressed the issues of reargument and renewal. As to reargument, the Court stated

" . . . A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (*Fosdick v Town of Hempstead*, 126 NY 651; *American Trading Co. v Fish*, 87 Misc 2d 193). Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. As was observed by the Court of Appeals in *Simpson v Loehmann* (21 NY2d 990), 'A motion for reargument is not an appropriate vehicle for raising new questions'. Moreover, were we to consider the present motion as one for

reargument, it was clearly untimely, since such a motion may not be made after the time to appeal from the original order has expired (*Matter of Huie [Furman]*, 20 NY2d 568, 572; *Fitzpatrick v Coe*, 58 AD2d 642; *Prude v County of Erie*, 47 AD2d 111). To hold otherwise would permit circumvention of the prohibition against extending the time to take an appeal from the original order (see 2A Weinstein-Korn-Miller, NY Civ Prac, par 2221.03)." **Foley v. Roche, supra at 567-568.**

In the absence of a submission of an affidavit of service of the plaintiffs' prior application, the plaintiffs have not established that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. As such, the plaintiffs' application for an Order allowing the Plaintiff's to re-argue and re-submit for decision the within motion in which application was previously made on January 28, fully submitted for decision on March 12, 2010 and decided on March 17, 2010 by the Hon. Roy S. Mahon, who dismissed the motion based on Plaintiff's alleged failure to submit an affidavit of service attesting to service upon the respective parties as directed in the Order to Show Cause. The Plaintiff's can prove by way of the annexed exhibit "A" that the affidavit of service was in fact filed with the court on February 16, 2010 which attests to service upon the respective parties as directed in the Order to Show Cause. The Affidavit of Service was recorded in the Nassau County Clerk's Office on February 17, 2010 (See Proof of the filing with court annexed hereto in "Exhibit A"). The Attorney's office copy was also stamped by the Clerk's office. (See copy of attorney's office copy annexed hereto as "Exhibit B");_consolidating this action with an action pending in the District Court of the County fo Nassau First District Landlord-Tenant Part, under the caption, Troy Charles Brewster, Plaintiff -against- Joan Bernard, et al., Respondents, Index No: SP2018/2009 concerning the subject premises located at 1181 Bernard Street, Valley Stream, NY 11580; consolidating this action with a foreclosure action currently pending in Nassau Supreme Court; consolidating this action with a foreclosure action currently pending in Nassau Supreme Court, Nassau County under the Caption GMAC Mortgage, LLC -against- Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster; American General Finance, Inc., American General Home Equity, Inc., Argent Mortgage Company, LLC, New York State Department of Taxation and Finance. "John Does" and "Jane Does" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises, under Index No. 22176/09; pending the hearing of this motion, let all proceedings on the part of the Plaintiff, its attorneys, agents and any Marshal or Sheriff of the County of Nassau, including but not limited to the execution of the warrant of eviction be stayed in the County of Nassau First District Landlord-Tenant Part under the caption, Troy Charles Brewster, Plaintiff - against- Joan Bernard, et al., Defendant's, Index No. SP2018.2009;staying all proceedings pertaining to the foreclosure of the subject property located at 1181 Bernard Street, Valley Stream, New York Section 35 Block 632 Lot 24; enjoining and restraining GMAC Mortgage, LLC from foreclosing on the subject property located at 1181 Bernard Street, Valley Stream, New York, 11580 Section 35 Block 632 Lot 24 currently pending in Nassau Supreme Court Nassau County under the Caption GMAC Mortgage, LLC -against- Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster; American General Finance, Inc., American General Home Equity, Inc., Argent Mortgage Company, LLC, New York State Department of Taxation and Finance. "John Does" and "Jane Does" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises, under Index No. 22176/09; enjoining and restraining respondent Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster, residing at 620 E. 54th Street, Brooklyn, NY 11203 from selling and/or encumbering the subject property located at 1181 Bernard Street, Valley Stream, New York 11580 Section 35 Block 632 Lot 24; Directing the Nassau County Clerk's Office to void and cancel the deed created for 1181 Bernard Street, Valley Stream, NY Section 35 Block 00632-00 Lot 24 on March 19, 2008 and recorded on May 22, 2008 for fraudulent inducement by the Defendant's, Bar code #2008052201170, Liber Book: D 12395 Pages from:782 to 785 Control #1170 Ref #RE 019740 and transfer the subject property located at

1181 Bernard Street, Valley Stream, NY back into the name of the Plaintiff, Hinsley D. Bernard the original titled owner of the subject property (see copy of deed annexed hereto as "Exhibit A"); directing the Nassau County Clerk's Office to void and cancel the mortgage for \$412,250.00 for 1181 Bernard Street, Valley Stream, NY Section 35 Block 00632-00 Lot 24 on March 19, 2008 and recorded on May 22, 2008 for fraudulent inducement by the Defendant's, Bar code #2008052201171, Liber Book: M 32997, Pages from 104 to 119, Control #: 1171, Ref. #CZ 008780. (See copy annexed hereto as "Exhibit B"); ordering the Defendant's to produce a copy of all closing documents including but not limited to copies of checks paid out at the closing pertaining to the sale of the subject property dated March 18, 2008; holding the Defendant, Venetta Johnson, liable for contributing to fraudulently induce the Plaintiff's into transferring the subject property to the Defendant, Troy H. Charles Brewster a/k/a Troy Hugh Charles Brewster; order Defendant, Eric S. Finger, Esq. to produce all closing documents including but not limited to copies of checks paid out at the closing pertaining to the closing of the subject premises on March 19, 2008 and allowing the Plaintiff's to subpoena the address of the Notary Public from the Nassau County Clerk's office, who notarized the deed transfer and all closing documents at the sale of the subject property on March 19, 2008, is denied.

SO ORDERED.

DATED: 2/21/2012

.....*Ray S. Walton*.....
J.S.C.

ENTERED
FEB 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE