Good Karma Props., LLC v Gromis
2011 NY Slip Op 33930(U)
December 16, 2011
Sup Ct, NY County
Docket Number: 103796/11
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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GOOD KARMA PROPERTIES, LLC, Index # 103796/11

Plaintiff,

v.

CECILE GROMIS, EDWIN GROMIS, and
REBECCA GROMIS,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover monies plaintiff Good Karma Properties, LLC ("plaintiff") allegedly overpaid to defendants, defendants Cecile Gromis ("Cecile"), Edwin Gromis ("Edwin"), and Rebecca Gromis ("Rebecca") (collectively, "defendants") move pursuant to CPLR 2221 to reargue and renew the Court's Decision and Order dated October 18, 2011, granting summary judgment on plaintiff's first cause of action for $4,424,58, on its fourth cause of action for fraudulent inducement, concealment and misrepresentation as against Cecile and Edwin, on the sixth cause of action for fraud against Cecile, on the seventh cause of action against Cecile for conversion, and for the eighth cause of action for attorney's fees, and that branch of the plaintiff's cross-motion for sanctions against the defendants pursuant to NYCRR 130-1.1.

Factual Background

Defendants raise five points in support of their motion.

As to their first point, defendants seek reargument based on the Court's statement that it was not until July 12, 2010 that plaintiff discovered the first Civil Court Action, which had

awarded a default judgment to the defendants herein. Defendants maintain that this statement is inaccurate, in that plaintiff's "Affirmation in Opposition" to the Motion to Disqualify Counsel contains a sworn affidavit by Andrea Lara, the principal of the plaintiff, that she received notice of the default judgment "on or around December, 2009." Such contradicts plaintiff's representation in its initial complaint, which the Court may have accepted as fact in finding that there was no notice until July 12, 2010.

As to the second point, defendants argue that the Court's order made reference to the settlement of June 25, 2010. However, that settlement had only to do with the repayment of $1,763.35, paid in addition to the $3200 a month rent, charged as "Occupancy Tax" and "Room Use," charges which were not additional rent and which were sought to be recouped independent of the $3,200 security deposit. The $1,763.35 had nothing to do with the return of the security deposit. It is marked by plaintiff in its check for $1,763.35 as "taxes." The second action was not filed to be litigious.

Defendants submit the monthly invoices paid by Rebecca Gromis showing these charges over and above the agreed-upon rent, and to the extent that these invoices were not a part of the original complaint or the answering papers, the invoices may be considered a motion to renew. The original check in payment for the $1,763.35 was a part of the original record and was clearly marked "taxes," along with the explanation in the Verified Answer and Counterclaim that this payment had nothing to do with the security deposit. As such, the invoices had not been submitted as a part of the original answer. To the extent the Court may have relied on the plaintiff's assertion in its original complaint that the repayment of that money was repayment of taxes and interest connected to the security deposit, such invoices are submitted to counter this

affirmation.

As to the third point, defendants contend that contrary to the Court's opinion, defendants have not been compensated twice. The $3,200 check defendants received from the plaintiff was never cashed (see Verified Answer and Counterclaim) and defendants never intended to cash it because it did not contain the 2 ½ years of interest to which they were entitled by law. The only compensation for the security deposit that the defendants ever received was from the sheriff's execution. Defendants' counsel as an officer of the court will present the original, un-cashed check to the court at the first conference date as proof that there was no double-payment.

Unlike the check for $1,763.35 involving return of the "taxes" imposed over and above the $3,200 monthly rent as per the written lease, there was no stipulation or discontinuance ever entered into that the tender of payment of the $3,200 was a basis to vacate the judgment execution. Defendants always relied on the judgment execution as satisfaction of their claim. As proof, defendants include a transcript of the Small Claims proceeding held before Judge Bluth on November 22, 2010. To the extent this transcript was referred to in the Decision, but never previously produced as an exhibit, it may be considered part of a motion to renew. The transcript shows that Cecile stated that she was paid after the previous adjournment date (September 28, 2010), corresponding to the sheriff's execution, and the $3,200 was never cashed. The transcript shows that Cecile considered the check she received by virtue of the sheriff's execution the only payment in the case and she asks if Judge Bluth would you like to see the check. The transcript shows that plaintiff's counsel represents that plaintiff did not know of the default judgment at the time it offered a check for $3,200 when plaintiff's principal swore that she did have knowledge. The transcript also shows that plaintiff's counsel knew that the $3,200 check was never cashed.

