Homar v American Home Mtge. Acceptance, Inc.
2012 NY Slip Op 33724(U)
July 24, 2012
Supreme Court, Orange County
Docket Number: 4330/2011
Judge: Catherine M. Bartlett
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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ANDREW J. HOMAR and JOSEPH E. RUYACK III,

Plaintiffs,

-against-

AMERICAN HOME MORTGAGE ACCEPTANCE, INC. et al.,

Defendants.

----------x

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 4330/2011
Motion Date: June 25, 2012
(adjourned to July 19, 2012)

The following papers numbered 1 to 7 were read on this motion by plaintiffs to renew and reargue their motion for summary judgment as against defendants American Home Mortgage Servicing, Inc., Mortgage Electronic Registration Systems, Inc. and Deutsche Bank National Trust Company:

Notice of Motion-Affirmation-Affidavit-Exhibits-Memorandum of Law 1-5

Affirmation in Opposition 6

Reply Affirmation 7

Upon the foregoing papers it is ORDERED that the motion is determined as follows:

Plaintiffs move this Court to renew and reargue the denial of their motion for summary judgment for summary judgment as against defendants American Home Mortgage Servicing, Inc., Mortgage Electronic Registration Systems, Inc. and Deutsche Bank National Trust Company.

The Court is drawn to the conspicuous absence of the proper supporting papers by the

plaintiff. As stated in Rule IV (D) of the Rules of this Part, available both online and in the courtroom:

> D. Supporting Documents. **All documents required to decide the application must be included in the moving papers. It is not sufficient that those documents are on file with the Court Clerk. All motions to renew or reargue must contain as exhibits a complete copy of all papers filed on the motion sought to be reargued as well as a complete copy of any decision and order of the Court pertaining to same. Failure to do so will result in a denial of the application.**

The Court has no obligation to retrieve from the County Clerk papers filed with a previous motion in the same case. "Because a Supreme Court Justice does not retain the papers following his or her disposition of a motion and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions, Supreme Court properly required plaintiffs to submit to it all papers that were to be considered on the instant motion." (*Sheedy v. Pataki,* 236 A.D.2d 92, 663 N.Y.S.2d 934 [3d Dept 1997]). The Court, in *Lower Main St. v. Thomas Re & Partners,* NYLJ, April 5, 2005, at 19, col 3, (Sup Ct, Nassau County, Alpert J.] instructed:

> the Court notes that the respective submissions do not include the papers submitted on the motion for which reargument is sought. In the absence thereof and other relevant documents providing a context for the position advanced, reargument is not available. (see, generally, *Gerhardt v. New York City Transit Authority,* 8 A.D.3d 427, 778 N.Y.S.2d 536).

Moving counsel, as a seasoned lawyer, should be well aware and appreciate that the Court does not retain the papers following the disposition of an application "and should not be compelled to retrieve he clerk's file in connection with its consideration of subsequent motions." (*Sheedy v Pataki,* 236 AD2d 92, 97 (3rd Dept. 1997), *lv den* 91 NY2d 805 (1998)). On the contrary, it is the

responsibility of the moving parties to assemble complete papers which document the procedural history of the application and provide a proper foundation for the relief requested. (*see, generally, Fenald v Vinci,* 13 AD3d 333 (2nd Dept. 2004)).(*See Bellofatto v Bellofatto,* 8 Misc3d 1019(A) [Sup Ct, Putnam County 2005]).

The absence of all of the underlying motion papers in direct contravention fo the law and this Court's specific rule regarding same is reason enough for denial of plaintiffs' motion.

