

**Gelobter v Fox**

2010 NY Slip Op 32850(U)

October 1, 2010

Supreme Court, Nassau County

Docket Number: 011416/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

**TRIAL/IAS PART 20**

\_\_\_\_\_  
ELLEN GELOBTER,

Plaintiff,

-against-

Index No.: 011416/08  
Motion Sequence...09  
Motion Date...08/04/10

ARYEH FOX (a/k/a CHRISTIAN FOX), TOWN  
& COUNTRY PROPERTIES INC., DEBORAH  
BHOLA, ALISA SCHIFF, ESQ., SCHIFF &  
SKURNIK, PLLC, MICHAEL GROSS, ESQ.,  
PARMANAND RAMDASS, ESQ., JARED W.  
BESCHEL, ESQ., PEOPLE'S CHOICE GENERAL  
CONTRACTORS, DISCOUNT FUNDING  
ASSOCIATES and RIVER EDGE LAND  
SERVICES, INC.,

Defendants.

\_\_\_\_\_X

- Papers Submitted:
- Order to Show Cause.....X
- Supplemental Affirmation in Support.....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Affirmation in Opposition.....X
- Reply Affirmation in Support.....X

The Plaintiff, Ellen Gelobter, moves presumably, although not so denominated,

pursuant to CPLR § 2221 (f), for an order granting her leave to reargue or renew this Court's prior decision, dated May 5, 2010.

In or about 2006, the Plaintiff, Ellen Gelobter, was the owner of the premises located 64 Raymond Place, Hewlett, New York. In 2006, the Plaintiff placed her home on the market and after failing to find a buyer, enlisted the help of the Defendant, Aryeh Fox, a licensed real estate broker to whom she was introduced by her parents. In August 2006, the Plaintiff entered into a contract of sale to sell the subject premises to the Defendant, Deborah Bhola. At this time, the Plaintiff was represented by the Defendant, Alisa Schiff, Esq., who prepared the contract of sale. The contract recited a sale price of \$615,000 with a seller's concession of \$155,000, leaving the Plaintiff with a net of \$460,000. As adduced from her deposition transcript, the Plaintiff testified that at the conclusion of the closing, which took place on August 25, 2006, she received the sum of \$216,000<sup>1</sup> and that the balance of her mortgage in the amount of \$240,998.21, due and owing to American Home Mortgage, was paid off.

While the Plaintiff was initially represented by the Defendant, Alisa Schiff, Esq., she was ultimately represented at the closing by the Defendant, Michael Gross, Esq., after Ms. Schiff was unable to attend. With respect to the remaining parties herein, the Defendant, Deborah Bhola, was represented by the Defendant, Parmanand Ramdass, Esq., River Edge Land Services, Inc. served as the title closer, and the Law Office of Jared W.

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<sup>1</sup> The Plaintiff in fact received a check in the amount of \$216,185.21.

Beschel, by then associate Dan Boldi, Esq., served as attorney for the lender, Peoples's Choice Home Loan, Inc.

The Plaintiff contends that she was never informed that the selling price of her home was \$615,000 as is recited on the HUD-1 statement and contract of sale, and as a result did not receive all the proceeds to which she was entitled and was the victim of seller rescue fraud. As a consequence thereof, the underlying action was commenced by the Plaintiff in June of 2008 and included the following Eight (8) causes of action: the First Cause of Action sought a declaratory judgment in accordance with Article 15 of the New York Real Property Actions and Proceedings Law; the Second Cause of Action sounded in Fraud; the Third Cause of Action sounded in Conspiracy; the Fourth Cause of Action alleged violations of General Business Law §349; the Fifth Cause of Action alleged violations of the Federal Truth in Lending Act; the Sixth Cause of Action alleged violation of the Real Estate Settlement Procedure Act; the Seventh Cause of Action alleged Professional Malpractice and was particularly alleged against the Defendants, Schiff and Gross; and the Eighth cause of action alleged violations of the Racketeer Influenced and Corrupt Organizations Act.

Thereafter, this Court entertained the following applications: the Defendants, Jared W. Beschel, Esq., River Edge Land Services, Inc., Alisa Schiff, Esq., Schiff & Skurnik, PLLC, and Michael Gross, Esq., respectively moved for an order dismissing the Plaintiff's complaint and for the imposition of sanctions. The Plaintiff cross-moved seeking the following relief: an order striking the Answer of the Defendant, Discount Funding

Associates, and granting a judgment by default against said Defendant; an order striking the answer of the Defendant, Deborah Bhola; an order granting summary judgment on the complaint against the Defendants, Alisa Schiff and Schiff & Skurnik, PLLC for legal malpractice; an order granting leave to amend the within complaint to add Jared W. Beschel, PC as a named defendant, and; for an order granting summary judgment as to the Defendants, Jared W. Beschel, Esq. and Jared W. Beschel, PC.

By Order dated May 5, 2010, this Court GRANTED the applications interposed by the Defendants, Beschel, River Edge, Schiff, Schiff & Skurnik, PLLC and Gross and dismissed the Plaintiff's complaint and set the within matter down for a hearing as to the issue of sanctions (*see* Birney Affirmation in Support at Exhibit A). As to the application interposed by the Plaintiff, this Court DENIED as moot those branches thereof which sought summary judgment with respect to the Defendant, Beschel, as well as to the Defendants, Schiff and Schiff & Skurnik, PLLC, and further DENIED that branch of the application which sought leave to amend the complaint (*id.*). Additionally, this Court DENIED those branches of the Plaintiff's application which sought orders striking the Answers respectively interposed by the Defendants, Discount Funding Associates and Deborah Bhola, and after searching the record granted summary judgment and dismissed the Plaintiff's complaint as asserted against the Defendant, Bhola (*id.*).

The Plaintiff now submits the instant application seeking leave to renew and reargue this Court's prior determination. In support of the within application, counsel for the

Plaintiff reiterates many of the arguments previously set forth in the above referenced applications (*see* Novak Affirmation in Support at ¶¶ 4-22). Additionally, and with particular regard to the matter of sanctions, Plaintiff's counsel argues that the imposition thereof is unwarranted herein "where the plaintiff fully participated in discovery and appeared at each court conference and in no other way was contemptuous of any court ruling or warning" (*see* Novak Affirmation in Support at ¶ 3; *see also* Reply Affirmation at ¶ 9). Counsel further posits that "the court's main reasoning in imposing sanctions seems to be that the plaintiff cannot prove damages, irrespective of whether the underlying legal theory has merit" (*see* Novak Affirmation in Support at ¶ 49).

In addition to the foregoing, counsel for the Plaintiff challenges this Court's reliance upon a case entitled *Bishop v. Maurer* decided by the Appellate Division, First Department (*id.* at ¶ 23). Specifically counsel charges that "the 2006 Appellate Court decision is not good law" inasmuch as same was appealed to the Court of Appeals (*id.* at ¶ 23; *see also* Reply Affirmation at ¶ 2).

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision." (*Viola v. City of New York*, 13 A.D.3d 439 [2d Dept. 2004]; *Carrillo v. PM Realty Group*, 16 A.D.3d 611 [2d Dept. 2005]; *McNeil v. Dixon*, 9 A.D.3d 481 [2d Dept. 2004]). A motion to reargue is not to afford an unsuccessful party with additional

opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated (*McGill v. Goldman*, 261 A.D.2d 593 [2d Dept. 1999]; *Woody's Lumber Co., Inc. v. Jayram Realty Corp.*, 30 A.D.3d 590 [2d Dept. 2006]; *Gellert & Rodner v. Gem Community Mgt.*, 20 A.D.3d 388 [2d Dept. 2005]).

Alternatively, a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR § 2221 [e] [2]). The purpose of a motion to renew is “to draw the court’s attention to new or additional facts, which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court’s attention (*Gomez v. Needham Capital Group, Inc.*, 7 A.D.3d 568 [2d Dept. 2004] quoting *Natale v. Samel & Assocs.*, 264 A.D.2d 384 [2d Dept. 1999]).

Having reviewed the Plaintiff’s submission, this Court finds that in rendering it’s prior determination, it neither misapprehend the facts or law nor did the Plaintiff offer any new facts that would alter the prior decision (*Viola v. City of New York*, 13 A.D.3d 439 [2d Dept. 2004], *supra*; *Gomez v. Needham Capital Group, Inc.*, 7 A.D.3d 568 [2d Dept. 2004], *supra*).

