Dormitory Auth. of the State of N.Y. v M.T.P.
2014 NY Slip Op 30876(U)
April 2, 2014
Sup Ct, New York County
Docket Number: 103416/2011
Judge: Kathryn E. Freed

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: FREED Justice

PART 5

Index Number : 103416/2011
DORMOTORY AUTHORITY
vs.
M.T.P. 59 ST. LLC
SEQUENCE NUMBER : 006 CAL: # 16
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 006

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 08 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4-2-14
APR 02 2014

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

, 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: Part 10

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DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Plaintiff,

-against-

M.T.P., 59 ST. LLC, MTP 3330 BROADWAY CORP., MTP 57, LLC, MTP OPERATING CORP., 29 OPERATING CORP., MTP GLOBAL GROUP LLC, CHELSEA MTP OPERATING LLC, DAVID AVITAL, PERNILLA ANDRE-AVITAL and "JOHN DOE ENTITIES" 1 THROUGH 20,

Defendants.

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DECISION/ORDER
Index No. 103416/2011
Seq. No. 006

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2(Exs. A-E)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This is an action to set aside fraudulent conveyances by defendant M.T.P. 59 St., LLC ("MTP 59) and to hold the other defendants liable for a money judgment obtained against MTP 59. Defendants move for an order, pursuant to CPLR 2221, seeking reargument of their motion to vacate the decision and order of this Court, dated September 16, 2013 and entered on September 24, 2013,

which denied their motion to vacate the order of this Court dated December 13, 2012 and entered on December 14, 2012. Upon reargument, defendants seek to vacate the orders of September 16, 2013 and December 13, 2012. Plaintiff Dormitory Authority of the State of New York ("DASNY") opposes the motion. After oral argument, and based on a review of the motion papers and the relevant statutes and case law, the motion is **denied**.

Factual and Procedural Background:

In March of 2011, DASNY moved, by order to show cause, for an order of attachment against the property of defendants David Avital and Pernilla Andren-Avital ("the Avitals"). By order dated May 17, 2011 and entered May 19, 2011, this Court (Gische, J.) restrained the Avitals from transferring, encumbering or paying any of the defendants' assets to the extent of $387,143.36 "pending further order or judgment of the court." The order, which was rendered on default in light of the proof of service made on those defendants, further provided that "if a more complete order of attachment is required, plaintiff may settle same directly to the court on three (3) days' notice [to the Avitals]."

The Avitals subsequently moved, pursuant to CPLR 5015 and 6223(a), to vacate the order entered on their default. By order dated October 3, 2011 and entered the following day, this Court (Gische, J.) denied the motion on the ground that the Avitals failed to establish that they had a meritorious defense.

On November 20, 2012, DASNY served the order of attachment on counsel for the defendants. Counsel for the defendants objected to the order as untimely, asserting that it should have been served within 60 days of the May 19, 2011 order in accordance with 22 NYCRR §

202.48(a). Nevertheless, by order dated December 13, 2012 and entered the following day, this Court signed an order attaching defendants' assets in the amount of $387,143.36, including any interest, costs and sheriff's fees and expenses.

By notice of motion dated March 25, 2013, defendants moved to vacate, "as having been abandoned" pursuant to 22 NYCRR § 202.48(a) and (b), the "settled order dated November 20, 2012 from the decision and order of [Justice Gische] filed on May 19, 2011." In opposition to the motion, DASNY argued, inter alia, that since the initial order granting the attachment did not direct DASNY to settle the order, it had no duty to comply with 22 NYCRR 202.48.

