O'Brien v Town of Huntington
2007 NY Slip Op 31320(U)
May 2, 2007
Supreme Court, Suffolk County
Docket Number: 0015166/1981
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 15166-81

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 12/29/06
ADJ. DATE: 1/5/07
Mot. Seq. # 015 - MG
Mot. Seq. # 016 - XMD

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.	EDWARD J. LEDOGAR, ESQ. Attys. For Plaintiffs 630 Montauk Hwy. - POB 275 West Islip, NY 11795 ESSEKS, HEFTER & ANGEL, ESQS. Attys. For Plaintiffs - Gerard 108 E. Main St. - POB 279 Riverhead, NY 11901 BERKMAN, HENOCH, PETERSON ETAL Attys. For Defendants 100 Garden City Plaza Garden City, NY 11530

Upon the following papers numbered 1 to 13 read on this motion to reargue a prior Order and cross motion to vacate the judgment; Notice of Motion and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 7-9; Opposition to proposed Judgment and supporting papers 4-6; 10-11; Replying Affidavits and supporting papers 10-11; Other 12-13 (Memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#015) by the plaintiffs for an Order pursuant to CPLR 2221(a) and (d) granting the moving plaintiffs leave to reargue and/or modify the Order dated October 23, 2006 to the limited extent, if at all, that the Order reserve for decision any remaining, pending, undecided and potentially dispositive branches of the defendants' pre-trial motion for summary judgment in this action until after the completion of five other trials and, upon reargument and/or modification, granting the moving plaintiffs an Order clarifying the Order dated October 23, 2006 to the effect that the Order finally resolved this action and that there are no remaining, pending, undecided and dispositive branches of that motion in favor of the plaintiffs and against the defendants, is granted; and it is further

ORDERED that the Order dated October 23, 2006 is amended to reflect that the last line in paragraph two on page four, shall read as follows:

> The Court denies defendants' application for summary judgment as being premature regarding the pending motions for summary judgment in the remaining five other actions, which were and are not before this Court.

and it is further

ORDERED that the cross motion (#016) by the defendants, The Town of Huntington and the Board of Trustees of the Town of Huntington, seeking an Order vacating the judgment dated October 23, 2006 and compelling the Court to render a decision on the defendants' motion for summary judgment and a proper reviewable decision on the defendants' CPLR 4401 motion, as well, is denied; and it is further

ORDERED that counsel for the Gerard Family plaintiffs shall serve a copy of this Order with Notice of Entry upon counsel for the defendants and the other plaintiffs within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

This motion, brought by the Gerard family plaintiffs, is based upon a prior Order (Whelan, J.), dated October 23. 2006, the details and familiarity of which are well known to the parties and will not be reiterated herein. Plaintiffs seek an Order granting them leave to reargue and/or modify the Order dated October 23, 2006 to the limited extent, if at all, that the Order reserve for decision any remaining, pending, undecided and potentially dispositive branches of the defendants' pre-trial motion for summary judgment until after the completion of five other trials and, upon reargument and/or modification, granting the moving plaintiffs an Order clarifying said Order to the effect that the Order finally resolved this action and that there are no remaining, pending, undecided and dispositive branches of that motion in favor of the plaintiffs and against the defendants. While plaintiffs' motion is stated to be one for reargument, this is a misnomer as plaintiffs are actually requesting a clarification from the Court as to the sentence in paragraph two on page four of the decision (*see* ***Ungar v Ensign, FSB,*** 196 AD2d 204, 608 NYS2d 405 [1st Dept 1994]; ***Vierya v Briggs & Stratton Corp.***, 184 AD2d 766, 585 NYS2d 468 [2d Dept 1992]). The sentence plaintiffs seek to clarify, states as follows:

> The Court denies defendants' application for summary judgment as being premature.

While questioning the intent and meaning of this sentence, plaintiffs have raised the issue that if the sentence remains as stated in the Order, it could, in the future, create uncertainty as to whether the judgment entered in this case was a final judgment or whether the judgment is non-final, which could be vacated at some unknown date in the future based upon an undecided branch of the defendants' motion for summary judgment if and when all five of the remaining cases are finally decided. To alleviate plaintiff's uncertainty

and clarify the record, this sentence was intended to apply only to the five civil actions still remaining to be assigned to a trial part and not to the instant matter.

When this matter and the five related case rulings were assigned to Justice Catterson, and ostensibly to be tried before Justice Catterson, he determined that defendants' motions seeking summary judgment in all six actions would be decided together, however, the actions were never consolidated. This was a discretional decision by Justice Catterson (*see* ***Brothers v Bunkoff Gen. Contrs.***, 296 AD2d 764, 765, 745 NYS2d 284 [3d Dept 2002]; ***People v Evan,*** 94 NY2d 499, 504-506, 706 NYS2d 678 [2000]), although Justice Catterson's decision was not binding on subsequent trial courts under the doctrine of the law of the case (*compare* ***Matter of Independence Party State Comm. of N.Y. v Berman,*** 28 AD3d 556, 812 NYS2d 654 [2d Dept 2006]; ***EIFS, Inc. v Moore Co.,*** 298 AD2d 551, 748 NYS2d 672 [2d Dept 2002]). Thereafter, Justice Catterson was named to the Appellate Division, First Department, and this matter and the related five actions were reassigned to Calendar Control Part. The instant matter was then assigned to this IAS Part for trial and the other related five actions remained on the trial calendar.

The sentence shall be amended to read as above indicated. The Court has denied defendant's application for summary judgment in this action solely and squarely on the issues presented by defendants in this action only. The Court did not intend by its language in its decision to create any inherent uncertainty in granting plaintiffs a final judgment in this matter as set forth in its Order of October 23, 2006. This is the only matter tried before this Court and it is only in this matter that the Court has rendered a decision and a judgment.

The Court herein resolved any perceived doubt regarding the statute of limitations defense(s) raised by defendants before Justice Catterson, which were subsequently raised before this Court. The defendants' remaining contention that the defendants' action was a defacto taking or an inverse condemnation for a limitations period, is belied by the defendants' own actions in passing Town Resolutions vis a vis a physical occupation of the property in question (*see* ***Sarnelli v City of New York,*** 256 AD2d 399, 681 NYS2d 578 [2d Dept 1998], *lv den* 93 NY2d 804, 689 NYS2d 429 [1999], *reagument den* 93 NY2d 804, 694 NYS2d 635 [1999]). There was no evidentiary proof introduced that the defendants had ever physically occupied the land or commenced condemnation proceedings which would evoke a limitations period (*see* ***Sarnelli v City of New York***, 256 AD2d 399, *supra*).

However, the analysis does not end there regarding any limitations defense. Here, the defendants suddenly "discovered" the subject property within its geographical boundary and to facilitate the takeover of this "discovered land," transformed it by edict from private property into dedicated parkland by passing two resolutions and directing that the "discovered land" be removed by the defendants' assessor from the defendants. Defendants failed to submit any evidence, either statutory or case law, in support of its motion for summary judgment that it obtained title to the property based upon a valid deed. Therefore, any purported deed is void and the defendants never acquired title (*see* ***Union and New Haven Trust Co. v State of New York,*** 15 AD2d 1, 221 NYS2d 320 [3d Dept 1961]); *cf.* ***Grayson v Town of Huntington,*** 160 AD2d 835, 554

NYS2d 269 [2d Dept 1990]) and the defendants cannot assert a statue of limitations claim when its very act was an invalid act without authority. Furthermore, because the Town never had a valid deed to the property, any claim of title was void as a matter of law and public policy renders inapplicable any statutory bar to the plaintiffs' action, even though it was brought nine years after the Town's resolution (*see* ***Riverside Syndicate, Inc. v Munroe,*** ____ AD3d ____, ____ NYS2d ____ [2d Dept 2007]). The action of the defendants herein in simply declaring that the "discovered property" be deemed parkland was an arbitrary and capricious action without consideration and with a disregard of the facts (*see* ***Matter of Monachino v Rohan,*** 13 Misc2d 729, 178 NYS2d 246 [Sup Ct, Cayuga County 1958]). The action was taken without statutory power and therefore, is void (*see* ***Foy v Schecter,*** 1 NY2d 604, 154 NYS2d 927 [1956]).

The Town had no inherent power to declare the "discovered property " parkland. Such authority is solely by legislative grant and in the absence of the legislative delegation of power, the Town's action was ultra vires and void (*see e.g.* ***Kamhi v Planning Bd. of Town of Yorktown,*** 59 NY2d 385, 465 NYS2d 865 [1983]) and renders any statute of limitations defense inapplicable to preclude a challenge to the actions of the defendant (*see* ***Home Depot, USA, Inc. v Baum,*** 226 AD2d 725, 641 NYS2d 707 [2d Dept 1996]; ***South Shore Audubon Soc., Inc. v Bd. of Zoning Bd. of Appeals of the Town of Hempstead,*** 185 AD2d 984, 587 NYS2d 29 [2d Dept 1992]). Therefore, as enumerated herein, the Court finds that defendants' asserted affirmative defense of the statute of limitations must be denied as their actions were ultra vires and consequently there could be no limitations period based upon an illegal act.

