

O'Brien v Town of Huntington

2006 NY Slip Op 30574(U)

October 23, 2006

Supreme Court, New York County

Docket Number: 15166-81

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

JUDGMENT GRANTED; CDISP

-----X
 THOMAS E. O'BRIEN, EVELYN E. O'CONNELL:
 THE CHASE MANHATTAN BANK, as successor :
 trustee of the Trust for the benefit of. C.H. COSTER:
 GERARD, under Trust Deed dated Dec. 28, 1935 :
 of SUMNER GERARD, et al, :
 :
 :
 Plaintiffs, :
 :
 -against- :
 :
 TOWN OF HUNTINGTON and THE BOARD :
 OF TRUSTEES OF THE TOWN OF :
 HUNTINGTON, :
 :
 Defendants. :
 -----X

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Upon the following papers numbered 1 to 11 read on this application for a judgment
_____; Proposed Judgment and supporting papers 1 - 2; Notice of Cross Motion and supporting
papers _____; Opposition to proposed Judgment and supporting papers 3 - 5; 6-7; 8-9; Replying
Affidavits and supporting papers 10-11; Other _____; (~~and after hearing counsel in support and
opposed to the motion~~) it is,

ORDERED that this Judgment with Notice of Settlement is signed simultaneously with this Order;
and it is further

ORDERED that defendants' opposition to the proposed judgment, which requested certain affirmative
relief and an Order (1) granting the defendants leave to reargue the Order dated June 21, 2006 which denied
their post-trial motion brought pursuant to CPLR 4404(a) upon the grounds that the Court misperceived
controlling facts and rule of law; (2) determining defendants' motion to dismiss brought pursuant to CPLR
4401 (which was reserved), upon the grounds that the Court has yet to address or decide the motion; (3)

deciding the defendants' pre-trial motion for summary judgment to dismiss brought pursuant to CPLR 3212 (reserved until after trial) upon the grounds that the Court has yet to address or decide the motion; and (4) with respect to the two outstanding motions, deeming the defendants' counterclaims amended to conform to the proof at trial, to include a claim for judgment declaring the tax deeds upon which the Gerard plaintiffs rely, void as to the Board of Trustees of the Town of Huntington and the Town of Huntington, is denied; and it is further

ORDERED that counsel for each of the plaintiffs and the defendants shall serve a copy of this Order with Notice of Entry upon respective counsel within twenty-five (25) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavits of service with the Clerk of the Court.

The plaintiffs have submitted a proposed Judgment with Notice of Settlement to the Court for signature. Defendants oppose the application and rather than submit a counter judgment, submit opposition requesting affirmative relief, calling it a cross motion. Defendants are procedurally incorrect in their submission seeking affirmative relief (*see* CPLR 2215). However, the Court will deem defendants' application not as a cross motion, but as opposition only and will address the relief requested therein. In support of defendants' opposition, counsel states that the Court should substitute a decision and order consistent with the facts and arguments presented in his opposition.

Reargument is designed to afford a party the opportunity to establish that the court overlooked or misapplied any controlling principle of law (*see Schneider v Soloway*, 141 AD2d 813, 529 NYS2d 1017 [2d Dept. 1988]) and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]; *Town of Riverhead v TS Haulers*, 275 AD2d 774, 776, 713 NYS2d 740 [2d Dept 2000]; *see McGill v Goldman*, 261 AD2d 593, 691 NYS2d 593 [2d Dept 1999]). It is within the Court's sound discretion to grant reargument (*see Schneider v Soloway*, 141 AD2d 813, *supra*). However, the purpose of reargument is not to afford the aggrieved party a second chance to argue over the very questions previously decided (*see Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]; *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]; *app after rem* 86 AD2d 887 [2d Dept 1982]; *app den* 56 NY2d 507 [1982]). The party seeking to reargue must set forth the facts or law the court overlooked in making the original decision.

Here, in their opposition, defendants merely restate their previous arguments regarding issues already decided, which is inappropriate (*see Bliss v Jaffin*, 176 AD2d 106, 573 NYS2d 687 [1st Dept 1991]). The Court, after a thorough review of the papers presented on the original motion, finds that there were sufficient reasons for its decision. Further, the Court did not overlook or misapprehend the facts as presented by the parties nor misapplied any controlling principles of law (*see Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 588 NYS2d 28 [1st Dept 1992]; *Foley v Roche*, 68 AD2d 558, *supra*). Defendants have failed to set forth any valid grounds for reargument under the principles of reargument. Additionally, defendants have not set forth any factual matter or legal authority overlooked by this Court (*see Flynn v Town of No. Hempstead*, 114 Misc2d 125, 451 NYS2d 352 [Sup Ct, Nassau Cty 1982]; *aff* 97 AD2d 430, 467 NYS2d 395 [2d Dept 1983];

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Cisco v Levine 72 Misc2d 1087, 341 NYS2d 719 [Sup Ct, Nassau Cty 1973]). The Court finds that no basis for reargument exists here and defendants have not demonstrated that this Court overlooked or misapprehended the facts or the law to warrant reargument and a change its prior determination (*see Elarac v Masara*, 96 NY2d 847, 729 NYS2d 60 [2001]). Therefore, defendants' request for reargument is denied.

