

Casavecchia v Mizrahi
2007 NY Slip Op 33218(U)
October 2, 2007
Supreme Court, Nassau County
Docket Number: 8635-05/
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 12

JOSEPH CASAVECCHIA, SR.,

Plaintiff,

INDEX NO.: 008635/2005
MOTION DATE: 09/28/2007
MOTION SEQUENCE: 009

-against-

WILLIAM W. MIZRAHI, HILLS OF HEARTLAND, LLC
and CASA MASON CORP.,

Defendants.

The following papers read on this motion:

Order to Show Cause.....	1
Affirmation in Support of Laurel A. Wedinger & Exhibits Annexed.....	2
Affidavit in Opposition to Defendant Mizrahi's Motion to Reargue, Renew an/or Vacate Contempt Order of Jeffrey A. Miller & Exhibits Annexed.....	3

This motion by defendant Mizrahi, to reargue and renew a prior motion by plaintiff to punish defendant for contempt which resulted in an order dated September 11, 2007 granting such relief and upon reargument and renewal denying a finding of contempt and vacating an order of incarceration is determined as follows.

This action has been the subject of several prior motions and familiarity with the facts is presumed. Insofar as this motion is concerned, after plaintiff was granted summary judgment for the relief demanded in the complaint, and a hearing was held to determine the amount of property the defendant limited liability corporation, Hills of Heartland, owned subject to the distribution to it's members, plaintiff moved to punish defendant Mizrahi as a contemnor for violating orders

of the court directing him not to transfer any monies owned by Hills of Hartland to any other person or entity. The court found that Mizrahi had violated several clear and unequivocal orders of this court and directed that he turn over to plaintiff one hundred thousand dollars, that he turn over to Hills of Heartland two million dollars and that he be incarcerated until he could provide an accounting of the net profits of Hills of Heartland of which plaintiff is entitled to his proportionate share.

Defendant moves to vacate the September 11, 2007 order punishing him for contempt on the grounds that plaintiff did not sustain his burden of proof in establishing the defendant's disobedience of a clear and unequivocal order of the court, that defendant's due process rights were violated by not having been afforded a hearing, and on the grounds that the punishment for contempt was in effect a judgment enforcement proceeding although judgment had not been entered. Additionally, defendant argues that he has only recently found a document which shows that Hills of Heartland was formed to lend money as well as build houses.

A motion to renew must be based on material facts which existed at the time the motion was made but for some reason were not available to the party seeking renewal and were not accordingly made known to the court. Ragus v Law Department, 166 Misc. 2d 157 (Sup. Ct. NY Co. 1992); Brann v. City of New York, 96 A.D.2d 923 (2d Dept. 1983). The new evidentiary material that movant seeks to bring before the court must be pertinent to the decision already rendered. Cisco v. Lavine, 72 Misc. 2d 1087 (Sup. Ct. Nassau Co. 1973). A motion to renew is not simply a vehicle by which to bring different facts before the court which the proponent supposes, or hopes, the court will find persuasive.

Reargument on the other hand may be granted where the court has overlooked, or misapprehended a material factual matter or a controlling principle of law. Cisco v Lavine, 72 Misc. 2d 1087 (Sup. Ct. Nassau Co. 1973). On a motion to reargue, it is inappropriate to raise new arguments which have not previously been advanced upon the court, Simpson v. Loehman, 21 N.Y.2d 990 (1968), and new material facts need not be presented in order to reargue. Aldrich v County of Oneida, 299 A.D.2d 938 (4th Dept. 2002). Most importantly, a motion to reargue or to renew is not a procedural device to permit counsel to argue the same issues previously considered and decided.

The court finds that the document defendant submits as a purportedly new document has no bearing on the motion for contempt. Contempt was premised upon defendant's unabashed disobedience of three or more orders of the court enjoining the transfer of money out of Hills of Hartland. Whether Hills of Hartland was chartered to lend money has nothing whatsoever to do with the court's order not to transfer any of its monies. The only relevance the "new" document would have would be on the issue argued on plaintiff's motion for summary judgment, that is whether the purpose of the LLC was to lend money as well as to develop residential projects. Since the court found that there was no proof supporting the aforesaid argument, lending the profits of Hills of Heartland could only be effected by a vote of its members. Thus, if Mizrahi has just located a material and relevant document, the place to interject it into this action would be in a motion to reargue summary judgment. However, the record compiled heretofore conclusively shows that the document is neither genuine nor "newly discovered." In fact, if Mizrahi seeks to promote it as a dispositive document at this time, tending to prove that the members of Hills always intended to finance other projects with the profits of a former one, there is a great probability that he will be subject to sanctions or contempt again.

Defendant also argues that a finding of contempt requires clear and convincing evidence and, for criminal contempt, proof beyond a reasonable doubt. N.Y. Transit Authority v Transport Workers Union of America, 35 A.D.3d 73, 86 (2d Dept. 2006). The clear and convincing standard was the standard used by the court. To the extent that the court also stated that plaintiff had met its burden to a reasonable degree of certainty, it is submitted that that standard passes muster with the Appellate Division of the Second Department. See Winchester v Riverside, 28 A.D.3d 455, 456 (2d Dept. 2006). To the extent that there is not an iota of proof that defendant did not transfer the money of Hills of Heartland to other business, and even to the custody of the Federal Government, as was found by Court Attorney/Referee Dana, the court now holds that plaintiff has established the violation of the orders of this court beyond any doubt. That finding was implicit if not expressly stayed in the initial decision of this court. Defendant's proposal that investing two million dollars in high yield Treasury Bills is not a transfer of funds from Hills of Heartland's bank account is rejected. Moreover, the argument begs the question as it does not provide an excuse for all the other transfers which were interdicted.

Finally, if defendant was unclear on the meaning of the court's orders, his respectful recourse would have been to seek advisement, Id. at 457, rather than acceding to his will to finance his business in the way he desired. His transfer to Treasury Bills thus qualifies as a willful transfer and manifestation of his intransigence against conducting himself in any fashion displeasing to him. Mizrahi complains that he has been denied due process since no hearing was held on his alleged contempt. He is wrong on two accounts. First, where the facts are not contested no hearing is required. Id. at 456. Second, he was afforded a full opportunity to be heard before the Honorable Thomas Dana whose mandate was to ascertain the loans, financing or money emanating from Hills of Heartland to defendants other projects. He found four loans to Casa Mason, a loan to Centennial, one to Newvele, and one personal debt paid from corporate funds. Thus the evidence of defendant's transfers when he was enjoined from so doing is established. It bears noting that that hearing was held after the initial motion for contempt was submitted and after summary judgment was granted on motion since there were no longer any issue about liability.

We return to the punishment for defendants contemptuous conduct. It has been established that plaintiff is entitled to a twenty percent distribution of the net assets of Hills of Heartland. He is also entitled to the one hundred thousand dollars formerly approved for distribution, but not turned over. The harm produced by defendant's contemptuous financial transfers is that not only does Mizrahi persist in theorizing that plaintiff should not even expect a return of profits, but also that the court cannot direct disbursement of the money since it is not in Hills bank account. It has been placed in other hands. The behavior thrice over is a priori willful. The complete record is rank with argument that the court is wrong, not that Mizrahi does not understand. Yet, the court is not as interested in a criminal contempt as it is in a way to reverse the prejudice that has occurred to plaintiff, that is, to coerce defendant to modify his behavior and to keep Hills' property at Hills and to disburse it to, inter alia, plaintiff. NYC Tr. Authority v Transport, 35 A.D.3d 73, 86 (2d Dept. 2006). Plaintiff can be compensated only if the money is returned to Hills and defendant proves whether Hills has other present creditors. In this case, the elements of proof in both cases are satisfied. Defendant is eligible for imprisonment for both civil and criminal contempt. The application for reargument and renewal is granted and upon

reargument the court adheres to its earlier decision, however, it is modified to provide that defendant has until October 5, 2007 to return two million dollars to the bank account of Hills of Heartland, and to turn over \$100,000 to plaintiff.

In summary, movant has neither introduced new material proof nor has he identified a controlling principle of law which the court misunderstood.

Dated: October 2, 2007



J.S.C.

ENTERED
OCT 05 2007
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