Specialized Realty Servs., LLC v Maikisch
2012 NY Slip Op 33743(U)
April 30, 2012
Supreme Court, Orange County
Docket Number: 11/2011
Judge: Catherine M. Bartlett

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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SPECIALIZED REALTY SERVICES, LLC,

Plaintiff,

-against-

DAVID MAIKISCH,

Defendant.

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. 11/2011
Motion Date: December 16, 2011

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The following papers numbered 1 to 6 were read on plaintiff's motion to reargue:

Notice of Motion-Affirmation in Support-Exhibits 1-3

Affirmation in Opposition 4

Reply Affirmation-Exhibit Binder 5-6

Upon the foregoing papers, the motion is disposed of as follows:

This is an action seeking among other things, breach of an oral contract, tortious interference with contractual relations, and slander. The action was dismissed due to the same issues having been previously litigated in another Court. Now, plaintiff seeks to relitigate the issues once again on a motion to reargue.

In the first instance, 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]).

Plaintiff submitted none of the paperwork from the prior motion and attempts to do so on reply. Evidence submitted on reply for the first time attempting to demonstrate an essential element of a movant's prima facie case is improper, and therefore the respondent's papers never need be considered since movant's prima facie case was never established. *See, Klimis v Lopez*, 290 AD2d 538 (2nd Dept. 2002); *see also, Feratovic v Lun Wah, Inc.*, 284 AD2d 368, 369 (2nd Dept. 2001); *Voytek Technology, Inc. v Rapid Access Consulting, Inc.*, 279 AD2d 470, 471 (2nd Dept. 2001). In *Watt v Irish*, 184 Misc2d 413 (Sup. Ct. Columbia Co., 2000) the court stated that:

> Arguments advanced for the first time in reply papers are entitled to no consideration by a Court . . . Rather, the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for, the motion . . . Nor does it avail a movant to shift to his opponent, by way of the reply affidavit, the burden to demonstrate a material issue of fact at a time when the opponent has neither the obligation nor opportunity to respond absent express leave of court . . . If a movant, in preparation of a motion . . ., cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted.

On this basis alone, plaintiff's motion is denied.

Furthermore, CPLR 2221 states in pertinent part as follows:

> (d) A motion for leave to reargue:
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> 1. shall be identified specifically as such;
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> 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
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> 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.

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).

Plaintiff's counsel fails to demonstrate that the Court either misapprehended or the law which was mistakenly applied. The Court does not believe that it overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in deciding the motion in question. Basically, plaintiff's counsel is looking for a judicial cure to a fault of counsel's own making in judge shopping his case. Therefore the motion to reargue is denied in its entirety with $100.00 motion costs awarded to defendant by plaintiff.

The foregoing constitutes the decision and order of this Court.

Dated: April 30, 2012 ENTER
Goshen, New York

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