

Metropolitan Plaza WP, LLC v Goetz Fitzpatrick, LLP
2014 NY Slip Op 33666(U)
December 17, 2014
Supreme Court, New York County
Docket Number: 115519/2009
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Metropolitan Plaza WP, LLC
-v-
Goetz Fitzpatrick, LLP

INDEX NO. 115519/09
MOTION DATE _____
MOTION SEQ. NO. 04

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

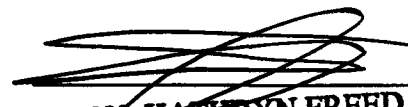
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
DEC 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/17/14
DEC 17 2014


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
METROPOLITAN PLAZA WP, LLC f/k/a
RIDGEMOUR MEYER PROPERTIES, LLC,
RIDEGMOUR DEVELOPMENT CORPORATION,
W&A DEVELOPMENT, LLC,
WILLIAM A. MEYER and A.J. ROTONDE,

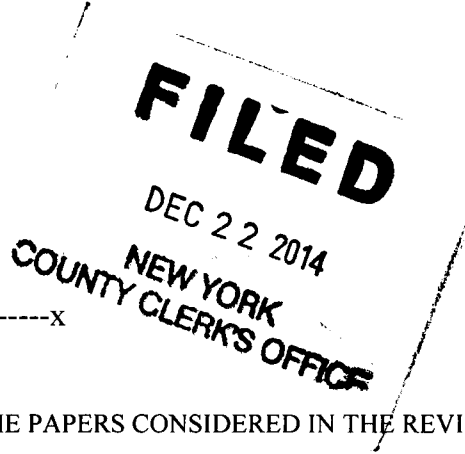
DECISION AND ORDER
Index Number 115519/2009
Motion Seq. No. 004

Plaintiffs,

-against-

GOETZ FITZPATRICK, LLP and
DONALD J. CARBONE, ESQ.,

Defendants.



-----X
HON. KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVIT ANNEXED.....	1-2(Exs. A-G)
AFFIRMATION IN OPPOSITION.....3.....
REPLY AFFIRMATION.....4.....
MEMORANDUM OF LAW.....5.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants Goetz Fitzpatrick, LLP and Donald J. Carbone, Esq. Move, pursuant to CPLR 2221, to reargue and/or resettle a prior order of this Court (York, J.), entered October 7, 2013 (“the order”), which granted summary judgment in their favor dismissing the complaint. Defendants’ motive in seeking the requested relief is apparent. They are concerned that a non-party to this action, Ginsburg Development Companies (GDC), will rely on certain language in the order, as discussed below, in renewing its summary judgment motion against defendants (GDC Renewal Motion) in a related action filed in the Supreme Court, Westchester County in which defendants herein are also

named as defendants. The relationship among defendants, plaintiffs and GDC, as well as the various disputes among them, were addressed in detail in the order. Therefore, familiarity with the background facts and issues relating to both the captioned action and the Westchester County action is presumed.

Because the GDC Renewal Motion was subsequently denied by the Westchester Court, a copy of that decision is annexed as Exhibit D to the Reply Affirmation of Steven Kent in Further Support of Defendants' Motion for Reargument (Reply Affirmation). Defendants' motive and concern in filing this motion is moot and unfounded. Indeed, Defendants acknowledge that they "offered to withdraw the [instant] motion pursuant to a stipulation [with Plaintiffs]" Reply Affirmation, ¶ 3.

In addition to mootness, the arguments made by defendants in support of this motion are without merit for the reasons stated below. Accordingly, the instant motion is denied.

Discussion

Legal Principles Governing Reargument Motions

CPLR 2221 (d) (2) states, in relevant part, that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" Also, a motion to reargue, "addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Mangine v. Keller*, 182 AD2d 476, 477 (1st Dept 1992)(citation and internal quotation marks omitted).

Initially, as plaintiffs correctly assert, defendants cannot seek reargument herein since they were not aggrieved by this Court's order. See *Tirado v. Miller*, 75 AD3d 153, 161 (2d Dept 2010). As the parties prevailing on a motion for summary judgment dismissing the complaint against them, it is clear that they were not aggrieved by the order. In any event, the motion must be denied for the reasons set forth below as well.

The Alleged Misapprehensions and Oversights

The issues of fact or law that were allegedly misapprehended or overlooked by this Court, as contended by defendants and for which they request a modification of the order, are: (1) to modify the statement on page 12 of the order that “[d]efendants do not oppose the application of collateral estoppel” to instead read “[d]efendants oppose the application of collateral estoppel to the [d]efendants, while supporting the application of collateral estoppel to the [p]laintiffs;” and (2) on page 13 of the order, to modify the statement “despite [p]laintiffs’ contention to the contrary, they ... as well as [d]efendants (who now reluctantly acknowledge wrongdoing on their part), were both found to have acted dishonestly ...” such that the parenthetical clause is changed to read “who deny wrongdoing on their part.” Defendants’ Brief, at 2. Defendants contend that these “minor modifications are needed to correct the [order] and forestall GDC’s improper use of the [order] in the Westchester Action.” *Id.*, at 5.

