

<b>Fabtastic Abode, LLC v Arcella</b>
2017 NY Slip Op 33276(U)
July 21, 2017
Supreme Court, Kings County
Docket Number: 500166/2012
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21<sup>st</sup> day of July 2017.

P R E S E N T:

HON. CARL J. LANDICINO,  
Justice.

-----X  
FABTASTIC ABODE, LLC,  
Plaintiff,

Index No.: 500166/2012

DECISION AND ORDER

- against -

CONSTANTINE ARCELLA, as EXECUTOR of  
the ESTATE OF JOHN ARCELLA,

MOTION SEQ.# 10

Defendants.  
-----X

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2, <u>        </u>
Opposing Affidavits (Affirmations).....	3, <u>        </u>
Reply Affidavits (Affirmations).....	4, <u>        </u>

After oral argument and upon review of the papers in this matter, the Court finds as follows:

This is an action whereby Plaintiff Fabtastic Abode LLC (hereinafter “the Plaintiff”) seeks a declaratory judgment as against Defendant Constantine Arcella as Executor of the Estate of John Arcella (hereinafter “the Defendant”) declaring that the Plaintiff is the sole owner of the property and that any mortgage debt owed to the Defendant has been satisfied. The subject complaint also contains causes of action for constructive trust, unjust enrichment, and conversion. On August 22, 2016, this Court issued a Decision and Order granting the Plaintiff’s prior application for the appointment of a Temporary Receiver. On October 24, 2016, this Court issued an Order Appointing a Temporary Receiver.

The Defendant now moves for an order pursuant to CPLR §2221(d) granting leave to reargue the Decision and Order of this Court dated August 22, 2016 and upon such leave being granted vacating that Decision and Order. Specifically, the Defendant argues that the underlying application was not supported by sufficient evidence to support the appointment of a temporary receiver.

In opposition, the Plaintiff argues that the motion should be denied, and that the Plaintiff should be put in possession of the subject property. The Plaintiff argues that the Defendant's motion is defective as it does not attach a copy of the previous motion papers, or this Court's underlying Decision and Order. The Plaintiff also argues that the Defendant's motion should be denied because the motion fails to show that this Court failed to consider or misapply controlling law.

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law." *McGill v. Goldman*, 261 A.D.2d 593, 594, 691 N.Y.S.2d 75, 76 [2<sup>nd</sup> Dept, 1999]. A motion for leave to reargue is not an opportunity for a litigant to reargue issues previously addressed and decided. *See Anthony J. Carter, DDS, P.C. v. Carter*, 81 A.D.3d 819, 820, 916 N.Y.S.2d 821 [2<sup>nd</sup> Dept, 2011].

Turning to the merits of the Defendants' application pursuant to CPLR 2221(d), the Court finds that the Defendant's application is defective and therefore denied. The Defendant's application did not include a complete set of the papers relied upon by this Court, including the prior motion papers or the Decision and Order of this Court dated August 22, 2016. *See Plaza Equities, LLC v. Lamberti*, 118 A.D.3d 687, 688, 986 N.Y.S.2d 347 [2<sup>nd</sup> Dept, 2014]. While the parties in this matter have consented to e-filing, this Court's rules explicitly require that "[w]here

pleadings, prior applications or prior decisions and orders are required to be annexed to the motion, reference to the electronically filed papers alone is insufficient.” *See Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 957 N.Y.S.2d 361 [2<sup>nd</sup> Dept, 2012].

Even assuming, *arguendo*, that the instant motion was not defective based upon the insufficiency of the papers, the Court finds that the motion fails to adequately show that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. The appointment of a receiver is within the discretion of the Court when it has been provided with proof that a party has an interest in property that needs to be protected. *See Suissa v. Baron*, 107 A.D.3d 689, 689 [2<sup>nd</sup> Dept, 2013]. In the underlying Decision and Order this Court stated that “the installation of a Temporary Receiver by this Court is both warranted and necessary in order to preserve the income stream and maintain the *status quo* of the management of the Subject Property.”

This determination was made as a result of the Plaintiff’s “apparent interest” as the fee title holder as well as the fact that it was unclear “whether the mortgage has been paid in full and whether expenses are being paid and profits being taken.” The Defendant, through counsel, attempts to argue this point in his application (See Defendant’s Affirmation, Page 8, Paragraph d.), without any indication as to whether these documents were provided in the initial application, or constitute “new evidence” not previously provided. What is more, the records attached, such as Internal Revenue Service (IRS) Schedule “E” forms for various years, purportedly completed by the Defendant, are not supported by an Affidavit by the Defendant himself, and are therefore inadmissible hearsay. *See Collins v. Laro Serv. Sys. of N.Y., Inc.*, 36

A.D.3d 746, 747, 829 N.Y.S.2d 168, 169 [2<sup>nd</sup> Dept, 2007]. As a result, the Defendant's motion for leave to reargue the prior Decision and Order is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant's motion (motion sequence 10) is denied.

The foregoing constitutes the Decision and Order of the Court.

Date: July 21, 2017

ENTER:



**Carl J. Landicino**

**J.S.C.**

**HON. CARL J. LANDICINO**

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KINGS COUNTY CLERK  
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