

Brimberg v O'Mara

2009 NY Slip Op 30103(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 107285-2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 107285/2007

BRIMBERG, BARNETT J.

vs

O'MARA, LAWRENCE K.

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

FILED

JAN 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

~~motion (a) and cross-motion (a) decided in accordance with the annexed decision/order of even date.~~

motion (a) and cross-motion(a) decided in accordance with the annexed decision/order of even date.

*Concordance cont 3/5/09 @ 9:30 am
Part 10 + NOI ex 3/6/09*

Dated: Jan 12, 2009

JUDITH J. GISCHE, J.S.C. 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: PART 10**

-----X
Barnett J. Brimberg and
Esther Matthews Schmidt,
Plaintiffs,

DECISION/ ORDER
Index No.: 107285-2007
Seq. No.: 003

-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

Lawrence K. O'Mara and
Alexandra O'Mara,
Defendants.

-----X
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Pltfs' n/m RR w/FLV affirm, DT and FILED affids, exhs	1
Def's' opp w/DJD affirm, exhs	3
Reply w/FLV affirm, exhs	4

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JAN 21 2009
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NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action arising from a dispute among adjoining property owners each claiming rightful title of a strip of land ("the strip"). Defendants have answered and asserted counterclaims against the plaintiffs. In connection with a prior motion to compel (by defendants) and cross motion (by plaintiffs) for enforcement of their discovery demands the court ordered that defendants would first have to depose Esther Matthews Schmidt's son, Whitney Schmidt (respectively hereinafter "Mrs. Schmidt" and "Mr. Schmidt") before deposing Mrs. Schmidt. The court permitted defendants to depose Mrs. Schmidt if after Mr. Schmidt's deposition they still felt her deposition was necessary (see decision and order dated August 18, 2008). In that same order, the court granted in part, but partly denied plaintiffs' cross motion for discovery. Plaintiffs'

now see to reargue and/or renew those branches of the court's August 18, 2008 order ("prior discovery order") to the extent the court directed Mrs. Schmidt to appear for her deposition and denied some of plaintiffs' discovery demands.

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the court's discretion. Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). It 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, 27 (1st Dept 1992). A motion to renew is, however, based upon the discovery of material facts which existed at the time the prior motion was made but were not then known to the party and for that reason not disclosed to the court. Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). An event that takes place after the prior order is made is not considered newly discovered evidence that would support a motion to renew. Donnelly v. Donnell, 114 A.D.2d 671 (3rd Dept 1985).

At the outset, the court considers whether plaintiffs' motion to reargue is timely. Defendants argue that it is not timely and should be denied for that reason alone. CPLR § 2221 (d) (3) requires that a motion for leave to reargue be made within thirty (30) days after service of a copy of the order determining the prior motion. Plaintiffs served defendants with Notice of Entry of the discovery order on August 25, 2008. It was served by first class mail. Allowing five (5) days for mailing, plaintiffs' motion to reargue (filed on September 29, 2008) is timely. CPLR § 2103 (b) (2); Benitez v. City of New York, 2 A.D.3d 285 (1st Dept 2003). Since a motion to renew is not subject to such time constraints, it is also timely. Therefore, the court will proceed to decide whether plaintiffs should be permitted to reargue and renew the court's prior discovery order.

Plaintiffs seek reargument and renewal of the court's order directing Mrs. Schmidt to appear for her deposition. They contend that Mr. Schmidt has now provided proof he is his mother's attorney in fact, and that his mother will not be testifying at the trial. Further, plaintiffs contend that since Mr. Schmidt is now his mother's attorney in fact, the "defendants [should have to] declare what additional information they need from Mrs. Schmidt and pay all costs regardless of which method they use to depose her." The court previously made payment of expense contingent upon which method was used for the deposition (*see* prior discovery order).