In an order dated September 16, 2013 and entered September 24, 2013, this Court denied the defendants' motion to vacate. In denying the motion, this Court stated, inter alia, that:

> The [defendants'] argument . . . seems to be identical to that proffered in its opposition to [DASNY's] motion for an [o]rder of [a]ttachment, which was before this Court on December 13, 2012. At that time, this Court granted [the DASNY] an [o]rder of [a]ttachment via a decision dated December 13, 2012.
>
> Now, it would seem more appropriate if defendants moved to vacate this Court's previously rendered decision. This previous [o]rder was granted pursuant to Justice Gische's decision dated May 17, 2011. However, in their motion, defendants treat this Court's decision of December 13, 2012, as a nullity and specifically seek to vacate Justice Gische's earlier decision. This is something that they may not do.
>
> If defendants are seeking to have either this [Court's] or Justice Gische's [o]rders vacated, they have chosen an entirely inappropriate legal mechanism by which to do so. Defendant cannot use a motion to vacate based on the same legal argument it previously proffered in opposition to [the DASNY's] previous motion, and which this Court has, by granting plaintiff's motion, ruled against. If defendants disagree with either the decision of Justice Gische or of this Court, there are various legal remedies which are available to plaintiffs. However, the within motion to vacate is not one of them.

Defendants now move, pursuant to CPLR 2221, for reargument "of this Court's decision and order dated September 16, 2013 . . . which denied [their] motion to vacate the order of this Court dated December 13, 2012 . . . and, upon the granting of reargument, vacating [the September 16 and December 13, 2013 orders]."

Positions of the Parties:

The defendants argue that their motion must be granted because DASNY failed to settle an order within 60 days of Justice Gische's order of May 17, 2011, as required by 22 NYCRR §202.48.

In opposition, DASNY argues that, since it settled an order for relief already granted by this Court, and sought no additional relief, it was under no obligation to comply with 22 NYCRR § 202.48.

In a reply affirmation in further support of the motion, the defendants assert that, contrary to the September 16, 2013 holding of this Court, they seek to vacate this Court's order of attachment dated December 13, 2013, and not this Court's order of May 17, 2011.

Legal Conclusions:

A motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such a motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782

(1993). Reargument is not intended to afford an unsuccessful party successive opportunities to argue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *William P. Pahl Equip. Corp. v. Kassis, supra* at 27; *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374 (2d Dept. 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th ed) succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

Here, the defendants' motion for reargument must be denied, since the defendants fail to point to any question of law or fact overlooked or misapprehended by this Court in its order of September 16, 2013.

Initially, this Court properly determined in its September 16, 2013 order that the defendants "treat this Court's decision of December 13, 2012 as a nullity and specifically seek to vacate Justice Gische's earlier decision [of May 17, 2011]." Although the defendants insist that they are moving to reargue the December 13, 2013 order, and not the May 17, 2011 order of this Court, their argument is disingenuous. This claim is belied by the defendants' own notice of motion, dated March 25, 2013, which specifically seeks to vacate the order dated May 17, 2011 and entered May 19, 2011.

Further, as DASNY correctly asserts, it was not required by 22 NYCRR § 202.48(a) to settle an order within 60 days of Justice Gische's May 17, 2011 order. Subdivision (a) states that "[p]roposed orders or judgments, with proof of service on all parties where the order is directed to

be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted." Here, the May 17, 2011 order, rendered on default, did not direct DASNY to settle an order but merely stated that "if a more complete order of attachment is required, plaintiff may settle same directly to the court on three (3) days' notice [to the Avitals]." However, DASNY did not seek a more complete order of attachment but sought merely to enforce the terms of the order issued so as to obtain the relief already granted. Thus, DASNY was not subject to the 60-day requirement set forth in 22 NYCRR § 202.48. *See Farkas v Farkas*, 11 NY3d 300, 309 (2008).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants' motion for reargument is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: April 2, 2014

APR 0 2 2014

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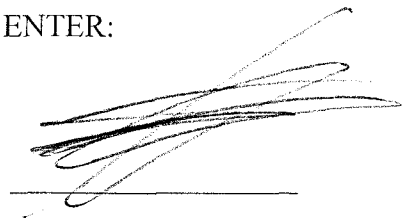

Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT