Homar v American Home Mtge. Acceptance, Inc.
2012 NY Slip Op 33723(U)
September 27, 2012
Supreme Court, Orange County
Docket Number: 4330/2011
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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ANDREW J. HOMAR and JOSEPH E. RUYACK III,

Plaintiffs,

-against-

AMERICAN HOME MORTGAGE ACCEPTANCE, INC. et al.,

Defendants.

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.

Action No. 1
Index No. 4330/2011

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DEUTSCHE BANK NATIONAL TRUST COMPANY,

Plaintiff,

Action No. 2
Index No. 7829/2011

-against-

ANDREW J. HOMAR, et al.,

Defendants.

Motion Date: September 24, 2012

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The following papers numbered 1 to 6 were read on these motions by Andrew Homar and Joseph E. Ruyack III to reargue the Court's decision and order disqualifying Joseph E. Ruyack III, Esq. as counsel for co-plaintiff Andrew J. Homar:

Notices of Motion-Affidavits-Exhibits 1-6

Upon the foregoing papers it is ORDERED that the motions are determined as follows:

Andrew Homar and Joseph E. Ruyack III to reargue the Court's decision and order

disqualifying Joseph E. Ruyack III, Esq. as counsel for co-plaintiff Andrew J. Homar in both of the aforesaid actions. Their adversaries originally sought Mr. Ruyack's disqualification on the grounds that Mr. Ruyack's interest as a co-plaintiff in this matter and his signature on various documents material to this case make him a necessary witness with a potential for conflict between his personal interests and those of the co-plaintiff. Messrs. Homar and Ruyack vehemently proclaim that this Court was incorrect in granting the motion to disqualify and essentially assert that this Court refuses to acknowledge what Messrs. Homar and Ruyack declare is a fraud scheme by the banks involved. The fact that the mortgage itself has not been paid is clearly of no moment to Messrs. Homar and Ruyack.

As a preliminary matter, American Home Mortgage Acceptance, Inc. and Deutsche Bank National Trust Company admittedly submit late opposition to the instant motions. CPLR §§ 2214(b) and (c) read

> (b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits shall be served at least seven days before such time if a notice of motion served at least twelve days before such time so demands; whereupon any reply affidavits shall be served at least one day before such time.
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> (c) Furnishing papers to the court. Each party shall furnish to the court all papers served by him. The moving party shall furnish at the hearing all other papers not already in the possession of the court necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced by him at the hearing on notice served with the motion papers. Only papers served in accordance with the

> provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct.

The rules above, regarding the timely submission of papers, and the sanctions prescribed by the same should be strictly enforced by the court, "since indifference to these provisions results in unfairness to the movant and impairment of the administration of justice." *Wallin v Wallin,* 34 AD2d 870, 871 (3rd Dept.1970). Thus, where a party submits tardy papers in violation of CPLR § 2214, presents no excuse for the violation and such a delay results in prejudice, the court should exercise its discretion and reject said papers. *Mosheyva v Distefano,* 288 AD2d 448 (2nd Dept.2001); *Bush v Hayward,* 156 AD2d 899 (3rd Dept.1989). In fact it has been held that untimely papers should be rejected when no excuse for the delay is proffered, irrespective of whether the movant has been prejudiced by the delay. *Risucci v Zeal Management Corp.,* 258 AD2d 512 (2nd Dept.1999). In fact, accepting late papers without an excuse for the delay has been held to be an abuse of the court's discretion. *Romeo v Ben-Soph Food Corporation,* 146 AD2d 688 (2nd Dept.1989).

In the instant case, Messrs. Homar and Ruyack served their motions on August 31, 2012 and made them returnable on September 24, 2012. The banks never requested any adjournment. Instead of serving papers within the statutory 7 day period, the banks instead chose to serve opposition on September 21, 2012, 4 days after the 7 day statutory period within which to do so, in derogation of the CPLR. No where in the banks' opposition is any reference made to any excuse for the late opposition only a request for the Court to consider same. The Court will not consider untimely served papers and therefore the banks' opposition will not be considered.

Turning to the question of the motion to reargue, CPLR 2221 states in pertinent part as

follows:

> (d) A motion for leave to reargue:
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> 1. shall be identified specifically as such;
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> 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
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> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

The Court of Appeals long ago pronounced the purpose behind a motion to reargue and criticized counsel for abusing the CPLR's provisions relating thereto. In *Fosdick v Town of Hempstead*, 126 NY 651 (1891) the Court stated:

> This is a motion for a reargument, and the moving papers do not show a single ground recognized by this court as a proper foundation for the motion. The learned counsel for the defendant argued orally every proposition in the case with zeal and ability. The court has decided against him not on account of his failure to properly present his views for the defendant, but because, after mature and careful deliberation, it has differed with the learned counsel in his contention as to the proper construction of the will. Many years ago the court announced the rule which should govern in this class of motions. In *Mount v. Mitchell*, 32 N. Y. 702, it was stated that a motion for reargument should be founded on papers showing that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with the statute, or a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel. In *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, at 73, the same rule was again alluded to, and announcement again made that the court would adhere to it, and that motions for a reargument would not be entertained unless counsel brought the case within the rule. Judging by the character of the papers upon which motions of this nature are now frequently

> made, we should assume that the profession has lost sight of the rule, for in most of the cases which have lately come under our notice there has been an entire failure to comply with its requirements, and the motion has been made simply because the unsuccessful counsel has thought that he would like to again argue the very questions he had already submitted to, and which had been expressly decided by, the court. While it is very possible that we err in many cases, yet the rule adopted in regard to reargruments is a proper one, considering the fact that there must be at some point an end of litigation; and after counsel has had his day in this court, and has been unsuccessful in his case, it is but fair to the court, and to other litigants who are pressing to be heard, that a case should be made such as the court has decided to be necessary before entertaining the question of the propriety of granting a reargument

Fosdick, 126 NY at 651-652 (emphasis supplied).

More recently in *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 (1st Dept. 1992), the Court held:

> A motion for leave to reargue pursuant to 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." (*Schneider v. Solowey,* 141 A.D.2d 813, 529 N.Y.S.2d 1017.) Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage, Inc. v. Home Insurance Co.,* 99 A.D.2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v. Roche,* 68 A.D.2d 558, 418 N.Y.S.2d 588.)

Pahl, 182 AD2d at 27; *Foley v Roche,* 68 AD2d 558, 567 (1st Dept. 1979); *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept. 1984).

Messrs. Ruyack and Homar fail to demonstrate that the Court either misapprehended or overlooked the law or mistakenly applied the facts. Mr. Ruyack is a party to these actions. His apparent intimate and personal knowledge of and involvement with the matters at issue requires

this Court to find that his testimony is necessary to this action (*see Congregation Talmud Torah Ohev Shalom R. Morris Kevelson v Sorscher*, 69 AD3d 898). The Court does not believe that it overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in deciding the motions in question. Movants simply disagree with the Court's decision which is their privilege, as it also is their privilege to seek Appellate Division intervention. However, movants' present motions are denied in their entirety.

The foregoing constitutes the decision and order of this Court.

Dated: Sept 27, 2012
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT,
A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE