

**Joo v Cho**

2008 NY Slip Op 33649(U)

September 16, 2008

Sup Ct, New York County

Docket Number: 113591/2005

Judge: Shirley Werner Kornreich

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH  
*Justice*

PART 54

Index Number : 113591/2005

INDEX NO. \_\_\_\_\_

JOO, KONG WAN

MOTION DATE 5/29/08

vs

CHO, NICOLE M.

MOTION SEQ. NO. \_\_\_\_\_

Sequence Number : 002

MOTION CAL. NO. \_\_\_\_\_

REARGUMENT/RECONSIDERATION

motion to/for ✓

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits \_\_\_\_\_

4-6

Replying Affidavits \_\_\_\_\_

7-8

Cross-Motion:  Yes  No

**FILED**  
SEP 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 9/16/08

HON. SHIRLEY WERNER KORNREICH  
J.S.C.

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):

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

-----X  
DONG WAN JOO and ON KYUNG JOO,

Index No. 113591/2005

Plaintiffs,

DECISION & ORDER

-against-

NICOLE M. CHO, individually and doing business as  
LOTTE MORTGAGE, BACK CHUL KIM, SOONA  
LEE and AMERICAN GATEWAY ENERGY, LLC,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.

**FILED**  
SEP 19 2008  
COUNTY CLERKS OFFICE  
NEW YORK

Defendant American Gateway Energy LLC (AGE), moves to reargue a prior order of this court, dated April 9, 2008, which denied AGE's motion for summary judgment dismissing the fifth and sixth causes of action to set aside a fraudulent conveyance. The ground for the motion is that a notice of pendency filed on January 27, 2004, in an action entitled *Dyche v. Kim*, Sup. Ct. N.Y. Co. Index No. 101296/04 (Prior Action), precludes plaintiffs from setting aside the conveyance to AGE because plaintiffs' mortgage was recorded on October 14, 2004, a later date.

AGE's motion must be denied because it made the same argument on the original motion and has not shown that the court overlooked any fact or controlling principle of law. Reargument should be granted where the movant demonstrates that the court "misconstrued relevant facts or misapplied governing law." *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1<sup>st</sup> Dept. 2005). It should not be a vehicle to rehash arguments already made or to advance new arguments or present different evidence that was available at the time of the original application. *James v. Nestor*, 120 A.D.2d 442 (1<sup>st</sup> Dept. 1986); *Foley v. Roche*, 68 A.D.2d 558 (1<sup>st</sup> Dept.

1979). AGE has not met this standard.

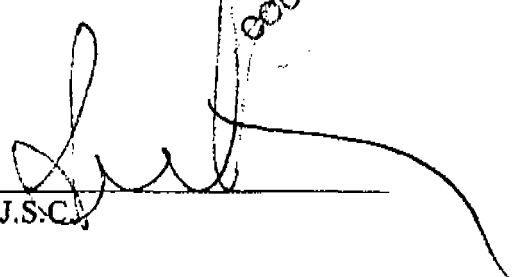
In addition, AGE now argues that the \$25,000 defendant Dyche paid to defendant Kim for the alleged fraudulent conveyance was a settlement in the Prior Action, which resulted after Justice Marcy S. Friedman granted a permanent injunction. There is no proof in the parties' submissions that there was a settlement or a permanent injunction in the Prior Action. The purported record of the settlement is improperly supplied by AGE for the first time on this motion, which is reason enough to deny reargument. In addition, it is not a settlement. It is an affidavit by defendant Kim swearing that he dismissed his attorney in yet another action entitled *Dyche v. Kim*, bearing Supreme Court Index No. 1764/2003, which is not the same index number as the Prior Action. Neither the papers submitted nor computerized records of this Court or the New York County Clerk reflect a settlement or an order by Justice Friedman granting a permanent injunction in the Prior Action. The computerized records reflect that the Prior Action was discontinued at the time of trial after Justice Friedman had granted a motion for a preliminary injunction.

Hence, summary judgment for AGE would be inappropriate because there is evidence that the Prior Action did not result in a determination that binds AGE pursuant to CPLR 6601. Accordingly, it is

ORDERED that the motion for reargument is denied for the reasons stated in this decision and the Prior Order.

Dated: September 16, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
SEP 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK