

Dibuono v Abbey, LLC
2011 NY Slip Op 34308(U)
October 3, 2011
Supreme Court, Westchester County
Docket Number: 15975/08
Judge: Joan B. Lefkowitz
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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.

FILED

OCT - 4 2011

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

**FILED
AND
ENTERED**
ON 10-4 2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
JAMES DIBUONO and IRACI DIBUONO,

Plaintiffs,

-against-

ABBEY, LLC, HARBORVIEW PROPERTIES, LMC
PARTNERS, LLC, JOSEPH C. CRABTREE, THE ESTATE
OF MICHAEL R. CRABTREE, ROBERT E. CRABTREE, JR.,
CONSTANCE MARKEY, MARGARET CRABTREE LYSTER,
SENTINEL LEASING OF FLORIDA, INC., C & M REALTY,
CARLA COLAINNI, MICHAEL DIVOLO, A. TARRICONE, INC.,
J & K AUTOMOTIVE, INC., ROB'S AUTO CARE, INC.,
TONY & SONS AUTO BODY, LLC, GULF OIL LIMITED
PARTNERSHIP, GULF OIL CORP., GETTY PETROLEUM
MARKETING, INC., GETTY OF LARCHMONT, INC.,
LA RISERVA, INC., WILLIAM'S GAS MART, INC., EDITH
SHULMAN,

Defendants.

-----X
L.M.C. PARTNERS, LLC,

Third-Party Plaintiff,

-against-

PALISADES RESOURCES, INC.,

Third-Party Defendant.

-----X
PALISADES RESOURCES, INC.,

Second Third-Party Plaintiff,

-against-

SOUNDVIEW RESOURCES, LLC,

Second Third-Party Defendant.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No.: 15975/08

Seq Nos. 30 and 31

Index No.: 15975/08T

Index No.: 15975/08T2

The following papers numbered 1 to 14 were read: (1) on the motion by defendants, LMC Partners LLC, the Estate of Michael Crabtree, and Constance Markey (hereinafter LMC)¹, for an order pursuant to CPLR 2221(d) granting them leave to reargue the Court's Decision and Order filed and entered July 19, 2011, which granted in part, the prior motion of defendant Getty Petroleum Marketing Inc. (hereinafter GPMI), and directed them to provide to GPMI certain email documents in their unredacted form and, upon reargument, denying all of GPMI's prior motion and, in the event that this motion is denied, granting these defendants leave to appeal and also granting a stay in this matter pending completion of any such appeal and, (2) on the cross motion by GPMI for an order pursuant to CPLR 2221(d) granting it leave to reargue the same Decision and Order of the Court filed and entered July 19, 2011, and upon reargument granting its prior motion in its entirety.

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Upon the foregoing papers, this motion and this cross motion are determined as follows:

Plaintiffs commenced this action on July 21, 2008, to recover damages for injuries to their land, alleging that on or before July 25, 2005, their property was contaminated by the leaking of petroleum from gasoline storage tanks located at three nearby service stations. One of those service stations was allegedly owned and operated by defendant LMC Partners, LLC.

On or about March 5, 2010, GPMI served upon LMC its request for the production of documents. This request for documents specifically sought allegedly relevant e-mail communications. Copies of certain e-mails were produced on April 1, 2011. In the previous motion, GPMI stated that those e-mails were improperly redacted based on claims of attorney-client privilege and the common interest/joint defense privilege. GPMI sought unredacted copies of the e-mail documents. LMC answered that it produced the requested documents and that it properly redacted

¹It appears that in the previous motion, James E. Nealon, Esq., of Kelly Drye & Warren, represented defendants LMC Partners and Constance Markey who were, there, jointly referred to as LMC. On the present motion for reargument, Mr. Nealon is also representing the Estate of Michael Crabtree.

those documents where privilege applied.

By Decision and Order filed and entered July 19, 2011, this Court (Lefkowitz, J.), granted GPMI's motion only to the extent of directing LMC to provide to GPMI certain, enumerated, e-mail documents. Presently, LMC seeks, *inter alia*, leave to reargue the prior motion and upon reargument an order sustaining all of its privilege contentions. GPMI is cross-moving for leave to reargue and, upon reargument, an order directing LMC to produce all requested documents. GPMI states that the order herein should make clear that the order of July 19, 2011, constitutes "law of the case" that has equal application to documents produced by both the LMC defendants and defendants Robert E. Crabtree, Jr., and Margaret Crabtree Lyster (the Crabtree defendants).

The Crabtree defendants oppose GPMI's cross motion. They state that although they share a common interest privilege with LMC, they did not oppose the previous motion because therein GPMI sought relief only against LMC. The Crabtree defendants assert that to the extent GPMI now seeks to extend the application of the order of July 19, 2011, to them, it should be denied. They would be entitled to make their own evidentiary record concerning documents they withhold on the basis of privilege, when and if a motion to compel is filed against them.

The motion by LMC, although denominated as one for leave to reargue, is in actuality a motion for leave to reargue and to renew. "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" (CPLR 2221 (f)).

A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but does not include any matters of fact not offered on the prior motion (CPLR 2221 (d)(2); *Matter of American Alternative Ins. Corp.*, 85 AD3d 1157 [2d Dept 2011]). The determination to grant leave to reargue a motion lies within the sound discretion of the court which decided the prior motion (*see Barnett v Smith*, 64 AD3d 669 [2d Dept 2009]).

A motion to renew is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court's attention (*Gomez v Needham Capital Group, Inc.*, 7 Ad3d 568 [2d Dept 2004]). However, this requirement is a flexible one and the court, in its discretion, may grant renewal in the interest of justice (*Adzer v Rudin Mgt. Co., Inc.*, 50 Ad3d 1070 [2d Dept 2008]; *Gomez v Needham Capital Group, Inc.*, 7 Ad3d 568 [2d Dept 2004]). LMC's current submission of the affidavit of defendant Robert Crabtree establishes that Kathy Sears and Ed Gorman are his agents at least for the purpose of receiving emails in this matter. In view of the foregoing, it is,

ORDERED that the branch of the motion by LMC and, that the branch of the cross motion by GPMI, both seeking leave to reargue the Decision and Order rendered by this Court on July 19, 2011, are granted. Upon reargument it is,

ORDERED that the Court's previous order is modified only to the extent that LMC

shall provide a copy of all unredacted emails (the redacted versions of which were included as Exhibit B in the papers submitted in opposition to GPMI's prior motion), to the Compliance Part Clerk, on or before October 14, 2011, for an *in camera* review by the Court. After its *in camera* review, the Court will determine which emails, if any, are subject to disclosure and at that time direct LMC accordingly; and it is further,

ORDERED that the branch of the motion seeking leave to renew is also granted only to the extent that upon renewal the Court finds that Kathy Sears and Ed Gorman are agents of Robert Crabtree at least for the purpose of receiving emails in this matter; and it is further,

ORDERED that all other branches of the motion and the cross motion are denied; and it is further,

ORDERED that the Compliance Conference scheduled for October 6, 2011, is adjourned to November 21, 2011, on which date all parties are directed to appear for a conference in the Compliance Part, Room 800, at 9:30 A.M.

Dated: White Plains, New York
October 3, 2011



HON. JOAN B. LEFKOWITZ, U.S.C.

TO:

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