As if that deficiency were not enough, plaintiffs failed to comply with the dictates of the CPLR. CPLR 2221 states in pertinent part as follows:

> (d) A motion for leave to reargue:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
>
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.
>
> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. 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; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.
>
> (f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were

> separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

In contravention of CPLR §2221(f), plaintiffs failed to demonstrate what portions of their motion was to renew and which portions was to reargue. CPLR Rule 2221 (d) (2) requires that a motion for leave to reargue "*shall* be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion [*emphasis added*]" and CPLR Rule 2221 (e) (2) requires that a motion for leave to renew "*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 [*emphasis added*]." However, plaintiff's counsel presents to the Court a hodgepodge of arguments. The Court emphasizes the word "*shall*" in the various clauses of CPLR Rule 2221, because when "*shall*" appears in a statute it means that absent a contrary legislative intent, the statute is preemptory rather than permissive. (*See People v Schonfeld*, 74 NY2d 374, 378 [1989]; *Podolsky v Narnoc Corp.*, 196 AD2d 593 [2d Dept 1993]; *Murphy Constr. Corp. v Morrissey*, 168 AD2d 877, 878 [3d Dept 1990]). Thus, plaintiff's failure to comply with CPLR Rule 2221(f), by not identifying separately and supporting separately each item of relief sought is sufficient for denial of his combined motion for leave to renew or reargue. (*Giardina v Parkview Ct. Homeowners' Assn.*, 284 AD2d 953 [4d Dept 2001]). The Court, in *Andrade v Triborough Bridge & Tunnel Auth.* (10 Misc 3d 1063 [A] [Sup Ct, Bronx County 2005]), in discussing CPLR Rule 2221, at 3, instructed, "[p]rocedurally, it is noteworthy that this particular statute requires that, when a movant submits a single motion that seeks to both renew *and* reargue, movant must take special care to identify and support each item of relief separately." In *Brzozwy v ELRAC, Inc.* (11 Misc 3d 1055 [A] [Sup Ct, Kings County 2006], the Court could have been discussing the instant motion, in holding, at 3, that "[t]he moving papers at

bar fail to identify, and support separately each item of relief sought, to wit, reargument and renewal. The plaintiff has not, with specificity, made references to particular issues, and/or evidentiary rulings. This constitutes a fatal procedural error and is a ground for denial by the court." Given plaintiffs' failure to properly delineate which portions are to renew and which are to reargue, plaintiffs' motion is fatally defective and must be denied.

Turning to the issue of the plaintiffs' motion to reargue, the Court of Appeals long ago pronounced the purpose behind a motion to reargue and criticized counsel for abusing the CPLR's provisions relating thereto. In *Fosdick v Town of Hempstead*, 126 NY 651 (1891) the Court stated:

> This is a motion for a reargument, and the moving papers do not show a single ground recognized by this court as a proper foundation for the motion. The learned counsel for the defendant argued orally every proposition in the case with zeal and ability. The court has decided against him not on account of his failure to properly present his views for the defendant, but because, after mature and careful deliberation, it has differed with the learned counsel in his contention as to the proper construction of the will. Many years ago the court announced the rule which should govern in this class of motions. In *Mount v. Mitchell*, 32 N. Y. 702, it was stated that a motion for reargument should be founded on papers showing that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with the statute, or a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel. In *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, at 73, the same rule was again alluded to, and announcement again made that the court would adhere to it, and that motions for a reargument would not be entertained unless counsel brought the case within the rule. Judging by the character of the papers upon which motions of this nature are now frequently made, we should assume that the profession has lost sight of the rule, for in most of the cases which have lately come under our notice there has been an entire failure to comply with its requirements, and the motion has been made simply because the unsuccessful counsel has thought that he would like to again argue the very questions he had already submitted to, and which had been expressly decided by, the court. While it is very possible that we err in many cases, yet the rule adopted in regard to reargruments is a

> proper one, considering the fact that there must be at some point an end of litigation; and after counsel has had his day in this court, and has been unsuccessful in his case, it is but fair to the court, and to other litigants who are pressing to be heard, that a case should be made such as the court has decided to be necessary before entertaining the question of the propriety of granting a reargument

Fosdick, 126 NY at 651-652 (emphasis supplied).

More recently in *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 (1st Dept. 1992), the Court held:

> A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and 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." (*Schneider v. Solowey*, 141 A.D.2d 813, 529 N.Y.S.2d 1017.) Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage, Inc. v. Home Insurance Co.*, 99 A.D.2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588.)