Accordingly, the Court hereby **DENIES** the Plaintiff’s within application. However, in denying the application the Court is constrained to point out some glaring errors, both procedural and substantive, which appear in the Plaintiff’s submissions.

Initially, the Plaintiff's within application is procedurally defective for various reasons. Here, as extrapolated from the Notice of Motion, the Plaintiff is moving for both renewal and reargument. CPLR § 2221 [f], which allows the moving party to move for the combined relief of renewal and reargument in one application, expressly provides that on such an application the movant "shall identify separately and support separately each item of relief sought." In the instant matter, the Plaintiff has failed to comply with this statutory directive. Moreover, the Plaintiff has failed to provide this Court with a copy of the complete record upon which this Court based its prior decision, in relation to which the Plaintiff now seeks renewal and reargument (*see Brzozowy v. Elrac*, 11 Misc.3d 1055, Sup. Ct., Kings County, January 19, 2008, Balter, J.).

Additionally, the Court is compelled to address the Plaintiff's counsel's assertion that the case of *Bishop v. Maurer* decided by the Appellate Division, First Department "is not good law." In the section of the underlying decision which dealt with the Defendant, Gross, this Court relied on *Bishop* for the general legal proposition that "an individual who signs a document without any valid excuse for having failed to read the contents thereof, is 'conclusively bound' by the terms therein contained" (*Gelobter v. Fox, et al*, Sup. Ct., Nassau County, May 5, 2010, Marber, J., Index No. 11416/08 at p. 25). A review of *Bishop's* subsequent history reveals that it was *Affirmed* by the Court of Appeals (*Bishop v. Maurer*, 9 N.Y.3d 910 [2007]). Thus, counsel's unequivocal characterization that *Bishop* is "not good law" is patently incorrect and somewhat puzzling (*id.*). In affirming the

Appellate Division, the Court of Appeals held that while the plaintiffs in that case were bound by estate documents signed by the decedent, it also noted that “Nevertheless, the conclusiveness of the underlying agreement does not absolutely preclude an action for professional malpractice against an attorney for negligently giving to a client an incorrect explanation of the contents of a legal document” (*id.*).

In the instant action, the Plaintiff herself stated that Mr. Gross indeed explained to her the contents of the documents and the numbers recited therein. Additionally, even assuming there was an allegation that Mr. Gross incorrectly explained the contents of the relevant documents, the basis upon which this Court dismissed the Plaintiff’s legal malpractice action was due to her failure to prove an essential element of such a cause of action, to wit: damages resulting from the alleged malpractice. As noted in the May 5, 2010 decision, the Plaintiff repeatedly testified that she received the consideration for which she bargained when she agreed to sell her home.

Finally, the Court notes that counsel’s assertion, that a sanctions hearing was ordered because “the plaintiff cannot prove damages”, completely disregards the substance of this Court’s prior decision. In ordering a hearing on sanctions, this Court, after an exhaustive review of the totality of the record, stated, *inter alia*, “that the actions of the Plaintiff and the Plaintiff’s counsel in commencing the action herein and then opposing the Defendants’ motions to dismiss, were ‘completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing

law” (*Gelobter v. Fox, et al*, Sup. Ct., Nassau County, May 5, 2010, Marber, J., Index No. 11416/08 at p. 30).

Accordingly, it is hereby

**ORDERED**, that the Plaintiff’s instant application which seeks leave to renew and reargue the decision of this Court dated May 5, 2010 is hereby **DENIED** in its entirety; and it is further

**ORDERED**, that counsel for the Plaintiff, as well as counsel for the moving Defendants herein, shall appear before the undersigned for a hearing on the matter of the imposition of costs and sanctions which shall be held on **OCTOBER 28, 2010 at 9:30 a.m.** (22 NYCRR 130-1.1[d]); and it is further

**ORDERED**, that counsel for the Defendants shall serve a copy of this Order upon the Plaintiff’s counsel pursuant to CPLR § 2103 (b) 1, 2, or 3 within seven (7) days of the date of this Order and shall file with the Court proof of such service prior to the hearing date.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York  
October 1, 2010

  
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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
OCT 07 2010  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE