

Matter of Seaman v Farrell Fritz, P.C.

2011 NY Slip Op 31028(U)

March 23, 2011

Sur Ct, Nassau County

Docket Number: 348202/H

Judge: Edward G. McCabe

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Proceeding to Discover Property and Obtain Information in
the Possession of the Coalition of Landlords, Homeowners &
Merchants, Inc., in the Estate of

File No. 348202/H

HENRY BOGART SEAMAN,

Dec. No. 27058

Deceased.

The Coalition of Landlords, Homeowners & Merchants,
Inc.,

Cross-Claim Petitioners,

-against-

Farrell Fritz, P.C., Eric Penzer,
individually, Robert Harper, Individually,

Cross-Claim Respondents.

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The respondent, the Coalition of Landlords, Homeowners & Merchants, Inc. (“the Coalition”), moves for leave to reargue and/or renew this court’s decision dated June 30, 2010 (Dec. No. 26605), in which this court denied the Coalition’s motion to dismiss the petition in its entirety and granted the motion of the petitioner, Bank of America, as executor of the estate, to dismiss the Coalition’s cross-claims and counterclaims, other than the claims for unjust enrichment and breach of contract, against petitioner only.

In this discovery proceeding, the petitioner alleges that the respondent collected over \$123,000 from the decedent, purportedly for its representation of the decedent, in among other things, litigation involving the use of his property in Nassau County. Petitioner contends that it appears that the services provided to the decedent by the respondent may have been legal services which the respondent is not licensed to provide and therefore any such fees collected should be

returned to the estate.

Motions for leave to reargue and/or renew are governed by CPLR 2221. A motion for leave to reargue and a motion for leave to renew must be specifically identified as such motions (CPLR 2221 [d] [1]; 2221 [e] [1]). A combined motion for leave to reargue and leave to renew must identify separately and support separately each item of relief sought and the court decides each part of the motion as if it were separately made (CPLR 2221 [f]).

A motion to renew is based upon new facts not presented on the prior application that would change the prior decision and must contain a reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e] [2], [3]). The Second Department has repeatedly held that the additional evidence offered on a motion to renew must be either newly discovered or have been unavailable to the movant at the time of the prior application (*Winograd v Neiman Marcus Group*, 11 AD3d 455 [2d Dept 2004]; *Seltzer v City of New York*, 288 AD2d 207 [2d Dept 2001]; *Delvecchio v Bayside Chrysler*, 271 AD2d 636 [2d Dept 2000]). Where the movant has not advanced any argument to support a claim of reasonable justification as to why the facts presented could not have been presented to the court on the prior motion, the mandatory language of CPLR 2221 [e] [3] requires denial of the motion (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2221, C2221:9).

A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221 [d] [2]). It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Andrea v E.I. du Pont de Nemours & Co.*, 289 AD2d 1039 [4th Dept 2001]; *Bolos v Staten Island Hosp.*, 217

AD2d 643 [2d Dept 1995]; *Schneider v Soloway*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovaniello v Carolina Wholesale Off. Machine Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frislinda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). Nevertheless, “[i]t 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” (*Peak v Northway Travel Trailers*, 260 AD2d 840, 842 [3d Dept 1999]). “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” (*Louis v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005]).

MOTION TO RENEW

In support of the branch of the motion for renewal, the Coalition annexes to the motion papers a “Voluntary Contribution Agreement” (hereinafter “the Agreement”) allegedly entered into by the decedent and the Coalition on July 19, 2006. The Coalition contends that this documentary evidence was not previously available. According to the Coalition, the Agreement

was “inadvertently misplaced, subsequently forgotten and recently found.” The Coalition maintains that the decedent signed the Agreement, which it characterizes as an agreement for contribution of monies and a release, on July 19, 2006. According to the Coalition, this document is an irrevocable gift and release of the money given by the decedent which is binding upon his estate. Accordingly, the Coalition argues that the discovery proceeding must be dismissed based upon the Agreement.

The Coalition argues that there is reasonable justification for why the Agreement was not produced on the underlying motion to dismiss. The Coalition contends that the purported release was not previously available or known to the Coalition’s counsel despite a diligent search by both the Coalition and its counsel. The document was allegedly misfiled by the secretary for the Coalition and the “person who had knowledge of and control of the document in question.” The secretary has submitted an affidavit in which she states that she was undergoing chemotherapy and radiation treatments and was “unable to produce or verify the existence of the document.” She further states that she was diagnosed with throat cancer on or about February 26, 2009 and underwent treatment for a period of approximately five months and thereafter underwent follow-up tests and appointments. The Coalition also claims that, upon information and belief, the Agreement was in the decedent’s possession and, therefore, the petitioner should have supplied it in response to the Coalition’s discovery demands.

The Coalition also annexes a letter dated August 4, 2010 from petitioner’s attorney to the Coalition’s attorney, which it argues constitutes new documentary evidence on the claims for deceit and collusion by Farrell Fritz, P.C., attorneys. According to the Coalition, the court’s prior decision was based upon petitioner’s counsel’s representation to the court that the Coalition had

not responded to the petitioner's demands. The Coalition maintains that the letter clearly reflects that the Coalition did, in fact, respond to petitioner's discovery demands. The Coalition argues that renewal on the claims of deceit and collusion should be granted on the basis of the August 4, 2010 letter.

Petitioner's counsel argues that the Agreement cannot provide a basis for a renewal motion since it was admittedly in the Coalition's possession and its existence was known to the Coalition. Counsel argues that the Coalition has offered no reasonable justification for the failure to present the Agreement on the prior motion. Petitioner contends that the argument that the Agreement was "misfiled" and could not be located by the secretary, who is also married to the Coalition's president, because she was ill does not constitute reasonable justification. Her inability to search for the document is not the relevant inquiry.

Second, petitioner argues the Agreement is of questionable authenticity. It appears to be written entirely by the president of the Coalition and is notarized by his wife/secretary. Moreover, only a copy is attached to the motion. Petitioner claims that it appears from the copy that the document may have been altered. Since serious questions exist concerning the authenticity, validity and legal effect of the Agreement, discovery is necessary.

While the court is sympathetic to the secretary's situation, she is not the only officer of the Coalition. Her illness may explain why she herself could not search for the Agreement; however, her illness does not constitute reasonable justification for the Coalition's failure to discover the document and present it on the prior motion.

Even assuming *arguendo* that the Coalition has presented reasonable justification for the failure to previously offer the Agreement, the court agrees with petitioner that it is entitled to

discovery concerning the authenticity of the document.

The court also finds the Coalition's argument for renewal based on the August 4, 2010 letter unavailing. The court's decision clearly stated that such conduct, even if the Coalition had responded to the discovery demand, did not constitute an action for deceit and collusion.

Accordingly, the branch of the motion seeking renewal is denied.

MOTION FOR REARGUMENT

Concerning the branch of the motion for reargument, the Coalition argues that reargument should be granted because the court's prior decision mistakenly failed to find that the Indemnification Agreement constituted a waiver and release and abandonment of any present or future right or claim of the decedent or his estate and dismiss the petition. With respect to the petitioner's cross-motion to dismiss the counterclaims and cross-claims, the Coalition argues that the court failed to consider that the petitioner and its attorneys did not disclose that they had ordered the discontinuance of the state and federal actions brought by the Coalition on decedent's behalf. According to the Coalition, the petitioner and its attorneys thereby minimized the ability of the Coalition to achieve successful results for the decedent and the number of pending actions from five to two. Moreover, the Coalition also argues that the conspiracy counterclaim and cross-claim were also mistakenly dismissed because the court failed to consider that the petitioner's attorneys had withheld that a response to discovery had been served by the Coalition.

In addition, the Coalition claims that the Farrell Fritz, P.C., attorneys tortiously interfered with the contract between the Coalition and the decedent by discontinuing the state and federal actions in order to raise their legal fees by allowing the firm to make a claim against the Coalition for its failure to achieve results. The Coalition also argues that the court mistakenly dismissed

the claims against the Farrell Fritz, P.C. attorneys on the basis that they are not parties to the action. The Coalition contends that the court was mistaken because the Farrell Fritz, P.C. attorneys stand in the place of the decedent and, therefore, are parties to the discovery proceeding.

The petitioner argues that the motion for reargument consists of a rehash of arguments already presented and decided against the Coalition. Petitioner further argues that the Coalition's argument that Farrell Fritz, P.C. intentionally discontinued actions to create a claim against the Coalition is entirely without merit.

The Coalition has failed to show that the court misapprehended or overlooked facts or law in arriving at its earlier decision (CPLR 2221 [d] [2]). Therefore, that branch of the motion seeking reargument is denied.

This constitutes the decision and order of the court.

Dated: March 23, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court