Collateral Estoppel

With respect to the requested modification that involves the application of the principle of collateral estoppel, the order states, in relevant part:

“In this case, Defendants do not oppose the application of collateral estoppel. Indeed, they contend, as follows:

if Carbone, a nonparty to the bankruptcy who was unrepresented by counsel, can be criticized by the Bankruptcy Court, then RMP and Rotonde, who were parties to the bankruptcy and represented by experienced bankruptcy attorneys, should be bound by those portions of the Bankruptcy Decision which set forth RMP’s and Rotonde’s own wrongdoings”

Order, at 12 (emphasis added).

The foregoing language in the order is based, in large part, on the statement made by defendants in their brief in support of their motion for summary judgment, dated October 15, 2012, in which they argued that “Plaintiffs’ Claims Are Barred by The Bankruptcy Decision.” Defendants’ summary judgment motion brief, at 12 (heading for Point I of arguments). Defendants sought to apply certain favorable portions of the Bankruptcy Court’s decision and the principle of collateral estoppel to preclude plaintiffs’ claims against them in this action (motion sequence number 003). On the other hand, however, plaintiffs also sought to use other portions of the Bankruptcy Court’s decision in their favor in seeking partial summary judgment against defendants in this action (motion sequence number 002). This Court noted as much in its order: “[d]efendants also point out, correctly, that [p]laintiffs have selectively chosen to cite only those portions of the Bankruptcy Decision that are in their favor.” Order, at 12.

In light of the foregoing, the subject statement in the order, which addresses summary judgment motions filed by plaintiffs and defendants in this action, that “[d]efendants do not oppose the application of collateral estoppel,” is accurate. Yet, defendants request that the statement be modified to state that they oppose the application of collateral estoppel as against them, but support the application of the same to plaintiffs. They argue that collateral estoppel is inapplicable to

Carbone because his “alleged wrongdoing was not essential to the issues before [Bankruptcy] Judge Bernstein – or for that matter to [the issues] in this action.” Defendants’ Brief at 13. This argument is unavailing. In the bankruptcy action, there was an explicit finding that Carbone had acted dishonestly and, in this action, this Court also found that Carbone had participated in a fraudulent scheme, as discussed below.

In Pari Delicto

With respect to the requested modification that involves whether defendants “acknowledge wrongdoing on their part,” the order states, in relevant part: “[b]ased on the foregoing, despite [p]laintiffs’ contention to the contrary, they (including RMP, RDC and Rotonde), as well as [d]efendants (who now reluctantly acknowledge wrongdoing on their part), were both found [by the Bankruptcy Court] to have acted dishonestly” Order, at 13. Moreover, the order states that, after conducting several days of evidentiary hearings during which it heard the testimony of many witnesses (including Carbone and Rotonde) and reviewed numerous trial exhibits, the Bankruptcy Court found that “the debtor, its principal, Rotonde, and its lawyer, Carbone acted dishonestly when they caused Pinnacle to transfer the Property secretly to the debtor” Order, at 12 (quoting Bankruptcy Decision). Defendants argue that they did not engage in any deceit or wrongdoing, despite the affirmative finding of the Bankruptcy Court.

Notably, it was defendants who argued that the doctrine of in pari delicto applied herein. That doctrine “mandates that the courts will not intercede to resolve a dispute between two wrongdoers.” Defendants’ summary judgment Brief at 15, quoting *Kirschner v. KPMP LLP*, 15 NY3d 446, 464 (2010). More importantly, whether defendants concede or deny wrongdoing on their part is of no

moment herein, since the order cited ample support for its conclusion that “there is ample circumstantial evidence which shows that Rotonde and Carbone were participants in the fraudulent scheme.” Order, at 15-17. The order concludes, after citing applicable case law, that “[b]ecause this case is similar to the above cases that involved fraud by both wrongdoers, application of the doctrine is warranted. In such regard, and on this basis alone, [d]efendants’ motion seeking dismissal of the complaint should be granted.” Order, at 19.

Conclusion

Based on the foregoing, defendants’ motion for reargument and/or resettlement of the order is denied. Indeed, defendants acknowledge that “[t]here is virtually nothing in the Court’s reasoning that is erroneous or mistaken. The Court properly applied the collateral estoppel and in pari delicto doctrines to the facts of this case.” Reply Affirmation, at 2.

Therefore, in accordance with the foregoing, it is hereby:


ORDERED that defendants’ motion is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: December 17, 2014

ENTER:

FILED
DEC 22 2014
NEW YORK
COUNTY CLERK'S OFFICE


KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT