

**Gerald Gardner Wright, P.C. & Assocs. v Champion
Prop. Mgt., LLC**

2012 NY Slip Op 30449(U)

February 6, 2012

Sup Ct, Nassau County

Docket Number: 4354-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**GERALD GARDNER WRIGHT, P.C. &
ASSOCIATES,**

Plaintiff,

-against-

**CHAMPION PROPERTY MANAGEMENT, LLC
and 2701 ASSOCIATES LLC,**

Defendants.
-----x

TRIAL/IAS PART: 16

NASSAU COUNTY

**Index No: 4354-08
Motion Seq. Nos. 8 and 9
Submission Date: 12/8/11**

The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Correspondence dated October 17, October 18,
November 16 and November 17, 2011.....X**
- Affirmation in Opposition and Exhibit.....X**
- Notice of Cross Motion, Affirmation in Support and Exhibits.....X**
- Reply Affirmation in Opposition/Support and Exhibits.....X**
- Reply Memorandum of Law in Further Support/Opposition.....X**

This matter is before the Court for decision on 1) the motion to reargue by Defendants Champion Property Management, LLC (“Champion”) and 2701 Associates LLC (“2701 Associates”) filed on September 29, 2011, and 2) the motion to amend by Plaintiff Gerald Gardner Wright, P.C. & Associates (“Plaintiff”) filed on November 18, 2011, both of which were submitted on December 8, 2011, following oral argument before the Court. For the reasons set forth below, the Court 1) grants reargument and, upon that reargument, modifies the Prior Decision to the extent that the Court directs that Plaintiff may not proceed on a fraud claim; and

2) grants Plaintiff's motion to amend but, in light of the Court's conclusion that Plaintiff's fraud claim is not viable, will permit Plaintiff to file a Second Amended Complaint consistent with this decision. The Court directs Plaintiff to file and serve its Second Amended Complaint within thirty (30) days of the date of this decision and directs Defendants to serve their answer within thirty (30) days of service of the Second Amended Complaint on them. The Court directs counsel for the parties to appear before the Court for a conference on April 19, 2012 at 9:30 a.m. **Counsel shall not be required to appear before the Court for a conference on March 1, 2012 as previously scheduled.**

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 2221(d), granting reargument of the prior decision of the Court dated August 19, 2011 ("Prior Decision") and, upon reargument, granting Defendants' prior motion ("Prior Motion") in its entirety and dismissing the Amended Complaint.

Plaintiff opposes Defendants' motion and cross moves for an Order, 1) pursuant to CPLR §§ 3025(a) and (b)(1), declaring that Plaintiff's Second Amended Complaint dated September 30, 2011 was properly served, pursuant to CPLR § 3025(a); or, in the alternative, 2) granting Plaintiff leave to serve and file the Second Amended Complaint *nunc pro tunc* and deeming same served upon the Defendants effective September 30, 2011; and 3) granting Plaintiff a default judgment against the Defendants based on their failure to timely answer or otherwise appear in regard to the Second Amended Complaint, and setting this matter down for an immediate inquest of damages.

Defendants oppose Plaintiff's cross motion.

B. The Parties' History

The parties' lengthy history, as well as the parties' positions and applicable law regarding the Prior Motion, is set forth in detail in the Prior Decision and the Court incorporates the Prior Decision herein by reference as if set forth herein. Following the issuance of the Prior Decision, and prior to the oral argument regarding this matter, counsel for the parties provided the Court with numerous letters outlining their positions regarding *inter alia* 1) the propriety of Defendants' rejection of Plaintiff's Second Amended Complaint dated September 30, 2011, 2) the timeliness, and timing, of the motion papers regarding the motions now before the Court for consideration, and 3) Defendants' application for costs based on Plaintiff's allegedly

improper conduct. This correspondence is symbolic, and symptomatic, of the progression of this matter.

As noted in the Prior Decision, the Amended Complaint alleges that 2701 Associates is fully liable for all causes of action asserted against Champion, as successors in interest of 50 Clinton Street Associates Management Co. The action arises out of Defendants' alleged 1) violation of a court order, 2) misrepresentation concerning the amount of space leased pursuant to a lease agreement, and 3) violation of the terms of a lease. The allegations in the Amended Complaint are substantially similar to those in the Original Complaint. Specifically, Plaintiff alleges that there have been violations of his lease agreement for the Premises regarding, *inter alia*, parking spaces, repairs and maintenance of the Premises. Plaintiff also alleges that Defendants have failed to comply with the Stipulation that was so-ordered by the Court (Austin, J.) in a prior related action. The Complaint contains four (4) causes of action: 1) fraud, 2) breach of contract regarding the Second Lease Amendment, 3) breach of contract regarding the Stipulation, and 4) actual partial eviction.

In the Prior Decision, the Court denied Defendants' Prior Motion based on the Court's conclusion that, pursuant to the doctrine of judicial estoppel, Defendants are foreclosed from seeking dismissal of the Amended Complaint on the grounds that Champion was never the owner of the Property. The Court reached that conclusion in light of Champion's prosecution of a related Non-Payment Proceeding in a manner that suggested that they were agents or representatives of the owner of the Property, and Defendants' lengthy participation in the instant action in a manner designed to communicate, and which in fact communicated, that Champion was acting on behalf of the owner of the Property.

C. The Parties' Positions

Defendants submit that the Court misapplied the doctrine of judicial estoppel in light of the fact that there is no prior action in which Defendants took a contrary position that resulted in a final and binding judgment. Defendants contend that, as no judgment was obtained in the Non-Payment Proceeding and no proceedings every took place in that action, the doctrine of judicial estoppel is inapplicable.

Defendants argue, further, that assuming *arguendo* that Defendants must remain as parties in this action, Plaintiff's claims are nonetheless not viable. Specifically, Defendants submit that 1) Plaintiff's execution of the Estoppel Certificate in 2004, subsequent to its execution of the Second Amended Lease and commencement of the Prior Owner Action,

constitutes a waiver of any claim that existed when the estoppel certificate was signed; 2) Plaintiff's claims are barred by the doctrine of res judicata in light of Plaintiff's execution of the Settlement Agreement in connection with the Prior Owner Action, contemporaneously with the execution of the Estoppel Certificate; 3) Plaintiff has failed to plead facts establishing successor liability of either Defendant; and 4) the Amended Complaint fails to allege the elements of fraud.

Plaintiff opposes Defendants' motion for reargument submitting *inter alia* that 1) the Court properly applied the doctrine of judicial estoppel even though Defendants did not obtain a final judgment in the prior proceeding; 2) the Estoppel Certificate does not preclude the instant action in light of the fact that a) the Estoppel Certificate confirms only that there was no dispute regarding issues including the amount of rent then being paid under the lease; the Estoppel Certificate does not state that there were no ongoing issues or disputes with the landlord pertaining to either the amount of rentable space and/or the rent properly payable under the Second Lease Amendment; and b) Defendants effectively conceded that the Estoppel Certificate does not preclude the instant action when they requested a second Estoppel Certificate from Plaintiff in early 2006; 3) the instant action is not barred by the doctrine of res judicata in light of the fact that the prior related action was not fully litigated and did not result in a final judgment being entered against any party but, instead, was resolved pursuant to the February 6, 2004 Stipulation of Settlement; 4) the Court should reject Defendants' successor liability arguments which are moot in light of Plaintiff's service of, and instant cross motion to approve and retain, its Second Amended Complaint dated September 30, 2011 which pleads successor liability in greater detail than the Amended Complaint; and 5) the cause of action for fraud is viable and the cases cited by Plaintiff are distinguishable.

Plaintiff also argues that the Court should permit Plaintiff to file the Second Amended Complaint in light of the liberal amendment policy and the absence of prejudice to Defendants. Defendants oppose Plaintiff's motion submitting that the claims in the proposed Second Amended Complaint are also precluded by the doctrines of estoppel and res judicata, contain insufficient allegations of successor liability and do not set forth a viable fraud claim.

