Bankers Conseco Life Ins. Co. v Wilmington Trust, N.A.
2020 NY Slip Op 34486(U)
August 17, 2020
Supreme Court, New York County
Docket Number: 652057/2019
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[*1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

BANKERS CONSECO LIFE INSURANCE COMPANY and WASHINGTON NATIONAL INSURANCE COMPANY,

Plaintiffs,

- v -

WILMINGTON TRUST, NATIONAL ASSOCIATION,

Defendant.

- X

DECISION AND ORDER
Index No.: 652057/2019

Motion Sequence Nos.: 003 & 004

O. PETER SHERWOOD, J.:

Motion sequence 003 and 004 are consolidated for disposition. In motion sequence 003, plaintiffs move to reargue the portion of this court's decision on Motion Sequence Number 002 (the Decision, NYSCEF Doc. No. 73) which granted defendant's motion to dismiss in its entirely. Plaintiffs now seek to reargue that portion of the decision and order that dismissed the first cause of action for breach of contract and for relief from the judgment as to the first cause of action pursuant to CPLR 5015 (a)(2)(newly discovered evidence).

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d

[*2]

216, 219 [2009]; *Tounkara v Fernicola*, 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

In the decision and order, the court dismissed of the first cause of action alleged acceptance of assets by defendant trustee that were not in negotiable form because under the express terms of the parties agreements, plaintiffs cannot show damages because damages are limited to direct damages and the damages being sought here are not direct (*see* Doc. No. 73 at p. 5). In this motion, plaintiffs now assert that defendant is guilty of gross negligence and gross negligence cannot be waived. [1] Plaintiff failed to plead gross negligence in its amended complaint and did not assert such a claim in its opposition to the motion to dismiss. Instead Plaintiffs argued that its damages are available "because they are direct damages" (Opp at p. 10, Doc. No. 46).

Plaintiffs' submission, made prior to oral argument of six cases including *Abacus Fed. Sav. Bank v ADT Sec. Servs.*, 18 NY 3d 675 (2012) and the discussion of that case at oral argument for the principle that a party to a contract cannot insulate itself for their own gross negligence, is insufficient to raise the claim. Nor are the hypotheticals discussed during oral argument that Defendant accepted 32 assets stamped as non-negotiable out of an unknown number submitted (*see* Transcript at p. 48, Doc. No. 68) sufficient as the number of instances of alleged ordinary degree of negligence by bank employees do not constitute gross negligence (*see Colnagli U.S.P. Ltd. v Jewelers Protection Servs. Ltd.*, 81 NY 2d 821, 823 [1993] ["'gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing"]).

Plaintiffs also urges that it should be relieved of the judgment pursuant to CPLR 5015(a)(2). However, they have not demonstrated that the newly discovered evidence, namely the short time elapsed between receipt of deal documents and acceptance by the bank employee responsible for checking to see if they were in "proper negotiable form" shows he "was clearly signing such documents without reading them" (*see* Buckly Affm, ¶ 32, Doc. No. 115), would "probably" change the result (*see* CPLR 5015 (a)(2). The task was merely to see whether the documents presented were in proper negotiable form and do not require extensive review. The "newly discovered evidence" does not rise to the level of gross negligence.

[1] The trust agreements provide at §4.8(a) that "in no event shall [Wilmington] be liable…for indirect, special, incidental, punitive or consequential damages"

[*3]

Accordingly, the court denies reargument as plaintiffs have shown neither that the court overlooked or misapplied facts or law in its earlier decision and order. Even if, in an exercise of its discretion, the court were to grant leave to reargue, upon reargument, the motion for relief from the judgment would be denied as plaintiffs has not satisfied the requirements of CPLR 5015 (a)(2).

Defendant's motion for leave to file a sur reply (motion sequence number 004) is denied as moot.

This constitutes the decision and order of the court.

DATED: August 17, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.