

Gourary v Green

2018 NY Slip Op 30568(U)

March 28, 2018

Supreme Court, New York County

Docket Number: 651932/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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JOHN P. GOURARY, AS LIMITED ADMINISTRATOR C.T.A. OF
THE ESTATE OF PAUL GOURARY,

Plaintiff,

- v -

ALICE GREEN, AS EXECUTOR OF THE ESTATE OF PAUL
GREEN, ELIZABETH LASTER, AS EXECUTOR OF THE
ESTATE OF OLIVER LASTER, SCOTT MACOMBER, GREEN &
ETTINGER,

Defendants.

INDEX NO. 651932/2010

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 297, 298, 299, 300, 301, 311,
312, 313, 314

were read on this application to/for REARGUMENT/RECONSIDERATION

HON. SALIANN SCARPULLA:

In this action for alleged breach of fiduciary duty and fraudulent concealment, plaintiff John P. Gourary, as Limited Administrator c.t.a. of the estate of Paul Gourary’s (“Gourary”) moves by order to show cause seeking leave to reargue this Court’s decision and order dated October 13, 2017, in which I dismissed the complaint and denied Guarary’s request to seek leave to amend the complaint. Guarary argues that I: (1) overlooked and misapprehended key facts and misapplied the doctrine of constructive fraud in dismissing the causes of action for fraudulent concealment and civil conspiracy to commit fraudulent concealment; and (2) overlooked and misapprehended key facts in dismissing the portions of the causes of action for breach of fiduciary duty and aiding and

abetting breach of fiduciary duty that were based upon New York Business Corporation Law (“BCL”) §713.¹

The underlying facts of this case have been set forth in detail in previous decisions in this action and will not be repeated herein. *See Gourary v. Green*, 143 AD3d 580 (1st Dept 2016); *Gourary v. Green*, 2017 WL 4569716 (Sup Ct, NY County 2017); *Gourary v. Green*, 2016 WL 184532 (Sup Ct, NY County 2016); *Gourary v. Green*, 2013 WL 11012084 (Sup Ct, NY County 2013).

Discussion

In a motion seeking leave to reargue pursuant to CPLR 2221(d), the movant must establish that the court “overlooked or misapprehended the facts or law in arriving at its earlier decision.” *Opton Handler Gottlieb Feiler Landau & Hirsch v Patel*, 203 AD2d 72, 74 (1st Dept 1994) (internal citations omitted). Absent mistake on the court’s part, the Court will adhere to its original decision – “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted.” *Setters v AI Properties and Developments (USA) Corp.*, 139 AD3d 492, 492 (1st Dept 2016) quoting *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept 1992).

Gourary’s argument here is virtually the same argument made on the original motion. Gourary’s claims for breach of fiduciary duty (aside from any breach arising out of the alleged BCL § 713 violation), aiding and abetting a breach of fiduciary duty, and

¹ Gourary also filed a notice of appeal on November 13, 2017.

fraudulent concealment are all grounded on the premise that defendant Oliver Laster's ("Laster") failure to disclose material information regarding the underlying transaction to Gourary caused damage to Gourary. The complaint alleges that Paul Green ("Green"), Gourary's attorney who represented him in the underlying transaction, also had complete knowledge of the material information that Laster allegedly failed to disclose to Gourary.

In the October 13, 2017 decision and order – based on the Appellate Division, First Department's prior decision in this action, *Gourary v. Green*, 143 AD3d 580 (1st Dept 2016) – I found that Green's knowledge of the material facts regarding the underlying transaction were imputed to Gourary and that Gourary cannot avoid imputation by claiming the adverse interest exception. Because of this imputation of knowledge to Gourary, I dismissed these claims for failure to state a cause of action because Laster's failure to disclose material facts could not have been the proximate cause of any injury to Gourary.

Gourary argues here that I erred in finding that Green's knowledge is imputed to Gourary, because any information that Green may have learned from Lester might be confidential if that information was obtained through his representation of Laster. However, my October 13, 2017 decision and order already addressed this argument, and Gourary fails to demonstrate that I overlooked or misapprehended the relevant facts or law. Instead, Gourary simply disagrees with my conclusion.

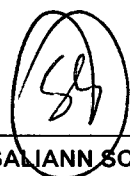
I have also reviewed Gourary's remaining arguments and find that they do not warrant the grant of reargument.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff John P. Gourary, as Limited Administrator c.t.a. of the estate of Paul Gourary's motion for leave to reargue is denied in its entirety.

This constitutes the decision and order of the court.

3/28/18
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:
CHECK IF APPROPRIATE: