

**Ward v Murariu Bros., Inc.**

2011 NY Slip Op 34274(U)

October 12, 2011

Supreme Court, Greene County

Docket Number: 10-1413

Judge: Richard M. Platkin

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

**ORIGINAL**

COUNTY OF GREENE

KEVIN WARD,

Plaintiff,

**DECISION**  
**AND**  
**ORDER**

-against-

MURARIU BROTHERS, INC.,

Defendants.

Index No. 10-1413  
RJI No. 19-10-5364

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Greene County Clerk  
Document Number 342230  
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Hon. Richard M. Platkin, A.J.S.C.

By Decision and Order dated July 11, 2011 ("the Prior Decision"), the Court, *inter alia*, denied plaintiff's motion for summary judgment on his claim of prescriptive easement and, after searching the record, granted summary judgment to defendant based upon "the undisputed proof of permissive use" of the subject driveway. Plaintiff now moves pursuant to CPLR 2221 for leave to reargue and renew. Defendant opposes the motion.

Plaintiff argues that the Court misconstrued the deposition testimony of plaintiff, which recited as follows:

Q: You indicated that you had talked to the neighbor and somebody said - - or he said that you could use the right-of-way; is that correct?

A: They said I could pull my car in and out of the driveway, yeah. (emphasis added).

Q: Who said that?

A: I don't know the gentleman.

Q: But it was the gentleman who owned the land next to you?

A: That's who he said he was, yeah.

Plaintiff now maintains that the "they" referred to above was not necessarily the former owner of the burdened parcel and may, in fact, have been a reference to a realtor. Plaintiff also argues that the "gentleman" referred to "[t]he first gentleman that owned the place" and was never conclusively identified as the owner of the burdened property. Plaintiff further asserts that his affirmative response to the final question quoted above was the product of defense counsel's improper leading questions. Finally, plaintiff claims that any

testimony concerning the statements of the former owner of the burdened premises, who is now deceased, is inadmissible hearsay and barred by the Dead Man's Statute (CPLR 4519).

“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” (*Loris v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005], quoting *Peak v Northway Travel Trailers*, 260 AD2d 840, 842 [3d Dept 1999]) “Reargument does not provide a party an opportunity to advance arguments different than those tendered on the original application” (*Rubinstein v Goldman*, 225 AD2d 328, 328 [1<sup>st</sup> Dept 1996], *lv denied* 88 NY2d 815).

A motion for leave to renew also “shall be identified as such” and “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [1], [2]). Such motion “shall contain reasonable justification for the failure to present such facts on the prior motion” (*id.* [e] [3]).

The Court does not find plaintiff's contentions to be persuasive. Plaintiff's assertion that the above-quoted deposition testimony refers to anyone other than the former owner of the burdened estate is belied by the exchange that preceded it:

Q. . . . Did the realtor say anything with respect to you using the right-of-way?

A. They said I could use it.

Q. The realtor said this?

A. Yeah.

Q. Did anybody else - - did you ever have any discussion, did anybody else ever tell you that you could this right-of-way?

A. The first gentleman that owned the place said it would be okay.

It is apparent from the foregoing exchange that plaintiff was not referring to the realtor within the testimony relied upon by the Court. Rather, plaintiff clearly testified that he entered onto the land with the permission of the owner. Such admission is fatal to plaintiff's claim of adverse possession.

Further, even if the Court were to consider plaintiff's new evidentiary objections, it would not alter the conclusions set forth in the Prior Decision. Plaintiff's claim that his testimony was the product of a leading question is precluded by his failure to interpose an objection at the deposition (CPLR 3115 [b]).<sup>1</sup>

Plaintiff's reliance upon the Dead Man's Statute is unavailing, since the subject testimony was adverse to plaintiff's interests (*Estate of Tremaine*, 156 AD2d 862, 862 [3d Dept 1989]) and not adverse to the interests of the former owner of the burdened property and his successors (*Brezinski v Brezinski*, 84 AD2d 464, 468 [2d Dept 1982]; *cf. Allen v Farrell*, 266 AD2d 857 [4<sup>th</sup> Dept 1999] [precluding reliance upon self-serving testimony adverse to decedent's successor in interest]).

Finally, plaintiff's belated hearsay objection is without merit. Plaintiff's acknowledgment that he entered upon the disputed property with permission from its then-

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<sup>1</sup> The record establishes that plaintiff's counsel did object to other questions as leading.. Further, this objection presupposes that there is something improper about relying upon deposition testimony elicited from an adverse party on the basis of leading questions, a point that seems highly doubtful considering that such testimony could be elicited and relied upon at trial.

owner falls within the well-established exception to the hearsay rule for an admission against interest of a party opponent. The case relied upon by plaintiff (*Brocco v Mileo*, 170 AD2d 732 [3d Dept 1996]), plainly is distinguishable, insofar as it concerned "pure hearsay" for which no exception was identified.

Accordingly, plaintiff's motion is denied in all respects.

This constitutes the Decision and Order of the Court. The original of this Decision and Order is being returned to defendant's counsel; all other papers are being transmitted to the Greene County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Catskill, New York  
October 12, 2011

  
RICHARD M. PLATKIN  
A.J.S.C.

**Papers Considered:**

Notice of Motion, dated August 2, 2011;  
Affirmation of Edward I. Kaplan, Esq., dated August 2, 2011, with attached exhibits A-B;  
Affirmation of Jens G. Lobb, Esq., dated August 10, 2011, with attached exhibits A-B;  
Reply Affirmation of Edward I. Kaplan, Esq., undated;  
Sur-Reply Affirmation of Jens G. Lobb, Esq., dated August 22, 2011.