

Pirraglia v Jofsen, Inc.
2018 NY Slip Op 33567(U)
June 11, 2018
Supreme Court, Bronx County
Docket Number: 23247/2015E
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JOHN PIRRAGLIA,

Plaintiff,

Index No. 23247/2015E

v.

DECISION AND ORDER

JOFSEN, INC., JORGENSEN'S LANDING, INC., JOHN
P. JORGENSEN, CARL D. MADSEN,

Defendants.

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GONZALEZ, D.:

Upon: 1) the Notice of Motion, dated April 9, 2018, by Janice I. Goldberg, Esq., attorney for the defendants, to renew and reargue the Decision and Order of this Court, dated March 7, 2018, pursuant to CPLR Rule 2221, and upon such re-argument for an order vacating that portion of said Decision and Order striking the answer of the defendant Jofsen, Inc.; 2) the Affirmation in Opposition, dated April 19, 2018, by Angel Cruz, Esq., attorney for the plaintiff; 3) the Notice of Cross-Motion, dated April 19, 2018, by Angel Cruz, Esq., for an Order: i) granting default judgment against defendant Jofsen, Inc., pursuant to CPLR Rule 3215(a) and CPLR Rule 3001, and declaring plaintiff the rightful, legal and equitable owner of the easement given by grant to defendant Jofsen, Inc., situated in Bronx County, in the State of New York, and more commonly known between 701 and 703 Minnieford Avenue, Bronx, New York 10464; ii) declaring plaintiff the rightful, legal and equitable owner of the adjacent access way and pier on the water in front of 701 and 703 Minnieford Avenue, Bronx, New York 10464; iii) directing defendant Jofsen, Inc. pay restitution in the amount of \$67,491.61 for its unpaid apportioned real estate taxes and attorneys' fees and costs; and iv) for such other and further relief this Court deems just and equitable; 4) the Affirmation in Opposition to the Cross-Motion, dated April 24,

2018, by Janice I. Goldberg, Esq.; 5) the Notice of Rejection of Plaintiff's Cross-Motion, dated April 24, 2018, by Janice I. Goldberg, Esq.; 6) the Notice of Rejection of Plaintiff's Affirmation in Opposition, dated April 24, 2018, by Janice I. Goldberg, Esq.; and 7) the Reply Affirmation by Janice I. Goldberg, Esq., dated April 24, 2018.

FACTUAL BACKGROUND

It is alleged that on or about February 11, 1986, the plaintiff's parents, Salvatore and Theresa Pirraglia, subdivided and sold a plot of land bearing City of New York tax lot 177, block 5636, in the County of the Bronx, City and State of New York, commonly known as 701 and 703 Minnieford Avenue, to Jofsen, Inc. Simultaneously, the parties entered into an agreement describing the rights and use of the land between 701 and 703 Minnieford Avenue. It is alleged that the agreement apportioned the real estate tax burdens of the subject property between defendant Jofsen, Inc. and the Pirraglias. It is further alleged that defendant Jofsen, Inc. has not paid its apportioned real estate tax burden since 2006.

It is alleged that on May 3, 1989, the Pirraglias and Jofsen, Inc. filed a correction deed, to correct the description of the property in the deed, dated February 11, 1986. On September 21, 1991, the plaintiff purchased 703 Minnieford Avenue.

On February 11, 2001, the plaintiff as owner and defendants Jofsen, Inc., and John Jorgenson as tenants entered into a lease agreement for a term of one year. The lease agreement provided the tenant Jorgenson access across the Pirraglia parcel to use Pirraglia's dock for the boat known as Riptide III.

On February 11, 2003, the plaintiff, John Pirraglia, as owner, entered into another five-year lease agreement with Jorgensen's Landing, Inc., and John Jorgenson, as tenants, for access across the Pirraglia parcel. The lease expired on February 11, 2008, but the defendants continue

to access across the Pirraglia property. It is further alleged that defendants Jorgensen's Landing, Inc. and John Jorgenson subleased the property in question to defendant Carl D. Madsen.

This is an action to quiet title in an easement dispute between adjoining landowners. The plaintiff seeks a declaratory judgment that he is the fee simple owner of the access way and pier on the water in front of 703 Minnieford Avenue, Bronx, New York.

PROCEDURAL HISTORY

This action was commenced by the filing of a Summons and Verified Complaint, on June 12, 2015. On or about September 9, 2015, the plaintiff filed and served an Amended Complaint. On or about October 16, 2015, the plaintiff filed and served a Second Amended Complaint. Issue was joined by service of defendants' Answer to the Second Amended Complaint, on or about December 21, 2017.

On or about June 15, 2015, the defendants filed an Order to Show Cause, seeking a preliminary restraining order against the plaintiff. On or about July 9, 2015, the defendants moved to compel arbitration and dismiss the complaint, pursuant to CPLR Rule 3211(a)(1), (a)(3) and (a)(7). By order, dated July 20, 2016, Justice Sharon Aarons denied defendants' motion to compel arbitration as it applies to Jofsen, Inc., and dismissed the second, third, fourth, fifth and sixth causes of action against all defendants and the first cause of action for breach of contract as against defendants Jofsen, Inc. and Carl D. Madsen. On or about July 27, 2015, Justice Aarons denied the defendants' Order to Show Cause for a temporary restraining order.

On November 20, 2015, the defendants moved to compel arbitration and dismiss the second amended complaint, pursuant to CPLR Rule 3211(a)(1). By order, dated August 18, 2016, this Court denied defendants' motion in its entirety.