Plaintiff knew the $3,200 check was never cashed and yet argued that the execution should be vacated because that money was never owed in the first instance. Defendants contend that plaintiff stipulated in writing to an extension of time of Rebecca's occupancy until May 31, 2007. To the extent this stipulation was never previously submitted, it constitutes part of the motion to renew. It had not been previously submitted because it is essentially duplicative of another form of the stipulation as set forth defendants' Verified Answer. Therefore, there was never any entitlement to the "overstay" fee and a proper basis always existed for the commencement of an action for the return of the security deposit as well as a separate basis for return of "hotel taxes" not part of the original lease but not discovered until after the first Small Claims action had been filed.

As to the fourth point, the Court stated that the "plaintiff was not served with summons or complaint in the First Civil Court Action." Defendants contend that the Small Claims Court, not the plaintiff, served the defendant in the Small Claims action, and service was effected upon plaintiff at the address listed on its own business checks, *i.e*, for $3,200 and $1,763.35. "60 E. 42nd St." remains the official corporate address of plaintiff on file with the Secretary of State as of November 3, 2011. Additional documentation not part of the original moving papers establishing plaintiff's continued official business address was obtained on November 3, 2011 is submitted for renewal to establish that process was properly served at the only address known, both by Small Claims Court and the Sheriff's Office.

Defendants' fifth point raises an issue as to the Court's finding of fraud, concealment, and frivolous conduct against them. Neither the motion to disqualify nor any other actions were purposely designed to delay or prolong the litigation nor did the defendants meet the standard for

frivolous conduct. Defendants' counsel's affidavit, setting forth the reasonable basis of all the actions taken herein, may be considered that part of the motion which is a motion to renew which could not have previously been furnished because it is an explanation in response to the Decision. The sworn affidavits of both Cecile and her witness, Jenna L. Harju, present at Mr. Foote's phone call in which he indicated he was taping the conversations, are also set forth herein. The purpose of including them here as part of the motion to renew is to set forth the basis of a "clear showing" referred to in the Decision at page 10 for the court reconsider its decision that the filing of the motion in the first instance was "frivolous" and geared for the purpose of delaying and prolonging the litigation resulting in an award of sanctions for attorneys' fees and costs. Additionally, as plaintiff's representative's sworn affidavit shows she had notice of the default judgment in December, 2009, that motion itself was not frivolous.

Defendants are involved in a time-consuming process of subpoenaing California telephone records to prove the phone calls made by Philip Foote to Cecile Gromis on or about March 11, 2011. The purpose of doing so at this stage is to refute the claim by plaintiff's that denied that any phone calls were taped, in order to show the plaintiff's attorney's papers were taking on some of the characteristics of unsworn testimony and that they lacked clean hands.

Defendants also argue that the Small Claims Court transcript shows there was no fraud, concealment, or conversion on the part of the defendants and that the actions of the defendants herein were always sincere, in good faith and never with any design to delay or prolong litigation whatsoever.

Thus, defendants request that the Court vacate the previous order granting summary

judgment on the plaintiff's first cause of action for $4,424,58, on its fourth cause of action for fraudulent inducement, concealment and misrepresentation as against Cecile and Edwin Gromis, on the sixth cause of action for fraud against Cecile Gromis, on the seventh cause of action against Cecile Gromis for conversion, and for the eighth cause of action for attorney's fees, and that branch of the plaintiff's cross-motion for sanctions against the defendants pursuant to NYCRR 130-1.1 granting attorney's fees and sanctions, and find the defenses to permit the entire matter to proceed to trial, or in the alternative to grant summary judgment to the defendants and impose costs and sanctions on the plaintiff.

In opposition, plaintiff argues that defendants do not assert any new facts and do not offer any explanation as to why the new evidence supporting facts originally asserted are being produced now. It appears that defendants are attempting to create a new record for their appeal. Defendants provide additional affidavits in support and the transcript from the Small Claims action in support of their motion. The facts and proof alleged were all available to the defendants at the time of the original motion and cannot be used to grant a motion to renew.

In any event, the transcript from the Small Claims action further proves that plaintiff was unaware that defendants were in possession of restrained funds and believed that the check defendants were speaking of was the $3,200 check originally given to defendants by plaintiff. Defendants' counsel has submitted an affidavit, in support of defendants' motion to renew, and no new facts are being alleged. Thus, defendants' motion to renew should be considered as one solely to reargue, and as such, should be denied because the Court did not misapprehend the relevant facts or misapply the law.

Defendants' claim that the Court misapprehended the facts of when plaintiff first

received notice of a default judgment against her is not material. Regardless, it was the principal of plaintiff, Andrea Lara, who confused her dates regarding previous litigation and not the Court. Ms. Lara was approached by Edwin Gromis in or around December 2009 wherein, Mr. Gromis demanded the return of the $3,200 security deposit. In Ms. Lara's Civil Court Affidavit, she mistakenly stated that in or around December 2009 was the date she first received notice of the default. This is a non-material error that has no effect on the outcome of the Court's Order since she corrected stated in the underlying action that she first received notice of the default on July 12, 2011.

Defendants additional assertions in their motion to renew are also unavailing and do not support the granting of a motion to reargue by this Court.

In the event this Court grants defendants' motion to renew, plaintiff requests that the Court grant, *sue sponte,* plaintiff's original cross-motion in its entirety.

Plaintiff also seeks sanctions against defendants and their counsel for their frivolous litigation practices. Defendants' motion was filed as retaliation against plaintiff for not granting them an adjournment of the preliminary conference scheduled by the Court. Plaintiff also argues that defendants have sued plaintiff on three different occasions, and it is clear by defendants' motion to reargue and renew and the simultaneous filing of a Notice of Appeal that defendants have no good intentions and do not seek to have an amicable resolution to this case. Defendants cannot put forth one case or statute that supports this frivolous motion. Because there is no merit to defendants' motion to renew, the Court should impose additional sanctions against defendants.

Discussion

Pursuant to CPLR 2221(e):

A motion for leave to renew:

> 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.

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). 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 renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529 NYS2d 277). Renewal is not available as a second chance for parties who have not exercised due diligence in making their first factual presentation (*Chelsea Piers Management v Forest Electric Corp.*, 281 AD2d 252 [1st Dept 2001]).

A motion for leave to reargue under 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" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] lv. denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], rearg. denied 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

As to the first point concerning the date upon which plaintiff's principal was on notice of the First Civil Court Action which awarded the default judgment, reargument is granted. However, upon reargument, the Court declines to modify its decision. The record indicates that the reference to December, 2009 made by plaintiff's principal was in error. Further, the Court notes that whether the principal of the plaintiff received notice of the default judgment issued in the First Civil Court Action "on or around December, 2009" as opposed July 12, 2010 when Bank of America notified plaintiff of the restraining notice placed against plaintiff's account, as stated by the Court, is of no moment. This factor had no bearing on the outcome of the Court's decision, and defendants failed to establish how plaintiff's notice on an earlier date warrants a change in this Court's analysis or opinion.

As to the second point, reargument is granted but renewal is denied. Defendants' contention that the settlement of June 25, 2010 had only to do with the repayment of $1,763.35, paid in addition to the $3,200 a month rent, charged as "Occupancy Tax" and "Room Use," charges which were not additional rent and which were sought to be recouped independent of the $3,200 security deposit, is inconsequential. The Court recognized that this $1,763.35 amount was for the settlement of the Second Civil Court Action, which in the same paragraph, was referenced by the Court as an action for "the return of the interest amount." Although the Court referred to the plaintiff's payment in December 2009 *and* plaintiff's payment of the settlement for the interest amount in June 2010 (see Court Order, p. 17) "in satisfaction of the default judgment against plaintiff" (obtained in the First Civil Court Action), and the First Civil Court Action solely involved the security deposit, the Court's conclusion stands. As stated by the Court, the Sheriff effected a levy upon plaintiff's account for $4,168.98, which was in connection

with the First Civil Court Action, and plaintiff also tendered an additional payment to defendants. Therefore, there is no basis to disturb the Court's finding that plaintiff established its entitlement to a declaratory judgment that it is entitled to the return of $4,168.98.

