

FAMO, Inc. v Green 521 Fifth Ave., LLC

2008 NY Slip Op 33646(U)

January 8, 2008

Supreme Court, New York County

Docket Number: 109028/07

Judge: Carol R. Edmead

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

PRESENT: EDMEAD
Justice

PART 35

Famo INC
- v -
GREEN 521 5TH AVE

INDEX NO. 109028/07
MOTION DATE 10/23/07
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

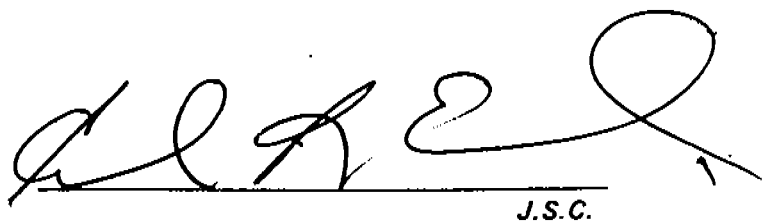
ORDERED that the order to show cause by plaintiff pursuant to CPLR 3211(d) for an order granting reargument with respect to this Court's order, entered on September 25, 2007, is granted, in part, and upon reargument, plaintiff's request for an order vacating said order and granting the plaintiff a preliminary injunction, enjoining defendant, Green 521 Fifth Avenue, LLC, from terminating the subject lease, erecting a wall in front of the subject premises, or disturbing the present visibility of the subject premises, is denied; and it is further

ORDERED that all stays are lifted; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/8/2008


J.S.C.

HON. CAROL EDMEAD

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):

FILED
JAN 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
FAMO, INC.,

Plaintiff,

Index No. 109028-2007

-against-

GREEN 521 FIFTH AVENUE, LLC,

Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, FAMO Inc., (the "Tenant") moves by order to show cause pursuant to CPLR 2221(d) for an order granting reargument with respect to this Court's order, entered on September 25, 2007, and upon reargument, vacating said order and granting the Tenant a preliminary injunction, enjoining defendant, Green 521 Fifth Avenue, LLC, ("Landlord") from terminating the subject lease, erecting a wall in front of the subject premises, or disturbing the present visibility of the subject premises.

Tenant argues that the Court (1) failed to mention the implied covenant of good faith and fair dealing, (2) failed to recognize the enormous detrimental effect that the Landlord's floating wall would have on Tenant's viability and visibility as a display space for art, (3) construed the subject lease in a way that frustrates the parties' reasonable expectations to assure that the gallery space would remain open, visible and unobstructed from the building lobby, and (4) violated applicable rules of contract construction and gratuitously found that the Tenant could not sell art when the use provision of the Lease allows the premises to be used as a private art gallery, wherein art is traditionally displayed for sale.

Tenant maintains that the Court construed the limited right of the Landlord under Rule 1 to “control” the public portions of the building so as to allow Landlord to build a wall which obliterated the premises from view, and render meaningless the more specific use clause of the lease itself. The Court also mistakenly regarded the affidavit of the predecessor Landlord as an attempt to modify the lease rather than an indication of what the reasonable expectations of the original contracting parties were when the lease was signed. In analyzing the effect of the “floating wall,” the Court disregarded the Tenant’s reasonable expectations, and then gratuitously ruled that the Tenant was prohibited from selling the art on display.

Tenant also argues that the Court wrongly limited Tenant’s use merely to exhibition space. According to Tenant, “gallery” is defined in Webster’s Ninth New Collegiate Dictionary as “an institution or business exhibiting or dealing in works of art.” More importantly, the Court erroneously determined that there was no irreparable injury since the goodwill contemplated by the subject lease enured solely to the benefit of the Landlord, thus creating an employment contract under which all benefits flow to the Landlord and none to the Tenant.

In opposition, the Landlord contends that the Court squarely addressed the implied covenant of good faith and fair dealing. In adopting the “fruits of the contract” theory propounded by the Tenant, the Court correctly found that the Tenant’s purported right to an unobstructed view from the lobby was not clearly established.

Further, the claim that the Court did not properly recognize the impact of the “floating wall” on the visibility of the art gallery is insufficient to support reargument. The Court did not “overlook” such argument; the Court recognized such impact by stating, in its decision, that the “floating wall” . . . “greatly diminishes the visibility of the art gallery.” The Court then

proceeded to address the merits of Tenant's claim by clarifying the true issue before the Court.

Furthermore, Tenant cannot rely on the affidavit of its predecessor to support reargument, in that the Court did not overlook the import of such affidavit, but simply found no need to consider it since the intent of the parties could be determined from the language of the subject lease. And, the Court considered whether the present attestation by Tenant's predecessor was relevant and held that it was not. Nor did the Court fail to properly weigh the specific use clause of the subject lease against the general provisions of the Rules and Regulations. The Court gave proper weight to the concept of "amenity" to the remaining tenants of the Building. Finally, Tenant's attack on the Court's analysis of Rule 15, prohibiting sales to the "general public" is insufficient to warrant reargument. Also, since Tenant failed to seek a stay with its notice of appeal, the present motion is moot.

Analysis

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 A.D.2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 A.D.2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588; *Pahl Equip. Corp. v Kassis*, 182 A.D.2d 22, 27, 588 N.Y.S.2d 8 (1st Dept.1992), *lv. denied and dismissed* 80 N.Y.2d 1005, 592 N.Y.S.2d 665 (1992), *rearg. denied* 81 N.Y.2d 782, 594 N.Y.S.2d 714 (1993)). On reargument the court's attention must be drawn to any controlling fact or applicable principle

of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Upon review of the submissions, the Court grants reargument solely to the degree of considering the Tenant's argument that the Court construed the Lease in a manner that frustrates the parties' reasonable expectations that the subject Art Gallery remain open, visible and unobstructed from view from the building's lobby. However, upon review of the caselaw, the Court is constrained to adhere to its original determination (*cf. Rainbow Shop Patchogue Corp. v Roosevelt Nassau Operating Corp.*, 60 Misc 2d 896 [Supreme Court, Kings County 1969]; *see also Broadway Copy Serv. v Broad-Wall Co.*, 77 AD2d 827 [1st Dept 1980]). Furthermore, although the case, *Pollock v Morelli* (245 Pa Super. 388, 369 A2d 458 [1976]), to which Tenant cites, is compelling, it is insufficiently unpersuasive to warrant the additional relief sought by Tenant herein.

Based on the foregoing, it is hereby

ORDERED that the order to show cause by plaintiff pursuant to CPLR 2221(d) for an order granting reargument with respect to this Court's order, entered on September 25, 2007, is granted, in part, and upon reargument, plaintiff's request for an order vacating said order and granting the plaintiff a preliminary injunction, enjoining defendant, Green 521 Fifth Avenue, LLC, from terminating the subject lease, erecting a wall in front of the subject premises, or

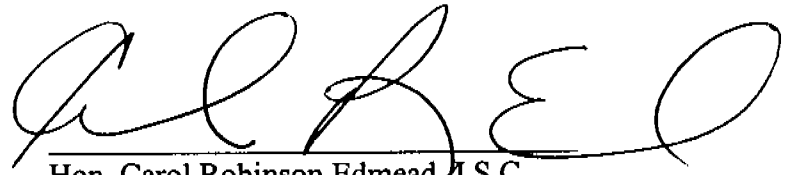
disturbing the present visibility of the subject premises, is denied; and it is further

ORDERED that all stays are lifted; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 8, 2008



Hon. Carol Robinson Edmead, J.S.C.

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