Pahl, 182 AD2d at 27; *Foley v Roche*, 68 AD2d 558, 567 (1st Dept. 1979); *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept. 1984). The Court did not misapprehend any law or fact. Plaintiffs are just unhappy with the Court's decision and improperly seek a second bite at the apple to argue summary judgment. This bite, however, is a poisonous one and the plaintiffs' motion must also be denied on this basis as well.

Furthermore, a claim unsupported by any new evidence is not the proper subject of a motion to renew. *See, Ribadeneyra v Gap, Inc.* 287 AD2d 362, 363 (1st Dept. 2001). Renewing a request by submitting new motion and absent any additional facts unknown at time of prior motion warrants the denial of a motion to renew, as does the failure to provide any excuse for not presenting the facts at the time of the first motion. *See, Mangine v Keller*, 182 AD2d 476, 477 (1st

Dept. 1992). A party is not entitled to renewal of a motion where it is based on the same facts asserted in opposition to earlier motions, although facts were contained in new documents. *See, William P. Pahl Equipment Corp. v Kassis* 182 AD2d 22, 27 (1st Dept. 1992); *Frascatore v Mione,* 97 AD2d 809, 810 (2nd Dept. 1983). The evidence defendant now claims to be "new" was available to have been discovered by plaintiff with due diligence since that evidence was in its own possession. *See, Elder v Elder*, 21 AD3d 1055 (2nd Dept. 2005); *Yarde v New York City Transit Authority*, 4 AD3d 352, 353 (2nd Dept. 2004); *Cooke Center for Learning and Development*, 19 AD3d 834 (3rd Dept. 2005). "A motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation . . .'" *Renna v Gullo*, 19 AD3d 472 (2nd Dept. 2005); *O'Dell v Caswell*, 12 AD3d 492 (2nd Dept. 2004).

In the instant case, there is no identification of any evidence which is being submitted now which was not submitted before, nor is there any indication why, if the new evidence was submitted, it was not timely done in the first place on the original motion. As such, plaintiffs' motion to renew must be denied.

Plaintiffs' motion is supported by an affirmation of Joseph E. Ruyack, III and an affidavit of Andrew Homar, notarized by Mr. Ruyack. CPLR § 2106 requires that for an affirmation to be effective, the attorney (1) is licensed in New York; (2) **is not a party in the action in which the affirmation is submitted**; and (3) actually signs the statement. Affirmations submitted by attorneys who are parties to actions are not to be considered. *See, Lessoff v 26 Court Street Associates LLC*, 58 AD3d 610 (2nd Dept. 2009); *Samuel & Weininger v Belovin & Franzblau*, 5 AD3d 466 (2nd Dept. 2004); *Pisacreta v Joseph A. Minniti P.C.*, 265 AD2d 540 (2nd Dept. 1999); *LaRusso v Katz*, 30 AD3d 240, 243 (1st Dept. 2006). In the instant case, Mr. Ruyack is a party to

this action and his affirmation must be deemed a nullity.

Furthermore, Mr. Ruyack, a party to this action, acted as a notary on Mr. Homar's affidavit. An acknowledgment before a party to the instrument is a nullity *See, Armstrong v Combs,* 15 AppDiv. 246 (3rd Dept. 1897); *People ex rel. Erie R.R. Co. v. The Board of R.R Com'rs,* 105 App.Div. 273 (3rd Dept. 1905); *Brodsky v Board of Managers of Dag Hammarskjold Tower Condominium*, 1 Misc3d 591, 596 (N.Y.Sup.,2003). Given Mr. Ruyack's status as a party, he is disqualified from notarizing any documents pertaining to this litigation. Therefore, Mr. Homar's affidavit is a nullity since it is acknowledged by a notary who is a party to the action. Given the complete absence of any admissible evidence, plaintiffs' motion is denied in its entirety.

The foregoing constitutes the decision and order of this Court.

Dated: July 24, 2012
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT,
A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE