

**NYCTL 2011-A Trust v 70 Orchard LLC**

2017 NY Slip Op 31431(U)

July 5, 2017

Supreme Court, New York County

Docket Number: 652883/2012

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ

PART 13

*Justice*

NYCTL 2011-A TRUST, and THE BANK OF NEW YORK MELLON as Collateral Agent and Custodian for the NYCTL 2011-A Trust,

Plaintiffs,

-against-

INDEX NO.  
MOTION DATE  
MOTION SEQ. NO.  
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652883/2012  
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70 ORCHARD LLC, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOE ERLICHSTER, ESTATE OF LEON ERLICHSTER and "JOHN DOE No. 1" through "JOHN DOE No. 100" inclusive, the names of the last 100 defendants being fictitious, the true names of said defendants being unknown to plaintiff, it being intended to designate fee owners, tenants or occupants of the liened premises and/or persons or parties having or claiming an interest in or a lien upon the liened premises, if the aforementioned individual defendants are living, and if any or all of said individual defendants be dead, their heirs at law, next of kin, distributees, exectuors, administrators, trustees, committees, devisees, legatees, and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through, or against the said defendants named as a class, of any right, title or interest in or lien upon the premises described in the complaint herein,

Defendants.

The following papers, numbered 1 to 8 were read on this motion for leave to renew and reargue and cross-motion for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3; 4 - 6</u>
Answering Affidavits — Exhibits _____	<u>4 - 6; 7 - 8</u>
Replying Affidavits _____	<u>7 - 8</u>

**Cross-Motion:**     **Yes**     **No**

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion to renew and reargue, is denied. Defendant 70 Orchard LLC's cross-motion for summary judgment, is granted and the Complaint is dismissed.

Plaintiff commenced this action with a notice of pendency to foreclose a tax lien (herein "Tax Lien") on real property located at 70 Orchard Street, New York, New York

(herein "Property"). The Property had delinquent charges on two water meters totaling \$44,444.02. These delinquent charges were converted into the Tax Lien and sold to the Plaintiffs on August 11, 2011. Defendant United States of America Internal Revenue Service filed a Notice of Appearance and Waiver in Foreclosure, and Defendant 70 Orchard LLC (herein "Orchard") interposed an Answer (Moving Papers Ex. A).

On July 17, 2016 Plaintiffs moved for summary judgment seeking to strike the answer of Defendant Orchard and requested that the court appoint a referee to calculate the sums due and owed under the Tax Lien (Moving Papers Ex. A-E). In an Order dated January 11, 2017 this court denied Plaintiffs' motion for summary judgment finding that there was no dispute that Defendant made an unconditional tender to pay-off the entire amount of the Tax Lien, which was accepted by the Department of Environmental Protection (herein "DEP", Moving Papers Ex. H). When the DEP did not return the money, an impression that the Tax Lien had been satisfied was established, thereby creating issues of fact precluding summary judgment.

Plaintiffs now move for an Order granting leave to renew and reargue its July 17, 2016 summary judgment motion, and upon such renewal and reargument, for summary judgment in its' favor. Defendant Orchard opposes the motion and cross-moves for summary judgment.

CPLR § 2221[d] states that a motion for leave to reargue (1) shall be identified specifically as such, (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 (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it "overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law" (*Kent v 534 East 11<sup>th</sup> Street*, 80 AD3d 106, 912 NYS2d 2 [1<sup>st</sup> Dept. 2010] *citing* *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1<sup>st</sup> Dept. 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (*Kent*, *supra* and *UI Haque v Daddazio*, 84 AD3d 940, 922 NYS2d 548 [2<sup>nd</sup> Dept. 2011]). The movant cannot merely restate previous arguments (*id*).

Upon a review of the July 17, 2016 summary judgment motion, this court finds it did not overlook or misapprehend the relevant facts (Moving Papers Ex. A-E). Plaintiffs failed to provide any grounds to justify reargument as the previous arguments were merely restated in this motion. As the court found the first time, "[t]here is no dispute that defendant made an unconditional tender to pay-off the entire amount of the tax lien, which was accepted by the DEP. The money was not returned to defendant (creating the impression that the lien had been satisfied), or forwarded to the holder of the Tax Lien thereby satisfying the obligation" (Moving Papers Ex. H). Summary judgment was precluded because of the inherently unfair position Defendant Orchard was placed in and issues of fact that were raised.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1<sup>st</sup> Dept. 1998]; *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1<sup>st</sup> Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (*Epstein v Scally*, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is “issue finding” not “issue determination”(Epstein, *supra*). It is improper for the motion court to resolve material issues of fact (*Brunetti v Musallam*, 11 AD3d 280, 783 NYS2d 347 [1<sup>st</sup> Dept. 2004]). These should be left to the trial court to resolve (*id*).

Defendant Orchard cross-moves for summary judgment contending that no genuine issues of fact remain as payment was made for the charge underlying the Tax Lien. Orchard contends that payment of the obligation represented by a tax lien extinguishes the lien and brings an end to all efforts of enforcing the lien. Orchard and Plaintiffs are both in agreement that Defendant paid \$44,444.02 to the New York City Waterboard and DEP to cover all the arrears on the two water meter charges (Opposition Papers Ex. A, Moving Papers Ex. D). The Complaint no longer states a viable cause of action in view of fact that the Tax Lien was satisfied (*Long Island City Savings and Loan Association v Gottlieb*, 90 AD2d 766, 455 NYS2d 300 [2<sup>nd</sup> Dept. 1982]). There remains no issues of fact as payment made by the Defendant extinguishes the Tax Lien and Plaintiffs are therefore equitably estopped from prosecuting this tax lien foreclosure.

Accordingly, it is ORDERED, that Plaintiffs’ motion for leave to renew and reargue this court’s January 11, 2017 Order denying Plaintiffs’ motion for summary judgment is denied, and it is further,

ORDERED, that Defendant 70 Orchard LLC’s motion for summary judgment pursuant to CPLR §3212 dismissing the Complaint is granted, and it is further,

ORDERED, that the Complaint is dismissed, and it is further,

ORDERED, that the Notice of Pendency is cancelled, and it is further,

**ORDERED, that the Clerk enter judgment accordingly.**

**ENTER:**

**Dated: July 5, 2017**

  
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**MANUEL J. MENDEZ**  
**J.S.C.**

**MANUEL J. MENDEZ**  
**J.S.C.**

**Check one:   X  FINAL DISPOSITION    NON-FINAL DISPOSITION**

**Check if appropriate:    DO NOT POST                    REFERENCE**