In reaching its decision to deny reargument, the merits of defendants' position have not been specifically discussed, as to do so, would improperly result, upon appeal, being deemed to have granted reargument (*see State of New York v Gruzen Partnership*, 239 AD2d 735, 657 NYS2d 830 [3d Dept 1997]; *Durham v Hilco Constr. Co., Inc.* 221 AD2d 586, 634 NYS2d 208 [2d Dept 1995]).

Defendants also seek a determination of their motion made during the trial of this matter under CPLR 4401. While the Court inadvertently neglected to indicate that its decision of June 16, 2006 was inclusive of both of defendants' CPLR 4404 and CPLR 4401 motions, (*see* 8 New York Civil Practice, Weinstein,-Korn-Miller, ¶ 4404 at p 44-44 [Lexis-Nexis 2006]; *Szczerbiak v Pilat*, 90 NY 2d 553, 664 NYS 2d 252 [1997]), the Court now corrects that error and for the reasons stated in its decision of June 16, 2006 incorporated herein by reference, denies the defendants' motions under CPLR 4401.

Additionally, defendants move to amend their answer and include counterclaims. CPLR 3025(b) provides that leave to serve an amended pleading should be freely given upon such terms as are just. The decision whether to grant or deny leave to amend rests within the sound discretion of the trial court and is made on a case by case basis (*see Monello v Sottlie, Megna, M.D. P.C.*, 281 AD2d 463, 722 NYS2d 41 [2d Dept 2001]; *Sherman v Claire Mfg. Co.*, 239 AD2d 487, 657 NYS2d 453 [2d Dept 1997]; *Matter of Goggins*, 231 AD2d 634, 647 NYS2d 804 [2d Dept 1996]; *app dis., leave to app. den.* 89 NY2d 973, 655 NYS2d 886 [1997]). In order to defeat a motion to amend a pleading, there must be some proof of prejudice to the non-moving party. Prejudice has been defined by the court as "some special right lost in the interim, some change of position or some trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*Barbour v Hospital for Special Surgery*, 169 AD2d 385, 563 NYS2d 418 [1991]).

This matter, initially commenced over twenty-five years ago, has been before this Court since April of 2005. Defendants now seek to amend their answer and interpose a counterclaim for judgment declaring the subject tax deeds void as to the Trustees and the Town of Huntington, almost a year and a half after the month long jury trial in this matter was taken to a verdict (*see e.g. Haller v Lopane*, 305 AD2d 370, 759 NYS2d 504 [2d Dept 2003]; *Caruso v Anpro*, 215 AD2d 713, 627 NYS2d 72 [2d Dept 1995]). This move by defendants vitiates the purposes of CPLR 3025(b) and is clearly without merit (*see Scott v Keycorp*, 69 AD2d 76, 669 NYS2d 76 [3d Dept 1994]). Allowing defendants to freely serve an amended answer with the asserted counterclaim for judgment will prejudice plaintiffs.

The defendants have not made an evidentiary showing that their claims can be supported (*see Joyce v McKenna Assoc.*, 2 AD3d 592, 768 NYS2d 358 [2d Dept 2003]; *see also Sample v Levada*, 8 AD3d 465,

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779 NYS2d 96 [2d Dept 2004]). Furthermore, the Court finds that the delay in requesting to amend their answer and the resultant prejudice to the plaintiffs by the proposed amendments, not submitted herein but rather, referred to, mandates denial (*see Clark v MGM Textiles Indus.*, 18 AD3d 1006, 794 NYS2d 735 [3d Dept 2005]; *Hill v Giuliani*, 249 AD2d 28, 670 NYS2d 493 [1st Dept 1998]; *Frost v Monet*, 202 AD2d 632, 609 NYS2d 308 [2d Dept 1994]). As indicated, defendants did not include a copy of their proposed amended answer (*see Chang v First American Title Ins. Co. of New York*, 20 AD3d 502, 799 NYS2d 121 [2d Dept 2005]; *Haller v Lopane*, 305 AD2d 370, *supra*). Therefore, their application to amend their answer to submit a proposed additional counterclaim, is denied.

Defendants move for summary judgment, as well, based upon the Order of Justice Catterson, dated January 25, 2002. In a colloquial with the Court during the trial of this matter, defendants stated that because of the particularity of this matter, they would present what they claimed to be undecided motions, to the trial court for decision.¹ Defendants failed to do so. Instead, they presented the Court with the full three volume Joint Appendix record on appeal of the orders of Justice Catterson.


In his decision, dated January 25, 2002, Justice Catterson stated:

... at this juncture, this Court holds that all motions not previously determined are hereby reserved for decision after completion of all six trials, except for the town's motion raised in all cases for a dismissal of the complaints on the ground that the plaintiffs failed to join the Board of Trustees as a necessary party.

That issue, decided by Justice Catterson in his Order and decision, dated January 25, 2002, was upheld on appeal and is, therefore, moot. The Order of Justice Catterson was clear, concise and direct in that all motions not determined by the Court, were reserved for decision after completion of all *six* trials. There has been only *one* trial thus far. The Court denies defendants' application for summary judgment as being premature.

Accordingly, the proposed Judgment is signed simultaneously herewith and defendants' application for affirmative relief and in opposition to the plaintiffs' judgment, is denied as noted herein. This constitutes the Order and decision of the Court.

DATED: 10/23/06



THOMAS F. WHELAN, J.S.C.

¹ The selected pages wherein the Court refers to defendants' statements regarding their motion submissions was submitted by plaintiffs in opposition to defendants' opposition papers.