As to defendants' third point contending that the defendants were not paid twice as stated by the Court, renewal based on documents (*i.e.*, the transcript of the Small Claims action held before Judge Bluth on November 22, 2010 and 30-day termination notice) establishing that the check plaintiff tendered for $3,200 was not cashed, is denied. Such information was in possession of the defendants at the time of the prior motion, and defendants failed to establish a justifiable basis for failing to bring this fact to the Court's attention in their opposition papers (*NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 845 NYS2d 235 [1st Dept. 2007], appeal dismissed 10 NY3d 757, 853 NYS2d 540, reconsideration denied 10 NY3d 883, 860 NYS2d 479, certiorari denied 129 SCt 458, 172 LEd2d 327). In other words, defendants did not argue, in opposition to plaintiff's cross-motion for the return of certain moneys, that the only compensation for the security deposit that the defendants ever received was from the sheriff's execution. Furthermore, that counsel "as an officer of the court" intends to "present the original, un-cashed check to the court at the first conference date as proof that there was no double-payment" is insufficient on their motion for renewal. There is no indication that counsel for defendants returned this check to plaintiff. Nor is reargument appropriate, since reargument is not designed to permit a party to raise arguments not previously raised.[1]

[1] Defendants' additional contention that the 30-day termination notice was not previously submitted because it is essentially duplicative of another form of the stipulation as set forth in Exhibit Two of the defendants' Verified Answer is insufficient to warrant renewal or reargument. Defendants rely on this document in support of their claim that plaintiff was never entitled to the "overstay" fee and that a proper basis always existed for the commencement of an action for the return of the security deposit as well as a separate basis for return of "hotel taxes" not part of the original lease but not discovered until after the first Small Claims action had been filed. This

As to the fourth point, that the Court stated that the "plaintiff was not served with summons or complaint in the First Civil Court Action" is immaterial to the Court's determination. Thus, there is no basis for the Court to consider any of the documentation in support of the claim that process was properly served at the address on file with the Secretary of State.

And as to the fifth point that defendants' actions were appropriate and not designed to delay or prolong the litigation, and that defendants failed to meet the standard for frivolous conduct, renewal and reargument is denied. As to renewal based on the Small Claim Court transcript, renewal is unwarranted. Contrary to defendants' contention, the Court's decision did not reference the transcript, which was not previously submitted, but referred to defendants' counsel's statement concerning what transpired in the Small Claims action (Verified Answer to Cross Motion, ¶3). And renewal based on defendants' counsel's affidavit justifying the actions defendants' undertook were appropriate is not "new" information, in response to the Court's decision. Such affidavit, which covers the same topics presented in defendants' previous opposition to the plaintiff's request for sanctions, could have been submitted before and does not raise anything new. Nor is reargument warranted, since the Court did not overlook any facts or arguments that would change this Court's determination in this regard.

As to defendants' additional contention that reargument and renewal of the Court's finding of conversion, fraud, or "concealment," reargument is granted in part on the conversion, fraud and concealment claims against Edwin.

The Court's opinion regarding the conversion claim (seventh cause of action) was

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contention, however, does not change the Court's opinion in any manner.

premised on the receipt and retention of the *$4,424.58* check received from the Sheriff, resulting from the First Civil Court Action. Thus, defendants' reliance on the purported fact that the $3,200 check was not cashed is misplaced. And, that the $3,200 check was not cashed is inconsequential, as this check has not yet been returned to plaintiff and may be cashed. However, the $4,424.58 check is made out to *Cecile*, not or Edwin, and the record contains no evidence that Edwin exercised the degree of control necessary to support a claim of conversion against him.

As to the fraud and concealment claims, defendants failed to cite any "new" facts, or facts or law the Court overlooked to support their claim that there can be no unlawful fraud or "concealment" until the $3,200 check is cashed. And, even if the Court were to consider the transcript on renewal, or on reargument based on defendants' previous position in opposition that the satisfaction of the security deposit claim was made known to the Small Claims Court, the transcript does not support defendants' claim. In particular, the transcript indicates the following conversation between Cecile and the Court:

> MS. GROMIS: I don't really know why we're here, because we received the security, but we received it after September 28 or we received it after the last time I was in court.
> THE COURT: So, you got the security deposit back?
> MR. GROMIS: Yes.

By the time of this proceeding on November 22, 2010, the Sheriff's check, dated September 16, 2010, was tendered, and plaintiff had already tendered its $3,200 check to Edwin. The record does not clarify to which payment Cecile was referring. Even after plaintiff's counsel explained to the Court that plaintiff tendered the $3,200 check to defendant, Cecile remained silent as to the Sheriff's check, which had been tendered on or about September 15, 2010, more

than two months prior to the Small Claims trial.

In light of the above, and given that the defendants' counsel's affidavit does not raise any new facts that warrant a change in this Court's previous order, there is no basis to renew or reargue this Court's finding as to Cecile on the fifth cause of action. And, defendants' claim that they acknowledged their receipt of the Sheriff's check in Small Claims Court, is a new argument, improperly raised in reargument as to Cecile.

However, as the Edwin, and upon reargument, the Court vacates its finding on the fifth cause of action as to Edwin. Upon reargument and review of the record, the Court finds that plaintiff failed to establish these claims as asserted against Edwin as a matter of law. Although plaintiff stated in its previous cross-motion, that both Edwin and Cecile appeared in Court and failed to disclose to the Court the payments plaintiff made, there is no evidence in the record and plaintiff failed to establish, that Edwin, who was not a party to that Small Claims proceeding, actually appeared on the record before the Court and made any statements to the Court. Plaintiff failed to establish that unlike Cecile, *Edwin* bore any special relationship or duty to the Court to disclose the payments made by plaintiff or special relationship or duty to the plaintiff that the First Civil Court action was filed by Cecile.

As to plaintiff's request for sanctions against defendants, this application is denied.

NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 (c) states that "conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable

argument for an extension, modification or reversal of existing law;
(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
(3) it asserts material factual statements that are false."

Despite the denial of the ultimate relief sought by defendants herein, and the claim that their motion was made in retaliation of plaintiff's refusal to grant defendants' an adjournment, the record fails to support an award of sanctions against them.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion for leave to reargue the Court's statement concerning the date upon which plaintiff's principal was on notice of the First Civil Court Action, reargument is granted. However, upon reargument, the Court declines to modify its decision in this regard; and it is further

ORDERED that the branch of defendants' motion for leave to renew and reargue the Court's reference to the settlement of June 25, 2010 for reargument is granted but renewal is denied. And upon reargument, the Court, the Court declines to modify its decision in this regard; and it is further

ORDERED that the branch of defendants' motion for leave to renew and reargue the Court's opinion that defendants were paid twice is denied; and it is further

ORDERED that the branch of defendants' motion for leave to renew and reargue the Court's statement that the "plaintiff was not served with summons or complaint in the First Civil Court Action" is denied; and it is further

ORDERED that the branch of defendants' motion for an order vacating the previous

order granting summary judgment on the plaintiff's first cause of action for $4,424,58 is denied; and it is further

ORDERED that the branch of defendants' motion for leave to renew and reargue the Court's decision on plaintiff's cause of action for fraudulent inducement, concealment and misrepresentation as against Cecile and Edwin Gromis, the sixth cause of action for fraud against Cecile Gromis, the seventh cause of action for conversion, and for the eighth cause of action for attorney's fees, and plaintiff's cross-motion for sanctions against the defendants pursuant to NYCRR 130-1.1 granting attorney's fees and sanctions, and find the defenses to permit the entire matter to proceed to trial, or in the alternative to grant summary judgment to the defendants and impose costs and sanctions on the plaintiff, is granted solely to the extent that reargument is granted on the conversion, fraud and concealment claims against Edwin; and it is further

ORDERED that upon reargument of the conversion, fraud and concealment claims against Edwin, the portion of the Court's order granting summary judgment against Edwin on these claims is vacated; and it is further

ORDERED that plaintiff's application for sanctions against defendants and their counsel for their frivolous litigation practices is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 16, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD