

Salzberg v Sena

2017 NY Slip Op 32973(U)

July 26, 2017

Supreme Court, Westchester County

Docket Number: 50399/2016

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 162

To commence the statutory time period for appeals as of right (C.R.C.P. 27) County Clerk to send a copy of this order, with notice of entry, upon all parties. 07/27/2017

Disp _____ Dec x _____ Seq. Nos. 5-6 _____ Type reargue _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON
-----X
CHARLES ANDREW SALZBERG and ANITA
SALZBERG,

Plaintiffs,

-against-

Index No. 50399/2016

DECISION AND ORDER

KENNETH SENA, JOSEPH MAZZAFERRO, LUXURY
MORTGAGE GROUP and WEBSTER BANK,

Defendants.

-----X

The following papers numbered 1 to 7 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Notice of Cross-Motion, Affirmation and Exhibits	3
Memorandum of Law	4
Affirmation	5
Memorandum of Law	6
Reply Affirmation	7

There are two motions before the Court in this adverse possession case. Each seeks to reargue the Court's March 20, 2017 Decision and Order (the "Decision"). The Decision addressed defendants' motion for summary judgment dismissing the complaint,

and granting defendants' counterclaims. It also addressed plaintiffs' motion, which sought (1) a declaration that the disputed land (the "parcel") is plaintiffs'; (2) injunctive relief prohibiting defendants from entering the parcel; (3) summary judgment on plaintiffs' claims for trespass and punitive damages; (4) to dismiss the counterclaims.

In the Decision, the Court found that "There are simply too many disputed facts about the fencing, the use of the parcel and the openness or notoriousness of the use, among other things, for the Court to find that either party has proven anything to the "clear and convincing" standard." The Court also stated that "As the above recitation of facts shows, the parties have all failed to meet this stringent and demanding standard."

It is well-settled 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. While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *Rodriguez v. Gutierrez*, 138 A.D.3d 964 (2d Dept. 2016). See also *Mazinov v. Rella*, 79 A.D.3d 979, 980, 912

N.Y.S.2d 896 (2d Dept. 2010) ("they failed to show that the Supreme Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law and improperly presented arguments not previously advanced.").

On plaintiffs' motion, they seek to rehash their prior arguments, which the Court found, and still finds, to be unpersuasive. Accordingly, their the motion is denied. See *PII Sam, LLC v. Mazzurco*, 121 A.D.3d 1063, 1064, 995 N.Y.S.2d 206, 207 (2d Dept. 2014).

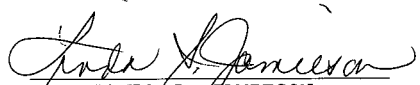
As for defendants' motion, defendants point out that since they are not the ones seeking to acquire property by adverse possession, they need not prove anything by the clear and convincing evidence standard. This is correct. Defendants' motion is granted to this sole, and minor, extent. However, this changes nothing. The Court continues to find that defendants are not entitled to summary judgment dismissing the complaint. See generally *Stroem v. Plackis*, 96 A.D.3d 1040, 1042, 948 N.Y.S.2d 90, 93 (2d Dept. 2012). Nor are they entitled to summary judgment on their counterclaims, which seek damages for the allegedly unlawful cutting down of a tree; a declaration that defendants are the rightful owners of the parcel; and for trespass. As the proponent of these claims, defendants bear the burden of proof, which they have not satisfied - even though the standard is merely establishing that there are no questions of

fact. See *Collado v. Jiacono*, 126 A.D.3d 927, 928, 6 N.Y.S.3d 116, 118 (2d Dept. 2015). See also *Peskin v. N.Y. City Transit Auth.*, 304 A.D.2d 634, 634, 757 N.Y.S.2d 594, 595 (2d Dept. 2003) ("as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense.").

Accordingly, the motions are denied, except as set forth above.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 26, 2017


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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