SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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In the Matter of the Application of
MARIE FLAHERTY,

Petitioner,

-against- Index No. 158612/13

MIDTOWN MOVING & STORAGE, INC.

Respondent.

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JOAN A. MADDEN, J.:

In this hybrid special proceeding/civil action, arising out of removal and storage of a tenant's personal possessions in connection with an eviction proceeding,[1] respondent Midtown Moving & Storage, Inc. (Midtown) moves for an order granting leave to reargue this court's decision and order dated April 24, 2014 (the original decision), to the extent the court found that Midtown did not have a valid warehousemen's lien against her and permitted petitioner Marie Flaherty (Flaherty) to retrieve her possessions stored by Midtown within thirty days without paying storage fees. Flaherty opposes the motion, which is denied for the reasons below.

A motion for reargument is addressed to the discretion of the court, and is intended to

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[1]The hybrid special proceeding/civil action asserts the following nine causes of action: 1) first cause of action pursuant to the UCC 7-211 challenging the validity of the warehouseman's lien as not applicable to household goods under New York law and seeking compensatory and punitive damages; 2) second cause of action seeking a preliminary and permanent injunction; 3) third cause of action for conversion; 4) fourth cause of action for criminal mischief; 5) fifth cause of action for theft of property; 5) fifth cause of action for theft of property; 6) sixth cause of action for extortion; 7) seventh cause of action for interference with contract; 8) eighth cause of action for intentional infliction of emotional distress; and 9) ninth cause of action for negligent infliction of emotional distress.

give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. *See, Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equipment Corp. v. Kassis,* 182 AD2d 22, *appeal denied in part dismissed in part,* 80 NY2d 1005 (1992). Here, the motion is properly denied as Midtown did not argue that New York Uniform Commercial Code (UCC) section 7-206 in its opposition to the original to the original motion. Midtown only argued it has a viable warehouse lien.

In its original decision, the court granted the relief requested by Flaherty in her first and second causes of action challenging the validity of the warehouseman's lien to the extent of staying the sale of her possessions and giving her 30 days to retrieve her possessions from Midtown, and directing Midtown to release Flaherty's possessions to her without any payment by her. Flaherty has already retrieved her goods in accordance with this order, so that to the extent Midtown seeks relief with respect to that aspect of the original decision, such request is moot.

In concluding that there was no valid warehouseman's lien against Flaherty under the UCC, the court relied on section 7-209 (1) which states that " [a] warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation," and noted that the bailor is the landlord, not Flaherty, the evicted tenant. The court's analysis is consistent with the limited case authority on the subject. *See*, *Matter of Young v Warehouse No. 2, Inc.*, 143 Misc 2d 350 (Civ Ct, Richmond County 1989)(holding that in an eviction case, under UCC § 7-209 et seq., the warehouseman could only look to the landlord, as the bailor, and not the tenant to pay the storage charges);

Moore v. Republic Moving and Storage, Inc., 548 NE2d 1211 (Ind App 990)(holding that warehouseman did not acquire a valid lien on evicted tenants personal property which was turned over to warehouseman by constable since tenants never consented to the storage of their property); *see also*, Frisch, Commentary, 7B Anderson UCC § 7-210:9 (3d ed. Sept. 2013) (noting that "only the warehouseman's customer is liable for the charges of the warehouseman"); Anzivino, UCC Transaction Guide § 25:28 (August 2013)(stating that "[a] valid warehouseman's lien against the owner of the property is created only if the owner of the property acts as a bailor or authorizes another to so act).[2]

On this motion, Midtown implies that the court erroneously found that a warehousemen may only collect storage fees via a lien proceeding under UCC § 7-210. However, the court made no such finding, but rather determined only that there was no valid warehouseman's lien against Flaherty. As previously stated, Midtown did not argue in connection with the initial motion, as it does now, that it was entitled recover moneys due for storage charges under UCC § 7-206, "Termination of Storage Charges." This section provides, *inter alia*, that a warehousemen may, upon notifying the interested parties, require payment of charges and removal of goods at the end of the agreed upon period for storage and, if no period is fixed, within a stated period of not less than thirty days. If the goods are not removed before the date specified in the notice, the

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[2]The court also wrote that subsection 3 of section 7-209 which states "[a] warehouseman's lien for charges and expenses under subsection (1) ... is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid" also fails to provide a remedy against the tenant, for the tenant did not "entrust" her goods to her landlord. Rather, her landlord took possession of those goods pursuant to an order of eviction. That order of eviction does not, however, operate as a legal surrender of Flaherty's right to possession of her personal property. *See Gale v Morgan & Bro. Manhattan Stor. Co.*, 65 AD2d 529, 529 (1st Dept 1978).

warehousemen is permitted under this section to sell the goods upon compliance with UCC § 210, pertaining to an enforcement of a warehousemen's lien. *See Matter of Young v Warehouse No. 2*. 143 Misc 2d at 351-352.

As the original decision made no determination as to Midtown's rights to recover under UCC § 206, Midtown is not foreclosed from seeking relief under this section. However, the court will not entertain a request pursuant to UCC § 206 on a motion to reargue. In any event, it appears that issues of fact exist as to whether Flaherty was given proper notice under UCC § 210. As noted in the original decision, over a period of nearly two years, Midtown repeatedly noticed auctions and withdrew its notices.[3]

Furthermore, the cases on which Midtown relies do not provide a basis for granting reargument Thus, for example, *General Fabrics Co. v. Renco Finishing Corp.,* 191 Misc2d 148 (App Term, 1st Dept 2002), involves issues related to the foreclosure of a lien on warehoused goods of a merchant, rather than the noncommercial household goods at issue here. Nor is *Dupont v. Joedon & Co* , 107 AD2d 369 (1st Dept 1985), also cited by Midtown, controlling here. Although it concerns stored property of a tenant, albeit a commercial one, it addresses claims by the warehousemen (and the moving company) against the landlord and not the tenant. Next, while the courts in both *General Fabrics Co., supra* and *Dupont, supra*, noted that the warehousemen's lien was not an exclusive remedy against a person liable for storage costs, and that the warehousemen could terminate storage and proceed under UCC § 206 or otherwise, as indicated above, the original decision's holding is not inconsistent with these holdings. Finally,

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[3]At oral argument, counsel for Midtown stated the earlier notices were withdrawn to accommodate various courts with respect to prior actions commenced by Flaherty.

Ellison v. Midtown Moving & Storage, Inc., 188 Misc2d 703 (App. Term, 1st Dept 2001), simply holds that the defendant moving/storage company complied with the notice and publication provisions under UCC § 210, and therefore could not be liable for any negligence in connection with the public sale of plaintiff's property.

In view of the above, it is

ORDERED that Midtown's motion to reargue is denied.

DATED: September 11,2014

J.S.C.

HON. JOAN A. MADDEN
J.S.C.