RULING OF THE COURT

A. Reargument Standards

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d

593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992). *Accord Matter of Carter*, 916 N.Y.S.2d 821 (2d Dept. 2011).

B. Leave to Amend

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

C. Application of these Principles to the Instant Action

The Court grants reargument and, upon that reargument, concludes that the Court should not have applied the principle of judicial estoppel in determining that Defendants were foreclosed from seeking dismissal of the Amended Complaint on the grounds that Champion was never the owner of the Property. Recent cases support the conclusion that judicial estoppel only applies when a party has obtained a judgment in its favor in the prior proceeding. In *Ferreira v. Wyckoff Heights Medical Center*, 81 A.D.3d 587 (2d Dept. 2011), the Second Department reaffirmed the principle that the doctrine of judicial estoppel will be applied when a party has secured a judgment in his or her favor by adopting the prior position, and then has sought to assume a contrary position simply because his interests have changed. *Id.* at 588. And in *Wenger v. DMR Realty Management, Inc.*, 934 N.Y.S.2d 221 (2d Dept. 2011), the Second Department held that the doctrine of judicial estoppel did not apply because the prior action at issue settled before the trial court considered the position taken by the plaintiff in that prior action. *Id.* at 222. Under the reasoning of *Wenger*, the doctrine does not preclude Defendants from arguing here and now that they are not a proper party in the instant action, as the Prior Owner Action was resolved by stipulation prior to consideration of any arguments made to the court in that action that may conflict with any positions taken in the instant action.

The Court is also persuaded that Plaintiff's fraud claim is not viable. In *Meiselman, Deniea, Packman & Eberz, P.C. v. 11-44 Associates, L.L.C.*, 12 A.D.3d 158 (1st Dept. 2004), which Defendants cited during oral argument on this matter, the First Department addressed plaintiff lessee's claims that defendant lessors had misrepresented the area of the commercial premises at issue. *Id.* at 159. The First Department held that plaintiff's claim of misrepresentation, and "dependent causes" alleging fraud and negligent misrepresentation and seeking reformation of the lease, were untenable, "particularly since [plaintiff] had every

opportunity to ascertain the actual dimensions of the leased space.” *Id.* Given that the matter *sub judice* involves the same issue, the Court is persuaded that Plaintiff’s fraud claim is not viable because Plaintiff had the opportunity to ascertain the dimensions of the Premises.

Thus, the Court modifies the Prior Decision to the extent that the Court directs that Plaintiff may not proceed on a fraud claim. The Court also concludes, however, that Plaintiff should be permitted to file its Second Amended Complaint which further details the basis for its theory of successor liability on the part of Defendants. While the Prior Owner Action does not preclude Defendants’ arguments of lack of ownership on judicial estoppel grounds, the fact that more than one party has appeared in the role of owner or manager of the Premises has made this action more complicated, and militates in favor of granting of Plaintiff’s application to amend. Accordingly, the Court will permit Plaintiff to file a Second Amended Complaint consistent with this decision, and directs Plaintiff to file and serve its Second Amended Complaint within thirty (30) days of the date of this decision, and directs Defendants to serve their answer within thirty (30) days of service of the Second Amended Complaint on them. Plaintiff’s application for a default judgment is denied. Defendants’ application for costs is denied.

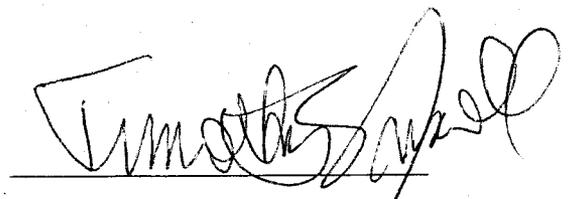
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on April 19, 2012 at 9:30 a.m. **Counsel shall not be required to appear before the Court for a conference on March 1, 2012 as previously scheduled.**

ENTER

DATED: Mineola, NY
February 6, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
FEB 16 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE