

Gural v Drasner

2012 NY Slip Op 32041(U)

July 30, 2012

Supreme Court, New York County

Docket Number: 103283/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART 19

Index Number : 103283/2008
GURAL, JEFFREY
vs.
DRASNER, FRED
SEQUENCE NUMBER 005
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, It is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

AUG 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/12

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
JEFFREY GURAL,

Plaintiff,

-against-

FRED DRASNER,

Defendant.

-----X

For Plaintiff:
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New York, NY 10020

Index No. 103283/08
Submission Date: 5/16/12

DECISION AND ORDER

FILED

AUG 03 2012

**NEW YORK
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Papers considered in review of this motion for leave to reargue:
Notice of Motion 1
Aff in Support 2
Mem of Law in Support 3
Mem of Law in Opp 4
Reply Mem of Law 5
Reply Aff 6

HON. SALIANN SCARPULLA, J.:

In this action for damages stemming from an alleged oral agreement to make improvements on land, defendant Fred Drasner (“Drasner”) moves pursuant to CPLR §2221(d) for an order granting leave to reargue his motion which sought summary judgment and leave to amend his answer. By decision and order dated January 11, 2012, Drasner’s motion for summary judgement was denied, his motion for leave to amend his answer was granted, and plaintiff Jeffrey Gural’s (“Gural”) cross motion for leave to serve and file an amended complaint was granted.

Drasner now moves to reargue, asserting that it was a misapprehension of the law to deny his motion for summary judgment on statute of frauds grounds. While Drasner concedes that “[t]he Court’s ruling that the Statute of Frauds is applicable based on the entirely correct factual finding that “. . . an essential, undisputed part of the alleged agreement – that Gural would create grazing fields – could not be accomplished within one year . . . ,” Drasner challenges the portion of my ruling which found a question of fact regarding whether the work performed by Gural constituted partial performance such as would take the oral agreement outside the Statute of Frauds. Drasner asserts that partial performance cannot save an agreement incapable of performance within one year from dismissal under General Obligations Law (“Gen. Oblig. L.”) §5-701(a)(1).

In opposition, Gural asserts that the motion to reargue should be denied as the Court’s decision did not contain any misapprehension or misapplication of law, and that the decision is consistent with precedent applying the partial performance exception outside the context of conveyances of real property. In addition, Gural argues that Drasner’s motion is defective for failing to include the underlying motion papers, and should be denied as defective on that basis alone.

Discussion

Pursuant to CPLR 2221(d)(2), a motion to reargue must “be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion.” *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep’t 1992). Absent mistake on the Court’s part, the Court must adhere to its original decision. *Pahl Equipment Corp. v*

Henry Kassiss, 182 A.D.2d 22, 27-28 (1st Dep't 1992). Here, reviewing the submissions of the parties for a second time, the Court once again finds issues of fact which must be resolved at trial.

As an initial matter, Gural is correct to note that Drasner's submission on this motion was defective, as Drasner failed to include the underlying motion papers. Pursuant to CPLR 2214(c), "[t]he moving party shall furnish . . . all other papers not already in the possession of the court necessary to the consideration of the questions involved." Of course, "[t]he court does not retain the papers following disposition of [a motion] 'and should not be compelled to retrieve the clerk's file in connection with consideration of subsequent motions.'" *J.D.M. Import Co. Inc. v. Hartstein*, 2008 NY Slip Op 30668U, at 6 (Sup Ct. N.Y. Co. 2008) (quoting *Sheedy v. Pataki*, 236 A.D.2d 92, 97 (3d Dep't 1997), *lv. appeal denied*, 91 N.Y.2d 805 (1998)). "[I]t is the responsibility of a moving party to assemble complete papers documenting the procedural history of the motion and provide a proper foundation for the relief requested A Court may refuse to consider improperly submitted papers." *J.D.M. Import*, 2008 NY Slip Op at 6 (citations omitted). However, as there is a preference to determine motions on the merits, and Drasner provided the complete record with his reply papers, I will consider Drasner's motion.

In the underlying decision, I found there was a question of fact whether Gural's part performance saved the alleged oral agreement from the statute of frauds. Drasner now argues that as a matter of law, the part performance exception to the Statute of

Frauds is applicable only under Gen. Oblig. L. §5-703 (“Conveyances and contracts concerning real property required to be in writing”), and is inapplicable under Gen. Oblig. L. §5-701, which pertains to oral agreements which cannot be performed within one year.

Drasner correctly notes that the Appellate Division, First Department has held on some occasions that partial performance cannot save an agreement incapable of performance within one year. *See, e.g., Bowman v. Di Placidi*, 27 A.D.3d 259 (1st Dep’t 2006); *Stephen Pevner, Inc. v. Enstler*, 209 A.D.2d 722 (1st Dep’t 2003). However, Drasner is incorrect when he claims that the Appellate Courts have uniformly rejected application of the partial performance exception to save oral agreements incapable of performance within one year.

A number of courts, including the First Department, have found oral agreements which cannot be performed within a year may be saved by partial performance. *See, e.g., Carey & Assocs. v. Ernst*, 27 A.D.3d 261, 264 (1st Dep’t 2006) (oral agreement may be saved from the Statute of Frauds where plaintiff’s part performance is “unequivocally referable” to oral agreement); *Signature Brokerage Inc. v. Group Health Inc.*, 5 A.D.3d 196 (1st Dep’t 2004) (oral agreement barred by Statute of Frauds (Gen. Oblig. L. §5-701(a)(10)) where plaintiff failed to establish that there was part performance unequivocally referable to alleged oral contracts); *EDP Hospital Computer Systems, Inc. v. Bronx-Lebanon Hospital Ctr.*, 13 A.D.3d 476, 478 (2d Dep’t 2004) (“After the defendant established its prima facie entitlement to summary judgment by tendering evidence that the alleged oral agreement failed to comply with the provision of General

Obligations Law § 5-701(a)(1), the plaintiff, in opposition, submitted evidence of partial performance in reliance upon, and unequivocally referable to, the oral agreement. Such evidence was sufficient to raise an issue of fact as to whether the oral agreement was removed from the Statute of Frauds”); *Brady v. Helmsley*, 246 A.D.2d 486, 487 (1st Dep’t 1998) (“cause of action for breach of an alleged oral promise to pay plaintiff’s 20-year mortgage was properly sustained as against the defense of the Statute of Frauds (General Obligations Law §5-701(a)(1)), since defendants’ actual payment of the mortgage for almost four years and plaintiff’s taking up additional residence in one of defendant’s buildings . . . are sufficiently extraordinary to show, at least for pleading purposes, partial performance removing the alleged oral agreement from the Statute of Frauds”); *Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP*, 35 Misc. 3d 1201A (Sup. Ct. N.Y. Co. 2011) (“Partial Performance will only rescue an oral agreement from the requirements of the statute of frauds where that performance is unequivocally referable to the oral agreement”) (internal citations omitted); *Man-Hung Lee v. Hartsdale Canine Cemetery, Inc.*, 28 Misc. 3d 234 (City Co. White Plains 2010) (“where an agreement fails to comply with General Obligations Law §5-701(a) the doctrine of part performance can nonetheless create an enforceable oral agreement where the parties’ part performance is unequivocally referable to that oral agreement”).

Accordingly, Drasner fails to demonstrate that the Court overlooked or misapprehended controlling law, and his motion is denied. *See McGill v Goldman*, 261 A.D.2d 593 (2nd Dept. 1999). The Court adheres to its initial ruling.

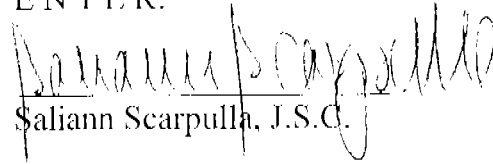
In accordance with the foregoing it is

ORDERED that the motion by defendant Fred Drasner to reargue the court's decision and order is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 30, 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED

AUG 03 2012

NEW YORK
COUNTY CLERK'S OFFICE