The power of attorney is not a "new" fact. The parties expected (and had agreed) the son would produce the power of attorney and it was expected that Mrs. Schmidt would not testify at the trial. The parties' so-ordered stipulation dated June 19, 2008 specifically states that "Plaintiff Schmidt's attorney in fact will provide defendants' counsel with a power of attorney." The stipulation, however, did not completely resolve defendants' motion or the dispute over whether Mrs. Schmidt still had to testify. That issue was submitted to the court to decide. The fact that Mrs. Schmidt provided her son with a power of attorney did not automatically preclude her deposition. *see Leon v. St. Vincent De Paul Residence*, 56 AD3d 265 (1st Dept 2008). The court's decision, that Mrs. Schmidt will have to be deposed, but only after her son is deposed, is entirely consistent with the parties' so-ordered stipulation, and based upon the record submitted to the court on that motion. The present modification sought by plaintiffs, that defendants bear all costs, is offered without any supporting facts or explanation. Therefore, plaintiffs have not met their burden in showing why they should be permitted to reargue or renew this particular branch of their prior motion or the court's discovery

order. Permission to reargue/ renew this aspect of the court's decision is, therefore, denied.

Plaintiffs also contend that the June 19, 2008 so-ordered stipulation resolved the parties' dispute involving document requests because they agreed that all document requests would be "adjourned" until after the depositions. Thus, according to the plaintiffs the court decided this particular branch of their motion prematurely, or in a manner inconsistent with their June 19, 2008 stipulation. That stipulation, however, only provides that the "cross motion resolved by agreement to adjourn all document requests until after the depositions." Notwithstanding the use of the word "resolved," neither the motion in chief, nor the cross motion were withdrawn by their respective movants. Instead both motions were submitted for the court to decide the remaining issues.

Consistent with the parties' stipulation, the court decided the scope of the documents to be turned over by the defendants. The court did not, however, disturb the parties' agreement, that they would hold off on document production until after the depositions. Plaintiffs have not identified any facts that were misapprehended by the court or why the court's decision is mistaken. There is, therefore, no reason to permit plaintiffs to reargue this branch of their motion and permission to do so is denied.

Plaintiffs argue in the alternative that reargument of their underlying cross motion should be permitted because the court misapplied the law by when it decided that certain documents plaintiffs had demanded were "privileged," or could be provided with redactions. The court did not, however, decide, that any of the materials plaintiffs had demanded were "privileged," or that they could be served in a redacted form. Those

arguments were never before the court to decide. In fact the word "privileged" does not appear anywhere in the court's decision. What the court did decide is that although defendants had turned over some documents in their redacted form, but had not turned over other documents, overall the documents plaintiffs had demanded - including estimates, materials orders, deliveries and contracts for work to be done - were neither material nor relevant to plaintiffs claims or defenses. The court explained and analyzed the reasons why in its prior discovery order. Thus, plaintiffs' motion to reargue the courts' decision that some documents are "privileged" is entirely without any basis, it is not what the court decided, and therefore permission to reargue is denied.

Plaintiffs separately argue that these documents are useful - indeed vital - to their claims and defenses, and therefore the court mistakenly denied their cross motion to compel the production of these documents. On the prior motion plaintiffs argued that they needed these documents to demonstrate at trial that defendants failed to use a single contractor who would have been responsible for quality control, but instead tried to save money by having the job done piecemeal. The plaintiff now amplify those arguments by stating further that defendants come to the court with unclean hands and that they deliberately and intentionally encroached upon plaintiffs' property (the strip of land) by proceeding to build offending structure even though they knew about the plaintiffs' claim of right.

All of these arguments pivot on defendants' motivation in building the encroachment. Plaintiffs have not completely explained why the defendants' intent or willfulness enters into the issue of damages or injunctive relief. The legal authority cited does not clarify this point. Plaintiffs have not proved the court's order is mistaken, or

that it misapprehended any relevant facts, or misapplied law. There is, therefore, no reason for the court to reconsider its decision. The motion for renewal of this aspect of the court's prior discovery order is denied as well. Although the depositions took place after the motions were sub judice (but before the court decided them), there are no newly discovered facts that support their motion for renewal that would cause the court to reconsider its prior order.

Conclusion

To recapitulate, plaintiffs' motion for permission to reargue and/or renew the court's prior discovery order is denied in its entirety. Plaintiffs have not met their burden on this motion by showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. This motion is not based upon the discovery of material facts which existed at the time the prior motion was made but were not then known to the party and for that reason not disclosed to the court. The court's prior discovery order remains in force, without modification. Stays if any are vacated forthwith.

This case will next appear on the court's calendar for a compliance conference on MARCH 5, 2008 at 9:30 a.m. in Part 10. No further notices will be sent.

Any relief requested that has not been addressed has none ~~been~~ been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 13, 2009

So Ordered:

Hon. Judith J. Gische, JSC

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