

**Rameau v Russo**

2013 NY Slip Op 31819(U)

August 8, 2013

Sup Ct, Queens County

Docket Number: 24133/07

Judge: Bernice Daun Siegal

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Short Form Order

**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

-----X  
Claude Rameau & Gladys Rameau,

Plaintiffs,

-against-

Carmine Russo, Bryan May, Michael Jagmohan,

Defendants.  
-----X

Index No.: 24133/07  
Motion Date: 5/10/13  
Motion Cal. No.: 87  
Motion Seq. No.: 7

The following papers numbered 1 to 14 read on this motion for an order to grant leave to reargue/renew defendants’ prior motion for an award of “use and occupancy”, pursuant to CPLR §2221.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion.....	5 - 9
Affirmation in Opposition.....	10 - 12
Reply Affirmation.....	13 - 14

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

### Facts

This motion is to reargue an Order dated October 31, 2012 granting use and occupancy from plaintiffs with respect to the property located at 209-55 White Hall Terrace, Queens, New York (“Property”). An October 31, 2012, Order directed plaintiffs to pay defendant Michael Jagmohan (“Jagmohan”) the sum of \$1,100.00 per month for use and occupancy of the Property from May 2007 through the pendency of this action. That order has been ignored by the plaintiffs. Jagmohan cross-moves for an order punishing plaintiffs for contempt of court for violating and willfully refusing to comply with the October 31, 2012 order and for an Order awarding Jagmohan attorneys’ fees associated with Jagmohan’s efforts to obtain plaintiffs’ compliance.

According to the defendant Jagmohan, he purchased the Property from defendant Bryan May 4, 2007, for the purchase price of \$415,000.00. The contract of sale between defendant Jagmohan and defendant May provided, in pertinent part, that defendant Jagmohan would take title of the Property “subject to the existing tenancy of Claude Rameau, who currently pays a monthly rent of \$1,000.00 on a month to month basis, and with no other lease agreement.” According to defendant Jagmohan, when he reached out to plaintiffs shortly after he had purchased the Property, plaintiffs refused to vacate the Property or to enter into a lease agreement or to pay rent in return for their use and occupancy of the Property.

According to the plaintiffs, defendant Jagmohan is holding the Property in trust for the benefit of plaintiffs; and plaintiffs are the owners of the Property. According to plaintiffs, the Property was initially owned by plaintiff Gladys Rameau via a deed, dated October 29, 1982, the

Property was then transferred on October 8, 2004 to her son, plaintiff Claude Rameau, in trust and for the sole benefit of plaintiff Gladys; the Property was then transferred on January 6, 2006 to defendant May maintaining the trust for the benefit of Plaintiffs until plaintiff Claude was able to repair his credit; and in early 2007, defendant May informed plaintiffs that the Property would be transferred to defendant Jagmohan to be held in trust for plaintiffs.

In July 2007, defendant Jagmohan brought an eviction proceeding against plaintiffs in the New York City Civil Court, Queens County. The eviction proceeding was consolidated into this action by an order, dated December 21, 2007.

For the reasons set forth below, Plaintiff's move to reargue the October 31, 2012 Order is denied and defendants are seeking to punish plaintiffs for contempt of said order is granted.

### **Discussion**

CPLR §2221(d)(2) provides, in pertinent part, 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, but shall not include any matters of fact not offered on the prior motion . . . .” “A motion for reargument is addressed to the discretion of the court.” (*Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 515 [2<sup>nd</sup> Dept 2001]; *see also V. Veeraswamy Realty v. Yenom*, 71 A.D.3d 874, 874 [2<sup>nd</sup> Dept 2010]; *Barnett v. Smith*, 64 A.D.3d 669, 670 [2<sup>nd</sup> Dept 2009]; *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654 [2<sup>nd</sup> Dept 2007].) In essence, the purpose of a motion for leave to reargue is to allow a party to either demonstrate that the court misapplied the law or misapprehended or overlooked the facts in its earlier decision.

