Matter of Ally Fin., Inc. v All County Towing & Recovery
2017 NY Slip Op 32924(U)
May 19, 2017
Supreme Court, Albany County
Docket Number: 1531-16
Judge: James H. Ferreira

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Special Proceeding
Application of ALLY FINANCIAL, INC.,
Petitioner,

-against-

ALL COUNTY TOWING & RECOVERY and
THE NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES,
Respondents.

DECISION & ORDER
Index No.: 1531-16
RJI No.: 01-16-120491

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Rudolph J. Meola, Esq.
Law Offices of Rudolph J. Meola
Attorney for Petitioner
1822 Western Avenue
Albany, New York 12203

Peter B. O'Connell, Esq.
Attorney for Respondent All County Towing & Recovery
130 Washington Ave.
Albany, New York 12210

HON. JAMES H. FERREIRA, Acting Justice:

Petitioner commenced this proceeding pursuant to Lien Law § 201-a seeking an order declaring a lien asserted by respondent All County Towing & Recovery (hereinafter respondent) to be null and void. Respondent opposed the petition. By Decision, Order and Judgment dated December 6, 2016, the Court found that respondent had failed to meet its burden of establishing the validity of its claimed lien and granted the relief sought in the petition. Specifically, the Court found that the evidence submitted by respondent in opposition to the petition – an attorney affirmation and

several documents – was insufficient to establish that respondent complied with the notice requirements set forth in Lien Law § 184 (2) and (5), as was required for a lien to attach. The Court found the affirmation of respondent's counsel to be without evidentiary value because counsel "d[id] not purport to have personal knowledge of the date and manner in which the notices were sent, or personal knowledge that the letter attached to his [affirmation] is, in fact, the letter that was sent to petitioner." Respondent now moves, pursuant to CPLR 2221 (d) and (e), for leave to reargue and renew. Petitioner opposes the motion.

Reargument

CPLR 2221 (d) provides, 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, but shall not include any matters of fact not offered on the prior motion." " '[A] motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision' " (Loris v S & W Realty Corp., 16 AD3d 729, 730 [3d Dept 2005], quoting Peak v Northway Travel Trailers, 260 AD2d 840, 842 [3d Dept 1999]; see Barnett v Smith, 64 AD3d 669, 670-671 [2d Dept 2009]). "Reargument is not a vehicle permitting a previously unsuccessful party to once again argue the very questions previously decided or to assert new, never previously offered arguments" (Kent v 534 E. 11th St., 80 AD3d 106, 116 [1st Dept 2010] [citations omitted]).

With respect to reargument, respondent contends that the Court overlooked or misapprehended facts or law when it granted the petition in this matter because a failure to provide the notice set forth in the Lien Law only affected respondent's asserted lien for storage charges and

did not affect its lien for towing charges. Respondent also argues that the Court should have accepted the documents attached to counsel's affirmation as business records pursuant to CPLR 4518 (a) and afforded them evidentiary value. Respondent urges that the Court should have upheld the asserted lien because respondent's notice met all the statutory requirements.

Upon due consideration, the Court finds that respondent has not established that the Court "overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision" (Peak v Northway Travel Trailers, 260 AD2d at 842; see CPLR 2111 [d]). Inasmuch as respondent argues that its asserted lien for towing was not affected by its failure to provide notice, respondent has not cited any legal authority for that proposition. The Court notes that, although Lien Law § 184 provides that a "a failure to mail [statutory] notice in a timely fashion shall not affect a lien for towing" (Lien Law § 184 [2] , [5] [emphasis added]), that provision is inapplicable where, as here, respondent failed to establish that it perfected its lien by serving notice upon petitioner. The Court also declines to grant leave to reargue on the ground that the Court should have considered the documents attached to respondent's answer as business records with independent evidentiary value, as respondent's submissions in support of its answer did not contain any basis for a finding that the documents were admissible as business records pursuant to CPLR 4518 (a).

Renewal

"A motion for leave to renew . . . 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 . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e]). The determination as to motion for leave to renew is a matter "left to the sound discretion of the trial court . . . and such

motions are not a second chance to remedy inadequacies that occurred in failing to exercise due diligence in the first instance" (Onewest Bank, FSB v Slowek, 115 AD3d 1083, 1083 [3d Dept 2014] [internal quotations and citations omitted]).

With respect to renewal, respondent has submitted the affidavit of Marisol Salgado, a secretary employed by respondent, and argues that it contains new facts – specifically facts regarding the mailing of the notice to petitioner – which would change the Court's prior determination. Respondent argues that it has a reasonable justification for failing to present this evidence in its answer, namely, its "good faith belief – and sound legal precedent – that supporting affidavits were not necessary because the answer and affirmative defense were based solely upon business records that were properly introduced into evidence pursuant to [CPLR] 4518 (a)" (Affirmation in Support of Motion ¶ 16).

Upon review, the Court finds that respondent has failed to establish a reasonable justification for failing to present this affidavit in the first instance. The evidence in the affidavit was accessible to respondent and could have been submitted in support of respondent's answer with due diligence (see Kirby v Suburban Elec. Engrs. Contrs., Inc., 83 AD3d 1380, 1381 [4th Dept 2011]). As noted above, respondent's original submission did not contain a factual basis for a finding that the documents submitted by respondent were admissible as business records pursuant to CPLR 4518 (a). As such, the Court finds unreasonable the assertions of counsel that he had a good faith belief that a supporting affidavit was not necessary because he had submitted business records in support of respondent's answer.

Based upon the foregoing, it is ORDERED that respondent's motion is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for petitioner. A copy of the Decision and Order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Decision and Order, and delivery of a copy shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
May 19, 2017

Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Motion, dated January 26, 2017;
2. Affirmation in Support by Peter B. O'Connell, Esq., dated January 26, 2017;
3. Affidavit in Support by Marisol Salgado, sworn to January 24, 2017, with attached exhibits;
4. Appendix in Support of Motion; and
5. Opposition to Motion by Rudolph J. Meola, Esq., dated February 6, 2017.