

Whitney Lane Holdings, LLC v Don Realty, LLC

2008 NY Slip Op 33709(U)

January 10, 2008

Supreme Court, Saratoga County

Docket Number: 2006-2874

Judge: Stephen A. Ferradino

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

WHITNEY LANE HOLDINGS, LLC

Plaintiff,

-against-

DECISION and ORDER
RJI #45-1-2006-1581
Index # 2006-2874

DON REALTY, LLC; DONOVAN and ARRIANNA
LITTLEFIELD (a/k/a ADRIANNA LITTLEFIELD)
by Their Guardian MATTHEW J. SGAMBETTERA, ESQ.
and DDA & A REALTY, LLC

Defendants.

APPEARANCES

Davidoff Malito & Hutcher, LLP
Attorneys for the Plaintiff
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Garden City, New York 11530

Sgambettera & Associates, P.C.
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STEPHEN A. FERRADINO, J.

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

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FILED

It is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision. CLR 2221(d)(2)); *Loris v S & W Realty Corp.*, 16 AD3d 729, 730 (3d Dept. 2005). Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate. *Id.* The plaintiff respectfully argues that the Court has overlooked or misapprehended the facts and/or the law or

mistakenly arrived at its July 3, 2007 decision to grant summary judgment to the defendants. The defendants counter that the Court's decision is sound and should not be disturbed. After a diligent reexamination of the arguments presented and strong reconsideration of its decision the Court find's the arguments advanced by the plaintiff to be persuasive.

"Summary judgment is often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue.... It does not deny the parties a trial; it merely ascertains that there is nothing to try." *Gilson v Metropolitan Opera*, 5 NY3d 574 (2005); Siegel, N.Y. Prac. § 278, at 459-460 [4th ed.]. Here the Court neglected to rigorously apply the cardinal rule that a motion for summary judgment must be supported by proof from an individual having personal knowledge of the facts, together with a copy of the pleadings and other available proof. *S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 NY 2d 338, 341 (1974). The plaintiff correctly points out that the defendants submitted attorney affidavits and did not provide an affidavit from any defendant in support of the motion. The attorney for the defendants did not have the required personal knowledge of what the defendants knew about the Town of Clifton Park's plans regarding the property and when they acquired their knowledge. See, *Wright v Rite-Aid of NY, Inc.*, 249 AD2d 931, 932 (4th Dept.1998); *Hodgson, Russ, Andrews, Woods & Goodyear v Roth*, 186 A.D.2d 1001, 1002 (4th Dept.1992). The defendants' failure to follow this rule should not have been overlooked. Rather it should have triggered a denial of the motion regardless of any proof submitted by the opposition. *Salas v Town of Lake Luzerne*, 265 AD2d 770, 770 (3rd Dept. 1999).

Additionally the plaintiff was entitled to rely upon the warranties contained in the agreement "without further investigation or sleuthing." *Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 500 F.3d 171 (2d Cir. 2007), citing *Metropolitan Coal Co. v Howard*, 155 F.2d 780, 784 (2d Cir.1946) (L. Hand, J.) ("A warranty is intended precisely to relieve the promisee of any duty to ascertain the fact for himself.") As sophisticated businesspeople it is anticipated that each party would act in reliance upon the contractual agreement governing the sale of the defendants' property to the plaintiff. Whether or not the defendants had superior knowledge about the property that they used to their advantage in reliance or in contravention of the contract is a question to be resolved by a jury. *Sterling Nat. Bank Israel Discount Bank of NY*, 305 AD2d 184 (1st Dept. 2003). The plaintiff's assertion that it acted in reliance upon the terms of the agreement and went forward with the purchase of the defendants' property without an investigation of the Town records to determine if any takings were planned is plausible. It is for a jury to determine all of the issues of fact to resolve this case. The motion to reargue is granted. The grant of the defendants' motion for summary judgment is vacated.

Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original papers shall be forwarded to the attorney for the plaintiff for filing and entry.

Dated: January 10, 2008

Malta, New York

Stephen A. Ferradino
 STEPHEN A. FERRADINO, J.S.C.

Papers Received and Considered:

Kathleen A. Marchione

Kathleen A. Marchione

Saratoga County Clerk

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 BALISTON SPA, NY

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ENTERED

Notice of Motion dated August 16, 2007

Affidavit of Stuart Perlmutter, Esq., sworn to August 16, 2007 with attached Exhibits 1-9

Memorandum of Law in Support of Plaintiff's Motion for Reargument

Supplemental Affidavit of Stuart Perlmutter, Esq., sworn to August 21, 2007 with attached Exhibits 10

Opposition to Plaintiff's Motion to Reargue dated September 25, 2007

Affidavit of Gregory J. Sanda, Esq., sworn to September 25, 2007

Reply Memorandum of Law in Further Support of Plaintiff's Motion for Reargument