On April 20, 2016, the plaintiff served the defendants Jorgensen's Landing, Inc. and Carl D. Madsen with a 30-day Notice to Quit. On May 18, 2016, the defendants moved by Order to Show Cause for a preliminary restraining order enjoining the plaintiff from enforcing the 30-day Notice to Quit against Jorgensen's Landing, Inc. and Carl D. Madsen. By order, dated August 18, 2016, this Court denied the defendants' motion for a preliminary restraining order in its entirety and recommended that the defendants get separate counsel due to a possible conflict of interest.

On July 29, 2016, the plaintiff filed an Order to Show Cause, seeking a stay of the arbitration. By order, dated August 18, 2016, this Court granted plaintiff's motion in its entirety and permanently stayed the arbitration.

On August 22, 2016, the defendants appealed both of this Court's order, dated August 18, 2016, which denied defendants' motion for a preliminary restraining order enjoining the plaintiff from enforcing the 30-day Notice to Quit, and Justice Sharon Aarons' order, dated July 20, 2016. The Appellate Division, First Department decided both appeals together.

By order, dated April 4, 2017, the Appellate Division issued a remittitur remanding the matter for a framed issue hearing on the issue of "whether defendant Jofsen, Inc. has a valid agreement to arbitrate." The framed issue hearing was held on June 9, 2017. By order, dated November 21, 2017, this Court found the defendant failed to sustain its burden in showing that Jofsen, Inc. had a valid agreement to arbitrate.

On January 18, 2018, the plaintiff moved to strike the defendant Jofsen, Inc.'s answer, pursuant to CPLR Rule 3211(a)(3), and the defendants cross-moved to compel the plaintiff to respond to the defendants' discovery demands. By order, dated March 7, 2018, this Court granted the plaintiff's motion and struck the defendant Jofsen, Inc.'s answer, counterclaims and affirmative

defenses, and denied the defendants' cross-motion. The Court also directed the plaintiff to request a preliminary conference.

The defendants argue that the Court misapprehended the law because the attorney affirmation was sufficient evidence to show that Jofsen, Inc. was active and retained them to represent them in this action. The defendants submit an affidavit by Thomas Costigan in support of the motion to renew and reargue. Mr. Costigan's alleges that the stocks of the deceased shareholders were transferred, and he was nominated as director of Jofsen, Inc. Mr. Costigan also alleges that Jofsen, Inc. has begun to cure its deficient tax filings to obtain a Certificate of Consent for reinstatement.

The plaintiff opposes the defendants' motion arguing that the Thomas Costigan affidavit fails to provide documentary evidence in support that the stocks of the deceased shareholders were transferred. The plaintiff cross-moves for a default judgment against Jofsen, Inc. since Jofsen, Inc.'s answer has been stricken and plaintiff's possession of the easement has been actual, open, hostile, continuous and exclusive, in accordance with RPAPL Rule 501 and CPLR Rule 212(a). The plaintiff submits the affidavit of John Pirraglia in support of the cross-motion.

The defendants filed notices of rejection of the plaintiff's cross-motion and affirmation in opposition alleging they are untimely. The plaintiff e-filed his cross-motion and affirmation in opposition on April 20, 2018. It is undisputed that the plaintiff filed his cross-motion and affirmation in opposition five days prior to the return date of the defendants' motion. The Court can entertain the cross-motion in its discretion and consider all papers submitted, when there is no prejudice to any party (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

DISCUSSION OF LAW

The law is well settled that pursuant to Rule 2221 of the New York Civil Practice Law and Rules, a motion to reargue must be based upon the contention that the Court overlooked or misapprehended relevant facts or misapplied relevant law (CPLR 2221 [d] [2]). Its purpose is not to permit a party to reargue the issues the Court has already decided. (*Foley v Roche*, 68 A.D.2d 558 [1st Dept. 1979]).

Based on the record before the Court, the defendants have failed to sustain their burden in showing that the Court overlooked or misapprehended relevant facts or misapplied relevant law that would warrant this Court's reconsideration of its prior decision of March 7, 2018. The defendants have failed to submit evidence in admissible form to support their position.

Regarding defendants' motion to renew, it is well settled that a motion to renew must be "based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]). Again, the defendants have failed to submit evidence in admissible form demonstrating that Jofsen, Inc. was a viable corporation at the time this action was commenced.

The Court has decided to consider the cross-motion since the parties have had the opportunity to be heard on the cross-motion and there is no prejudice to any side by this decision. Accordingly, in its discretion the motion for a default judgment against the defendant Jofsen, Inc. is properly before the Court.

It is well settled that as per CPLR Rule 3215(f), a moving party must present proof of service of the summons and complaint, an affidavit setting forth the facts constituting the claim, the default, and the relief requested in order to prevail on a default judgment motion. In the instant matter, the plaintiff has failed to sustain his burden showing his entitlement to a default judgment

against Jofsen, Inc. There is no evidence in admissible form to show that Jofsen, Inc. was properly served with the Summons and Complaint and/or the Amended Summons and Complaint.

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby

ORDERED, the defendants' motion to renew is denied; and it is further

ORDERED, the defendants' motion to reargue is denied; and it is further

ORDERED, that the plaintiff's cross-motion for a default judgment as to Jofsen, Inc. is denied; and it is further

ORDERED, that the parties are to comply with this Court's order of March 7, 2018.

This constitutes the Decision and Order of the Court.

Dated: June 11, 2018
Bronx, New York

E N T E R:



HON. DORIS M. GONZALEZ, J.S.C.