

Aviation Distribs., Inc. v Aviation Distribs., Inc.

2019 NY Slip Op 33152(U)

October 23, 2019

Supreme Court, New York County

Docket Number: 159192/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
AVIATION DISTRIBUTORS, INC., Formed May 1945
and DIANE HASLETT,

Plaintiff,

-against-

AVIATION DISTRIBUTORS, INC., Formed February
2014; COMMUNITY PRESERVATION
NEIGHBORHOOD, INC.; FUTURE HOLDING
TRUST; KOJO GLOBALPROPERTY DEVELOPMENT
INC., and JOHN DOE #1 through "JANE DOE #10," the
last ten names being fictitious and unknown to the
Plaintiffs, the persons or parties intended being the
occupants, tenants, persons or entities, if any, having or
claiming an interest in or lien upon the mortgaged
premises described in the verified complaint,

Defendants.

-----X
COMMUNITY PRESERVATION NEIGHBORHOOD,
INC.,

Plaintiff,

-against-

AVIATION DISTRIBUTORS, INC. Formed February
2014, JOHN KWABENA-ZI a/k/a JOHN ZI,
AVIATION DISTRIBUTORS, INC., VICTORIA
KELLEY, THE CITY OF NEW YORK DEPARTMENT
OF FINANCE and their respective successors, assigns,
distributees, heirs-at-law, next of kin and legal
representation, and JOHN DOE and JANE DOE, the
persons or parties intended being the tenants, occupants,
persons, entities, or corporations, if any, having or
claiming an interest in or lien upon the premises,

Defendants.

DECISION AND ORDER

Index No.: 159192/2015

Motion Sequence 006

Action No. 2

Index No.: 153297/14

-----X
COMMUNITY PRESERVATION NEIGHBORHOOD,
INC.,

Plaintiff,

Action No. 3
Index No.: 153556/15

-against-

AVIATION DISTRBTRS, INC., JOHN KWABENA-ZI
a/k/a JOHN ZI, AVIATION DISTRIBUTORS, INC.,
VICTORIA KELLEY, THE CITY OF NEW YORK
DEPARTMENT OF FINANCE and their respective
successors, assigns, distributees, heirs-at-law, next of kin
and legal representation, and JOHN DOE and JANE DOE,
the persons or parties intended being the tenants, occupants,
persons, entities, or corporations, if any, having or claiming
an interest in or lien upon the premises,

Defendants.

-----X
CAROL R. EDMead, J.S.C.:

In these consolidated actions, defendant (in action No. 1)/plaintiff (in action Nos. 2 and 3) Community Preservation Neighborhood, Inc. (Community Preservation) moves, pursuant to CPLR 2221, to reargue a portion of court’s decision and order dated June 10, 2019 (NYSCEF doc No. 233 under index No. 155301/15) (the June 2019 decision). Plaintiff (in action No. 1)/defendant (in action No. 2) Aviation Distributors, Inc, formed May 1945 (Aviation 1945) and Diane Haslett (Haslett) (Aviation 1945 and Haslett) oppose the motion.

BACKGROUND FACTS

This action involves real property on the Upper West Side of Manhattan. For a fuller description of the facts, which are laced with intrigue and forgery, see the June 2019 decision. In short, the parties to these consolidated actions all claimed ownership rights to the property, which is located at 44 West 73rd Street. The June 2019 order, among other things, declared that

Aviation 1945 owned the subject land, while Community Preservation owned the subject appurtenance on the land, a building. Community Preservation does not challenge either of these findings. Instead, Community Preservation challenges the portion of the June 2019 decision which declared that while it is the owner of the building appurtenant to 44 West 73rd, “this ownership right is subject to the 99-year lease held by nonparty El Pridian Corporation” and that, accordingly, Community Preservation “has no present possessory right in the premises until December 31, 2075” (NYSCEF doc No. 233 under index No. 155301).

The Court’s determination was based on the deed by which Community Preservation took ownership rights in the subject building, which states that Community Preservation’s ownership rights were “subject to the 99-year lease held by El Pridian Corporation” (NYSCEF doc No. 39 under index No. 155301/15), as well as a memorandum of Lease (NYSCEF doc No. 32 under index No. 155301/15). While the original lease is missing, Haslett submitted an affidavit outlining her efforts to locate the lease (NYSCEF doc No. 227) and the Court determined that the memorandum of lease was the best evidence of the missing lease.

Community Preservation here argues that the Court misapplied the best evidence rule and improperly found valid a lease that violates the statute of frauds. That is, Community Preservation contends that none of the evidence put forward satisfies General Obligation Law § 5-703, which requires long term leases to be in writing, as none of the evidence addresses material terms of the lease, such as how much rent is due under it.