(*Mazinov v. Rella*, 79 A.D.3d 979, 980 [2<sup>nd</sup> Dept 2010]; *Barnett*, 64 A.D.3d at 670–71; *Pryor v. Commonwealth Land Title Insurance Co.*, 17 A.D.3d 434, 435–36 [2<sup>nd</sup> Dept 2005]; *Spatola v. Tarcher*, 293 A.D.2d 523, 524 [2<sup>nd</sup> Dept 2002]; *Murray v. City of New York*, 283 A.D.3d 560, 560–61 [2<sup>nd</sup> Dept 2001]; *Frisenda*, 280 A.D.2d at 515; *Diorio v. City of New York*, 202 A.D.2d 625, 626 [2<sup>nd</sup> Dept 1994].)

The plaintiffs improperly contend the use and occupancy issue could not be settled by this Court prior to a determination of the ownership of the property. Again, to establish the existence of a “constructive trust” the plaintiff must establish (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on that promise; and (4) unjust enrichment. (*Ewart v. Ewart*, 78 A.D. 3d 992 [2<sup>nd</sup> Dept. 2010]; *Maiorino v. Galindo*, 65 A.D. 3d 525 [2<sup>nd</sup> Dept. 2009].)

In January 2006 plaintiffs deeded the property to Bryan May and have not offered a single document to support their contention that they somehow have an ownership interest in the Property nor provide the basis for a constructive trust. Generally, to establish ownership in real property the plaintiffs would be required to produce a document in writing as per the statute of frauds. N.Y. General Obligations Law § 5-703. Here, plaintiffs have failed to produce a document and merely rely upon the unsupported contentions of plaintiffs. While an issue of fact still exists regarding whether a constructive trust exists, that does not render the issue of “use and occupancy” moot. Therefore, the Court was correct in adjudicating the issue of “use and occupancy”.

Further, plaintiffs claims this Court “sat on appeal” of the previous decision by Judge Satterfield dated December 21, 2007. However, that order merely consolidated an eviction proceeding with the instant action and used “form language” when it stated that the actions shall

be tried jointly. That language was not to the exclusion of making motions for other relief. In fact, it is disingenuous of plaintiff to contend that Justice Satterfield intended to conclude that the issue of “use and occupancy” was ONLY to be resolved at trial.<sup>1</sup>

Next, to hold another party in civil contempt the movant bears the burden of proof. (*Matter of Powers v. Powers*, 86 N.Y. 2d 63, 70 [1995].) To sustain the charge of civil contempt, it must be shown that the mandate purportedly violated was clear and explicit, and the violation was established with reasonable certainty. (*McCain v. Dinkins*, 84 N.Y. 2d 216 [1994]; *Matter of McCormick v. Axelrod*, 59 N.Y. 2d 574 [1983].)

Here, it is clearly established that the plaintiff has not paid the sum of \$1,100 per month for use and occupancy of the Property from May 2007 through the pendency of this action as per ordered. The plaintiffs erroneously conclude, with no statutory or common law basis, that a motion to reargue is considered a stay in New York practice. Accordingly, plaintiffs are directed to pay the sum of \$1,100 per month from the period of May 2007, within (30) days of service of a copy of this order with notice of entry and continue to pay the sum of \$1,000 per month for the pendency of this action. Should the plaintiffs fail to comply with this order, petitioner may move for a contempt order upon proof of clear and convincing evidence that respondent failed to comply. (*See Yalkowsky v. Yalkowsky*, 93 A.D. 2d 834 [2<sup>nd</sup> Dept. 1983].)

### **Conclusion**

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<sup>1</sup>A review of the Order to Show Cause indicates that there was nothing in the Order to Show Cause relating to the issue of “use and occupancy.”

For the reasons set forth above, the plaintiff's motion for reargument is denied and defendant's cross motion is granted solely to the extent that plaintiffs are required comply with this order within (30) days of service of a copy of this order with a notice of entry.

Dated: August 8, 2013

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Bernice D. Siegal, J. S. C.