ORIGINAL

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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ANNE DENISSE HIDALGO,

Plaintiff,

-against-

4-34-68, INC., NATIONAL GRANITE 1031 SERVICES, INC., DONALD WHITFIELD, JOHN MCDERMIT, TOM BACHER and LENNOX BROWN, THOMAS BRYANT and KAREN BRYANT,

Defendants.

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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.

Index No. 4006/2008
Motion Date: May 2, 2012

The following papers numbered 1 to 8 were read on these defendant Karen Bryant's motion to reargue and plaintiff's cross-motion to compel defendant Bryant to comply with the Court's prior order granting plaintiff summary judgment:

Notice of Motion-Affirmation-Exhibits 1-3

Notice of Cross-Motion-Affirmation-Exhibits 4-6

Reply Affirmation-Exhibits 7-8

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

This is an action seeking the enforcement of deed restrictions surrounding the placement of a house owned by defendant Karen Bryant. This Court previously granted plaintiff's motion for summary judgment and upheld the deed restrictions as against defendant Bryant. Defendant

Bryant moves to reargue and plaintiff moves to compel defendant Bryant to comply with this Court's prior order. Defendant Bryant opposes the cross-motion first claiming it is untimely made and should not be considered and then claiming that the relief requested is not that which can be granted by the Court.

Motion to Reargue

CPLR 2221 states in pertinent part as follows:

(d) 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 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 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).

In the instant case, defendant Bryant failed to sufficiently demonstrate any law or fact which the Court misapprehended. The fact remains that all evidence on the prior motion demonstrated that defendant Bryant proceeded at her own peril and knowingly placed a portion

of her house in the area restricted by the filed deed. She knew it, chose to proceed anyway, and now seeks a judicial cure for her own blatant flouting of a filed deed restriction. Such a cure is not forthcoming and therefore defendant Bryant's motion to reargue is denied in its entirety.

Cross Motion

Plaintiff cross-moves to compel plaintiff's compliance with the Court's prior order. Defendant Bryant opposes claiming that it was untimely served, and even if it was, there relief sought is improper.

CPLR 2215 specifically requires that "At least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers . . ." As noted in the Practice Commentaries:

> The movant should take careful note that in order to exploit the option of requiring answering papers and any cross-motion to be served at least seven days in advance of the return date, so as to be sure of getting the answering papers and any cross-motion in sufficient time and securing the right to the last word in a reply or responding papers, the moving papers must specifically require the adverse party to serve answering papers and any cross-motion no later than the seventh day before the return date. This merely entails adding a clause or sentence to the notice of motion, commonly called a "seven day demand." The following will satisfy: "Pursuant to CPLR 2214(b), answering affidavits and any notice of cross-motion, with supporting papers, if any, are required to be served upon the undersigned at least seven days before the return date of this motion." *See* 22 N.Y.C.R.R. § 202.7(b) (including a form notice of motion). A motion served with sufficient notice to require that answering papers be served seven days in advance of the return date, but without the seven day demand, only requires answering papers to be served two days in advance of the return date.

Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:9)
In the instant case, defendant's original moving papers excludes a specific demand for cross-

motions to be served 7 days in advance, thereby invoking the alternative rule requiring only 3 days service if done personally. The cross-motion was served timely as it was served 5 days prior to the return date by personal service.

The cross-motion, however, seeks relief which this Court is not empowered to grant under the circumstances. The Court's previous decision and order stands. However, the relief requested is not to order that the defendant comply therewith. Counsel is directed to CPLR Article 51 which specifically lays out the proper enforcement mechanisms. Should relief that is requested thereunder be moved for by an appropriate party, the Court may entertain it at that time. No such application, however, is currently before this Court. As such, plaintiff's cross-motion must be denied.

The foregoing constitutes the decision and order of this Court.

Dated: May 24, 2012 ENTER
Goshen, New York

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