In opposition Aviation 1945 and Haslett argue that Community’s Preservation’s application regarding the statute of frauds is not the proper subject of a motion to reargue, as Community Preservation did not raise the issue in the underlying motion. Moreover, Aviation

1945 and Haslett argue that the court properly applied the best evidence rule. In reply, Community Preservation argues that the statute of frauds, while not discussed in the underlying papers, is properly before the Court on this motion to reargue, as the Court's determination with respect to El Pridian's purported lease "went beyond the scope of the original motion" (NYSCEF doc No. 261 under index No. 155301/15).

DISCUSSION

CPLR 2221 (d) (2) provides 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."

"Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016]). The Court grants reargument here.

Scope of the Underlying Motion and Cross Motion

Community Preservation argues that the issue of whether its ownership rights were subject to El Pridian's purported leasehold was not before the court in the underlying motion. If Community Preservation is correct, then this is properly the subject of a motion to reargue, as it would implicate a misapprehension of fact by the Court.

In the underlying motion, Aviation 1945 moved for five distinct forms of relief: (1) a declaration that Aviation 1945 owns the subject land; (2) a declaration that Haslett is the sole owner/shareholder of Aviation 1945; (3) a declaration that parties related to defendant John Kwabena-Zi have no ownership rights in the subject property; (4) an order dismissing all cross

and counterclaims of defendant Kojo Global Properties; and (5) an order voiding the fraudulent transfer and correction deed (NYSCEF doc No. 179 under index No. 155301). None of these applications seek judicial determination as to El Pridian's purported leasehold.

Community Preservation, in its notice of cross motion, sought a declaratory judgment determining it "to be the owner in fee simple of the building located at 44 W. 73rd Street" and granting it "an easement and dismissing the competing claims of the other parties to this consolidated action together with such other and further relief as may be just and proper" (NYSCEF doc No. 212 under index No. 155301/15). Community Preservation is correct that the Court misapprehended the scope of this application.

Although El Pridian was initially named as a defendant in Action No. 2 (see NYSCEF doc No. 1 under index No. 153297/14), it is no longer listed in the caption of Action No.2. Nonetheless, El Pridian's purported rights were not the subject the Community Preservation's application for relief in the underlying cross motion, as the requested relief related to other parties' interests was limited to "competing claims of the other parties to this consolidated action" (NYSCEF doc No. 212 under index No. 155301/15).

As the Court misinterpreted the scope of the underlying application and thus made a determination that was beyond the scope of the motion, Community Preservation is entitled to an amendment to the June 2019 decision that voids all discussion of the purported El Pridian lease and which declared that Community Preservation "ownership right is subject to the 99-year lease held by nonparty El Pridian" and that Community Preservation "has no present possessory right in the premises until December 31, 2075."

These declarations were not only outside the scope of underlying motion, but outside the scope of these consolidated actions. A review of the three complaints shows that no party has placed before the Court the issue of the validity of El Pridian's purported lease (*see* NYSCEF doc No. 1 under index No. 155301/15, NYSCEF doc No. 1 under index No. 153297/14, NYSCEF doc No. 2 under index No. 153556/15). Thus, the June 2019 order, as amended by this memorandum decision, following the amendments striking references to the purported El Pridian lease, still resolves all issues in these consolidated actions.

As the Court finds that the June 2019 decision overreached in determining issues related to El Pridian's purported leasehold -- and is striking the declarations related to it in the June 2019 decision -- the Court need not reach Community Preservation's argument that those declarations were made in contravention of controlling law.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant (in Action No. 1)/plaintiff (in Action Nos. 2 and 3) Community Preservation Neighborhood, Inc.'s motion, pursuant to CPLR 2221, for leave to reargue this court's decision and order dated June 10, 2019 (NYSCEF doc No. 233 under index No. 155301) (the June 10 decision), is granted

ORDERED and ADJUDGED that, upon reargument, the June 2019 decision is amended to strike all references to the purported leasehold by nonparty El Pridian Corporation, including the following portion of the declaration of Community Preservation Neighborhood, Inc.'s property rights in the subject building:

“However, this ownership right is subject to the 99-year lease held by nonparty El Pridian Corporation. Thus, Community Preservation Neighborhood Inc. has no present possessory right in the premises until December 31, 2075;”

and it is further

ORDERED that all claims in these consolidated actions are resolved by the June 10, 2019 decision, as amended by this memorandum decision; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly; and it is further

ORDERED that counsel for Community Preservation Neighborhood, Inc. shall serve a copy of this, along with notice of entry, on all parties within ten days of entry.

Dated: October 23, 2019



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.