

Board of Directors of the Maidstone Landing Homeowners Assn., Inc. v Maidstone Landing, LLC
2012 NY Slip Op 32391(U)
September 12, 2012
Supreme Court, New York County
Docket Number: 600438/2007
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 600438/2007
MAIDSTONE LANDING HOMEOWNERS
vs
MAIDSTONE LANDING LLC.
Sequence Number : 007
REARGUMENT/RECONSIDERATION

INDEX NO. 600438/07
MOTION DATE _____
MOTION SEQ. NO. 007

The following papers, numbered 1 to _____, were read on this motion reargument
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-E No(s). 1
Answering Affidavits — Exhibits 1-10 No(s). 2, 3
Replying Affidavits _____ No(s). 4

Upon the foregoing papers, It is ordered that this motion is decided in accordance
with the attached decision and order.

FILED

SEP 17 2012

NEW YORK
COUNTY CLERK'S OFFICE



Dated: Sept. 12, 2012

MARTIN SHULMAN, 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

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 1

-----X
THE BOARD OF DIRECTORS OF THE
MAIDSTONE LANDING HOMEOWNERS
ASSOCIATION, INC., suing on behalf of
its members, THE BOARD OF MANAGERS OF
THE MAIDSTONE LANDING CONDOMINIUM I,
suing on behalf of its unit owners, and
THE BOARD OF MANAGERS OF MAIDSTONE
LANDING CONDOMINIUM II, suing on behalf
of its unit owners,

Plaintiffs,

-against-

MAIDSTONE LANDING, LLC, WILBER FRIED,
DAVID FRIED, JUDITH FRIED, EXETER
BUILDING CORP., DOUGLAS R. SHARP and
BLOODGOOD, SHARP, BUSTER ARCHITECTS
AND PLANNERS, INC.,

Defendants.
-----X

Martin Shulman, J.:

Defendant Wilbur Fried (s/h/a Wilber Fried) ("Fried") moves to reargue this court's decision and order dated April 9, 2011 (the "decision") solely to the extent that it denied his motion for summary judgment dismissing the ninth cause of action against him. Plaintiffs oppose the motion for reargument. The relevant factual allegations are set forth in detail in the decision and as such will not be repeated.¹

Reargument

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law [and] ... is not to serve

¹ The defined terms in the decision are used herein.

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as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided [or] ... to provide a party an opportunity to advance arguments different from those tendered on the original application" (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]; see also, *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

At the outset, plaintiffs' claim that the motion to reargue is untimely is rejected. Plaintiffs argue this motion is untimely because it was not brought within 30 days of service of notice of entry as required by CPLR 2221(d)(3). In support of this claim, plaintiffs submit notice of entry of the decision served by the BSB co-defendants on April 25, 2012 (Schwartz Aff. in Opp. at Exh. 1). However, the affidavit of service thereof does not indicate that it was served on Fried's counsel. As such, the 30 day time period never began to run as to Fried and this motion is timely.

The ninth cause of action alleges Fried and co-defendants Judith and David Fried breached their fiduciary duty to plaintiffs as members of both the HOA's board of directors (the "board") and the board of managers of Condominiums I and II ("managers"). This court's decision granted summary judgment dismissing this cause of action as to Judith and David Fried as time barred. However, as to Fried, this court found that "from the arguments presented, it appears that [Fried] retained his seat on the board until May 17, 2004, which is less than three years prior to this lawsuit's commencement." As such, this court found that "[q]uestions of fact exist as to whether [Fried], as a member of the board, knew of the alleged defects and failed to remedy them in order to benefit himself as the owner of Maidstone and Exeter."

Fried alleges this court overlooked the fact that he relinquished his position as a board member on or before October 16, 2003, more than three years prior to this lawsuit's commencement² and accordingly, the ninth cause of action should have been dismissed as untimely against him. More specifically, Fried contends his position on the board terminated by operation of the terms of the offering plans³ for Condominiums I and II. As this court noted in its decision, the offering plans provide that Maidstone, as the condominium sponsor, was to retain control of the HOA's board until 95% of the units were conveyed, as well as control of the board of managers of Condominium I and II until 95% of the units in each phase was sold. Fried contends that title to 95% of the units had closed as of October 16, 2003 thus he is deemed to have resigned from the board as of that date.

In opposition, plaintiffs contend reargument should be denied because Fried alleges new facts and arguments not advanced in the prior motion with respect to when his board term ended. Plaintiffs also dispute the veracity of Fried's claim that he vacated his board seat on or before October 16, 2003 and maintain that he continued to serve on the board through May 17, 2004,⁴ less than three years from this action's February 9, 2007 commencement.

² Plaintiffs commenced this action by filing a summons with notice on February 9, 2007.

³ See Motion at Exh. A, sub-exhibit D.

⁴ May 17, 2004 is the date Maidstone's last unit was sold. As the condominium's sponsor, Maidstone had the right to designate one board member so long as it owned one unit.

Fried's motion to reargue is denied. This court did not overlook or misapprehend the facts herein. Rather, as plaintiffs aptly note, Fried bases his present motion to reargue on a new argument not previously advanced in support of his motion for summary judgment dismissing the ninth cause of action. Fried never submitted an affidavit either in support of his motion for summary judgment or in opposition to plaintiffs' motion for summary judgment positively averring that he resigned from the board on or before October 16, 2003 by operation of the offering plans' terms. In fact, it is difficult to discern from the underlying record when Fried claims his board term ended.⁵ Having failed to raise this argument in the prior round of motion practice, Fried cannot raise it for the first time on reargument.

Finally, in arguing that plaintiffs failed to submit any proof that he remained on the board until May 2004, Fried improperly attempts to shift the burden of proof to plaintiffs. However, as set forth above, Fried failed to sustain his burden of proof on his statute of limitations defense and as such the burden never shifted to plaintiffs. Even if the burden of proof had shifted to plaintiffs, Fried failed to submit an affidavit expressly refuting plaintiffs' affidavit in opposition from Mark A. Manzi, the president of the HOA board of directors, stating that Fried continued to serve on the board through

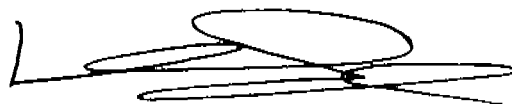
⁵ The memorandum of law in support of the Maidstone defendants' motion for summary judgment concedes that Fried continued to serve on the HOA board after September 12, 2002, the date co-defendants Judith and David Fried relinquished their seats on the HOA board, but fails to state when his term ended. See Schwartz Aff. in Opp. at Exh. 6, p.28, fn 1. Additionally, contrary to Fried's characterization, the Sixth Amendment to the Offering Plan filed with the Attorney General's Office on October 16, 2003 does not indicate that Fried was no longer on the board as of that date; rather, it expressly identifies Fried as a current member of the HOA board of directors. *Id.* at Exh. 10.

September 2004. As Fried failed to establish entitlement to summary judgment in his favor, no basis for reargument exists. Accordingly, it is hereby

ORDERED that defendant Wilbur Fried's motion to reargue is denied.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the moving defendant and plaintiffs.

Dated: New York, New York
September 12, 2012



HON. MARTIN SHULMAN, J.S.C.

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