

Urban Homesteading Assistance Bd. v Barreto

2007 NY Slip Op 30843(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0106057/2005

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

THE URBAN HOMESTEADING ASSISTANCE BOARD,
HOUSING DEVELOPMENT FUND CORPORATION,
Plaintiff,

Index No.: 106057/05

Motion Date: 01/09/06

Motion Seq. No.: 03

Motion Cal. No.: OSC

- v -

ALFREDO BARRETO, JULIO RODRIGUEZ, ANNIBEL
MARTINEZ, "JOHN DOE" Nos. 1 through 5, and
"JANE DOE" Nos. 1 through 5,
Defendants.

The following papers, numbered 1 to 3 were read on this motion to renew and reargue.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

FILED

Upon the foregoing papers,

APR 23 2007

The court shall deny defendants' motion pursuant to
2221 to renew and reargue this court's Order dated August 26,
2006.

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NEW YORK

Movants seek renewal on the grounds that there are "new
facts not offered on the prior motion that would change the prior
determination." Defendants argue that a copy of a New York City
Department of Housing Preservation and Development (HPD) survey
appended to the current motion demonstrates that the testimony of

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

[* 2]

the process server as to the place of service was incorrect and establishes that defendants were not served with due diligence. The court agrees with plaintiff that the renewal motion is meritless. Even assuming that the evidence now proffered by defendants would have caused the court to reach a different conclusion, renewal is not proper because by the defendants' own admission the evidence, a public record, "was in existence at the time [of the prior motion] but not thought to be needed." "Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (see CPLR 2221 [e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice." Mejia v Nanni, 307 AD2d 870, 871 (1st Dept 2003). However, this court in its initial decision found that defendant Barreto "admits that he found papers from plaintiff affixed to his door." In light of defendant's admission on the prior motion, the court has no reason to exercise its discretion and reexamine its prior determination where the defendants concede they could have introduced such evidence previously and made a strategic choice not to do so.

With respect to defendants' motion for reargument, it is conceded by the defendants that this motion is brought beyond the thirty day period provided for in CPLR 2221 (d) (3). Defendants argue the court has discretion to consider this motion beyond the

statutory period during the pendency of an appeal from the Order. Defendants position finds support in a decision of the First Department (Garcia v Jesuits of Fordham, Inc., 6 AD3d 163, 165 [1st Dept 2004] ["although plaintiff's motion for reargument was technically untimely pursuant to CPLR 2221 (d), it was not an improvident exercise of the court's discretion to have reconsidered its prior ruling"]) and a decision by a Justice of this Court (Dugas v Bernstein, 5 Misc3d 818, 827 [Sup Ct, NY County, Carey, J., 2004] ["a motion for leave to reargue, untimely under CPLR 2221 (d) (3), may be considered where a timely taken yet unsubmitted appeal is pending"]). Putting aside the issue of whether the court should exercise its discretion in allowing defendants' late application, the court shall deny reargument on the merits as the defendants fail to raise any issue of law or fact overlooked by the court. The court considered the process server's complete testimony credible and held that proper service was made based upon the facts in the record. Further, there was sufficient factual evidence in the record for the court to conclude that the defendant admitted to receiving process in this action notwithstanding the commencement of a second action. Finally, defendants have attached no support for their attempt to vacate their default under CPLR 5015 as to a meritorious defense to the present action and the defendants were never deprived of the opportunity to move on such grounds.

The court shall therefore deny the application for reargument on the grounds that defendants have cited no issue of law or fact overlooked by the court in its consideration and determination of the prior motion.

Therefore, it is

ORDERED that the defendants' motion is DENIED; any restraints set forth in the Order to Show Cause are hereby VACATED and ANNULLED, and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 12, 2007

ENTER:

~~_____~~
DEBRA A. JAMES J.S.C.
J.S.C.

FILED

APR 23 2007

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NEW YORK