

Robert v Koho

2007 NY Slip Op 31776(U)

June 19, 2007

Supreme Court, New York County

Docket Number: 0114552/2003

Judge: Walter Tolub

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

WALTER B. TOLUB

PRESENT:

Index Number : 114552/2003

PART 15

ROBERT, EILEEN

vs

KOHO, DANIEL

Sequence Number : 006

MODIFY ORDER/JUDGMENT

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 22 2007 IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION
NEW YORK COUNTY CLERK'S OFFICE

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6/19/07

WALTER B. TOLUB S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

RECEIVED

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
EILEEN ROBERT

Plaintiff,

-against-

DANIEL KOHO

Defendant.
-----x

Index No. 114552/2003
Mtn Seq. 006

FILED
JUN 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

By this motion, Plaintiff seeks to correct the amended judgment dated January 15, 2007 pursuant to CPLR 5019(a). Plaintiff's motion is denied in its entirety with leave to renew.

Facts

Plaintiff commenced this action claiming that during the course of construction to the building adjacent to Plaintiff's, Defendant trespassed upon Plaintiff's property. At the time Plaintiff served her complaint, she was advised that Defendant sold his building to Peter Georgiopoulos. Plaintiff did not modify her complaint to include Mr. Georgiopoulos as a party in this action.

A non-jury trial was held before this court on November 16, 2005 and November 17, 2005. On April 19, 2005, a judgment was entered which awarded Plaintiff \$500 for the pediment encroachment and otherwise dismissed the complaint with prejudice. Plaintiff appealed from the original judgment and on December 7, 2006, the Appellate Division affirmed the original

judgment but modified the remedy for the three-inch encroachment created by the pediment:

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered April 19, 2006, which, after a non-jury trial, awarded plaintiff the sum of \$500, unanimously modified, on the law and the facts, to vacate the award of monetary damages and declare that the pediment of 47 Charles Street encroaches on plaintiff's property, defendant directed to remove the pediment from plaintiff's property, and otherwise affirmed, without costs.

(Defendant Ex. B)

On or about January 9, 2007, Plaintiff submitted a Proposed Amended Judgment. The decretal paragraph of the Proposed Amended Judgment directed that:

. . . defendant and his successors in title to the real property 47 Charles Street, New York New York, to remove the offending pediment and structure encroaching upon 45 Charles Street, New York, New York, replace it with a smaller pediment without adversely affecting 45 Charles Street or otherwise make an appropriate equitable adjustment.

(Defendant's Ex. C). By adding such language, Plaintiff attempted to bind Mr. Georgiopoulos, a non-party to the action, to the Proposed Amended Judgment.

Defendant submitted a Proposed Counter Judgment on January 17, 2007. The Proposed Counter Judgment directed that: (1) The \$500 award of monetary damages be vacated; (2) that the Defendant remove the pediment from Plaintiff's property; and (3) that except as otherwise provided, the Complaint and Amended Complaint

be dismissed with prejudice.

On January 31, 2007, this court signed and entered Defendant's Counter Judgment. Plaintiff never served notice of entry of the signed Counter Judgment, rather, Plaintiff made this present motion pursuant to CPLR 5019(a) to correct the Counter Judgment. Plaintiff's motion is denied.

Discussion

CPLR §5019(a) provides that "[a] judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party. A trial or an appellate court may require the mistake, defect or irregularity to be cured." This same section also provides a court with the discretion to cure mistakes, defects and irregularities in judgments regarding ministerial matters which do not affect the substantive rights of the parties. (Haggerty v. Market Basket Enterprises, Inc., 8 AD3d 618 [2d Dept 2004] citing Kiker v. Nassau County, 85 NY2d 879 [1995]).

Plaintiff's motion does not seek to correct a ministerial defect or irregularity, but seeks to change and affect the substantive rights of both a party and a non-party to this action. Specifically, Plaintiff seeks to require the Defendant to remove the three-inch encroachment on to Plaintiff's property and also require the Defendant's purchaser, a non-party to this

action, to remove the encroachment. Since Plaintiff's proposed amendment is not confined to a ministerial manner, but rather seeks to alter the substantive rights of both parties and non-parties, the motion is denied.

Plaintiff also argues that a motion under CPLR 5019(a) may be made where a settled or entered judgment does not conform strictly to the decision of the court. Here, however, the Counter Judgment accurately reflects the Decision and Order of the Appellate Division.

The Appellate Division ordered that the Original Judgment be modified to "vacate the award of monetary damages and declare that the pediment of 47 Charles Street encroaches on plaintiff's property, defendant directed to remove the pediment from plaintiff's property, and otherwise affirmed, without costs." This language, and only this language, constitutes the Appellate Division's directive. The Appellate Division's directed is reflected the signed Counter Judgment.


Moreover, the Appellate Division decision cannot and does not bind the purchaser of Defendant's property. Mr. Georgiopoulos is a non-party to this action and is not subject to the jurisdiction of this court. However, the court recognizes that directing the Defendant to remove any pediment directly would amount to Defendant committing a trespass.

Accordingly, it is

ORDERED that Plaintiff's motion is denied in its entirety with leave to renew and the Defendant is directed to bring in Mr. Georgiopoulos, the purchaser, into this action as a third-party defendant.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/12/07



HON. WALTER B. TOLUB, J.S.C.

FILED
JUN 22 2007
NEW YORK
COUNTY CLERKS OFFICE