Falk v Nassau County
2018 NY Slip Op 33861(U)
January 17, 2018
Supreme Court, Nassau County
Docket Number: 600868/17
Judge: Jeffrey S. Brown

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 12**
JEFFREY P. FALK, on behalf of himself and all other similarly situated,	**INDEX # 600868/17**
Plaintiffs,	
-against-	**Mot. Seq. 2**
	Mot. Date 12.4.17
NASSAU COUNTY and NASSAU COUNTY DEPARTMENT OF ASSESSMENTS,	**Submit Date 12.20.17**
Defendants.	
----------X	

The following papers were read on this motion: E File Docs Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	18, 21
Answering Affidavits (Affirmations)	25
Reply Affidavit	27

Motion by plaintiff pursuant to CPLR 2211(d) for leave to reargue the court's order of September 27, 2017, which denied in part and granted in part defendant's motion to dismiss.

This action arises out of plaintiff's claims that defendant Nassau County and the Nassau County Department of Assessments have charged an excessive fee and unlawful tax pursuant to Section 6-33.0 of the Nassau County Administrative Code. Pursuant to this section, a tax map certification letter (TMCL) must be purchased and filed with various real property documents presented for recording at the Nassau County Clerk. Plaintiff contends that the fees extracted are for general revenue purposes and, therefore, constitute an unlawful tax.

By its earlier decision and order, the court sustained plaintiff's claim for declaratory and prospective injunctive relief under CPLR 3001, but dismissed the plaintiff's claims for disgorgement or restitution and those sounding in unjust enrichment, conversion, and "monies had and received" for failure to allege involuntary payment. In dismissing the claims for disgorgement or restitution of the collected fee, the court rejected plaintiff's argument that the

payments were made involuntarily under circumstances amounting to duress or coercion. Plaintiff does not quibble with the court's determination in this regard.

Rather, the gravamen of plaintiff's argument is that his payment of the challenged fee was made through his title agent, who was reimbursed for that fee and others by way of an invoice that did not itemize charges that were paid for specific services and fees. Accordingly, plaintiff contends that he never knew of the payment of the TMCL fee. Plaintiff alleges that because he was unaware of the nature of the TMCL fee at the time of its payment, payment was made under a mistake of fact based on a lack of knowledge, and no protest was required. In support of this position, plaintiff submits a copy of the title agent's invoice, which, although not submitted on the prior motion, does not alter this court's prior determination.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. (CPLR 2221[d][2]; *see Haque v. Daddazio*, 84 AD3d 940 [2d Dept 2011]). It is not designed as a vehicle to afford the unsuccessful party with successive opportunities to argue once again the very questions previously decided. (*Ahmed v. Pannone*, 116 AD3d 802 [2d Dept. 2014]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered. (*V. Veeraswamy Realty v. Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]; *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Haque*, 84 AD 3d 940). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked. (*Hoffmann v. Debello-Teheny*, 27 AD3d 743 [2d Dept 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion. (*Barrett v. Jeannot*, 18 AD3d 679 [2d Dept 2005]).

The cases cited by the plaintiff do not support his argument that payment under these circumstances can amount to a mistake of fact. In *Kessler v.Herklotz*, 190 NY 24 [1907], the plaintiff mistakenly made an unauthorized payment to defendant on behalf of third party at the direction of yet another party. The court determined that there was a question of fact as to whether the message directing payment misled the plaintiff, explaining that the critical inquiry was "whether it was under any material mistake of fact that the plaintiffs were induced to make the payment, for the mistake must be of a material fact to entitle the plaintiffs to relief." Here, there is no claim that the plaintiff was affirmatively misled into making the payment in question.

Further, plaintiff cites *Gimbel Brothers, Inc. v. Brook Shopping Centers, Inc.*, 118 AD2d 532 [2d Dept 1986] as a comparator case. In that case, lessee Gimbel Bros. made a number of "Sunday charge" rental payments not required by its lease agreement. Plaintiff points to the court's notation that invoices clearly indicated the Sunday charge but plaintiff fails to acknowledge that the totality of the evidence in that case showed that no mistake could be claimed, including testimony that disputed payments were made with full knowledge while the matter was being investigated.

Most significantly, plaintiff cites *Genesee Brewing Company, Inc. v. Village of Sodus Point*, 126 Misc.2d 827 [Sup. Ct. Wayne County 1984]. In *Genesee Brewing*, the plaintiff made certain industrial cost recovery payments (ICR) to the Village of Sodus Point during a moratorium period of the federal law requiring such payments. Upon repeal of the federal law, the plaintiff sought restitution of those ICR payments. The court found that the protest requirement was not applicable because the law in question was not adjudicated invalid but instead was repealed by legislative action. However, the court noted the general rule that "the voluntary payment of a tax or fee may not be recovered, and when payment is made . . . by a person with actual ***or constructive knowledge*** of the facts which render an assessment void, it is incumbent upon such person to demonstrate that payment was made involuntarily." (*Genesee Brewing*, at 833-834 [emphasis added]; citing *City of Rochester v. Chiarella*, 58 NY2d 316 [1983]). "Constructive knowledge" is the "[k]nowledge that one using reasonable care or diligence should have, and therefore is attributed by law to a given person." (Black's Law Dictionary 876 [7th ed. 1999]). Here, plaintiff has not shown that his ignorance regarding the breakdown of fees paid by his title agent can constitute a legally cognizable mistake of fact. The complaint, amplified by the plaintiff's motion papers, contains no allegation that the County in some way concealed the subject fees from the plaintiff or his agent or that the information was not otherwise readily available.

Moreover, to the extent that the cases cited by the plaintiff do not pertain to tax payments made to a municipality for general use, the court reiterates the reasoning set forth in *Chiarella* that:

> Recognizing that all governmental assessments are, in a sense, paid involuntarily, the determination is primarily one of degree, turning upon numerous factors, including: "[T]he right of the taxing authorities to rely on objection if there be resistance to payment, the likelihood that authentic resistance will be asserted, the unavoidable drastic impact of the taxes or fees on the claimant, and the impact on the public fisc, if revenues raised long ago and expended are subject to reimbursement" (*Paramount Film Distr. Corp. v. State of New York*, 30 N.Y.2d 415, 420, 334 N.Y.S.2d 388, 285 N.E.2d 695, cert. den. 414 U.S. 829, 94 S.Ct. 57, 38 L.Ed.2d 64).

(*Chiarella,* 58 NY2d at 323-324).

The court has considered the plaintiff's remaining contentions and finds them to be without merit.

For the foregoing reasons, it is hereby

ORDERED, that the plaintiff's motion for leave to reargue is **granted**, and upon reargument, the court adheres to its prior determination **granting in part** defendant's motion and dismissing plaintiff's claim for injunctive relief in the form of disgorgement and the second, third, and fourth causes of action.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 17, 2018

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

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