Defendants' cross motion seeking to vacate the Order dated October 23, 2006, which granted judgment to the plaintiffs, also seeks to compel the Court to render a decision on defendants' motion for summary judgment and a proper reviewable decision on the defendants' CPLR 4401 motion. Although this is not stated as such by the defendants, it is, in essence, a motion to reargue the Court's decision (*see* ***Adderly v State of New York***, 35 AD3d 1043, 825 NYS2d 384 [3d Dept 2006]).

A motion to reargue 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 75 [2d Dept 1999]). It is within the Court's sound discretion to grant a motion to reargue (*see* ***Schneider v Soloway,*** 141 AD2d 813, *supra*). The purpose of the motion to reargue, however, 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, 447 NYS2d 528 [2d Dept 1982]; *app den* 56 NY2d 507 [1982]). The party seeking a motion to reargue must set forth the facts or law the court overlooked in making the original decision.

Here, defendants have merely restated their previous arguments regarding issues already decided,

which is inappropriate (*see* ***Bliss v Jaffin,*** 176 AD2d 106, 573 NYS2d 687 [1st Dept 1991]). After a thorough review of the papers presented on the original motion, the Court has found that there were sufficient reasons for its decision and that it did not overlook or misapprehend the facts as presented by the parties nor misapplied any controlling principles of law as to the facts and circumstances of this matter (*see* ***Pahl Equip. Corp. v Kassis,*** 182 AD2d 22, 588 NYS2d 8 [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 and have not set forth any factual matter or legal authority overlooked by this Court (*see* ***Flynn v Town of N. Hempstead,*** 114 Misc2d 125, 451 NYS2d 352 [Sup Ct, Nassau County 1982]; *aff* 97 AD2d 430, 467 NYS2d 395 [2d Dept 1983]; ***Cisco v Levine*** 72 Misc2d 1087, 341 NYS2d 719 [Sup Ct, Nassau County 1973]). Since defendants have failed to demonstrate that the Court overlooked or misapprehended the facts or the law to warrant reargument, the Court finds no basis to change its prior (*see* ***Elarac v Masara,*** 96 NY2d 847, 729 NYS2d 60 [2001]). Therefore, defendant's cross motion is denied.

The Court notes that contrary to defendants' contention raised herein, there was no stipulation between the parties staying the five other related actions until a judgment was entered in this case. In fact, the stipulation was drafted so that only the co-plaintiff and defendants were required to be signatories, not the moving plaintiff herein. Therefore, the Gerard plaintiffs, as non-signatories, were never bound by the stipulation (*see* ***Estate of Roth v Erhal Holding Corp.***, 141 AD2d 693, 529 NYS2d 815 [2d Dept 1988]; *see also* ***Hudson Harbor Preservation Assn. v Davis***, 812 AD2d 745, 440 NYS2d 7 [1st Dept 1981]).

As to the defendants' claims reiterated in their cross motion that the Court had previously found they had not met their initial burden of setting forth any evidentiary facts or legal arguments sufficient to establish their entitlement to judgment as a matter of law, both during the trial and in their post trial motions (*see* ***Fabbricatore v Lindenhurst Union Free School Dist.,*** 259 AD2d 659, 685 NYS2d 629 [2d Dept 1999]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]), the Court notes that in reaching its decision to again deny reargument to the defendants, the merits of defendants' position have not been specifically discussed, as to do so, would improperly result, upon appeal, in this being deemed to have granted reargument to defendants (*see* CPLR 5517[a][1]; ***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], *lv app granted* 88 NY 807, 647 NYS2d 164 [1996], *order reversed* 89 NY2d 425, 650 NYS2d 335 [1996]).

Accordingly, plaintiffs' motion is granted as noted herein and defendant's cross motion is denied and this Court's Order of October 23, 2006 is clarified to the extent that it is applicable only to the instant case at bar. This constitutes the Order and decision of the Court.

DATED: 5/2/07

THOMAS F. WHELAN, J.S.C.