

Coney Realty LLC v Kings Highway Printers Inc.

2014 NY Slip Op 32791(U)

October 10, 2014

Sup Ct, Kings County

Docket Number: 502375/13

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of October 2014.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

-----X
CONEY REALTY LLC,

Plaintiff,

- against -

Index No. 502375/13

KINGS HIGHWAY PRINTERS INC., 2209 CONEY ISLAND AVE, LLC, SS2209 LLC, and JB2209, LLC,

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Plaintiff Coney Realty LLC (Coney Realty) moves for an order: (1) pursuant to CPLR 2221, granting leave for reargument of the Court's December 19, 2013, decision and order (the prior order), and, upon reargument, reinstating nunc pro tunc the lis pendens (lis pendens) filed by Coney Realty on May 15, 2013, on the real property located at 2209 Coney Island Avenue in Brooklyn, New York (adjoining property); (2) pursuant to CPLR 1018, 1001, and 1002, joining JB2209, LLC (JB2209) as a party defendant due to the recent

transfer by SS2209, LLC (SS2209) of all of its fee interest in the adjoining property to JB22009 pursuant to a deed, dated December 27, 2013, and recorded on February 4, 2014, in the Office of Kings County Register at CRFN 2014000045180.

On May 13, 2014, the Court granted that portion of Coney Realty's motion to join JB2209 as a party defendant and to amend the caption accordingly, and marked as submitted the balance of Coney Realty's motion seeking reargument of the prior order. The Court now turns to the balance of Coney Realty's motion.

A description of the facts giving rise to the within action, the related holdover proceeding, and the foreclosure action is set forth in the prior order and will not be repeated herein. Briefly, the prior order resolved both Coney Realty's order to show cause seeking to (1) consolidate the instant action with the pending licensee holdover proceeding entitled *Coney Realty LLC v Kings Highway Printers, Inc.*, Civil Court, Kings County (Housing Part) L&T index No. 8654/2012 (holdover proceeding), and (2) stay the foreclosure action entitled *The Dime Savings Bank of Williamsburg v 2209 Coney Island Ave LLC, et al.*, Supreme Court, Kings County, index No. 300003/10 (foreclosure action). The prior order also resolved SS2209's cross motion seeking, among other things, to cancel the lis pendens filed by Coney Realty against the adjoining property due to the dispute over the possession, use, and enjoyment of the Rear Space. Specifically, the prior order, in granting SS2209's cross motion to cancel the lis pendens against the adjoining property, explained:

“CPLR § 6514 (a) provides for the mandatory cancellation of a notice of pendency by:

‘[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct

any county clerk to cancel a notice of pendency . . .
if the action, discontinued or abated . . .’ (emphasis
added).

The plain meaning of the word ‘abated,’ as used in CPLR 6514 (a) is ‘the ending of an action’ (*477 Clinton Avenue LLC v Clinton Rising, LLC et al.*, 22 Misc 3d 1104[A], 2009 NY Slip Op 50014[U], *10 [2009]; *see also Wells v Fargo Bank, N.A. v Reyes*, 20 Misc.3d 1104(A) [2008]). Here, the court in the Foreclosure Action has determined title and possession of the 2209 Building. Consequently, cancelling the notice of pendency necessarily follows.”

Lastly, the prior order indicated that the Court had “considered the parties’ remaining contentions” and found them to be without merit.

Coney Realty now seeks leave to reargue that portion of the prior order which vacated the lis pendens and, and upon reargument, an order reinstating the lis pendens nunc pro tunc. Coney Realty argues that there was no legal basis by the Court to cancel the lis pendens under CPLR 6514 (a). According to Coney Realty, the lis pendens should be reinstated on the grounds that (1) the Court mistakenly based its ruling on the belief that the lis pendens had been filed in the foreclosure action; and/or (2) the dispute over the possession, use and enjoyment of the Rear Space had previously been determined by the foreclosure action. Coney Realty asserts that the dispute over the Rear Space has not been settled, abated, or discontinued by the foreclosure action because the foreclosure action merely led to an auction of the adjoining property in which the ownership and title to the adjoining property was transferred from 2209 Coney Island Avenue LLC to SS2209, and subsequently to JB2209. In contrast, Coney Realty maintains that the instant action relates solely to Coney Realty’s attempt to reclaim the possession, use, and enjoyment of the 2207 Rear Space. Coney Realty

argues that whoever owns or occupies the adjoining property currently has unfettered use, possession, and enjoyment of the Rear Space without Coney Realty's consent. Accordingly, Coney Realty concludes that preserving the lis pendens is important, as it is the only avenue to ensure that present and future owners and tenants of the adjoining property are made aware of Coney Realty's claim to the Rear Space.

JB2209, which is the current owner of the adjoining property, opposes Coney Realty's motion. At the outset, JB2209 notes that Coney Realty failed to file and serve any opposition papers to that portion of SS209's cross motion seeking to cancel the lis pendens filed by Coney Realty against the adjoining property. JB2209 further argues that the Court did not misapprehend the facts or misapply the law, as the instant action does not affect the title of the adjoining property, but instead merely affects the title of the premises located at 2207 Coney Island Avenue. In this regard, JB2209 notes that Coney Realty's complaint seeks a declaration that the 2207 Rear Space is owned by Coney Realty. Further, JB2209 cites to the prior order wherein the Court denied that portion of SS2209's cross motion seeking dismissal of the complaint as against it based upon the existence of factual issues with respect to the use of the 2207 Rear Space.

In reply, Coney Realty insists that the complaint in this action affects the possession, use, and enjoyment of the adjoining property. It argues that the complaint seeks no relief for an alleged wrong perpetrated by defendants on the 2207 Coney Island Avenue property. Rather, Coney Realty maintains that the complaint seeks to void and/or modify Kings Highway's lease to the store located at the adjoining property so as to prevent defendants Kings Highway and JB2209 from simultaneously possessing, using, and enjoying both the

2207 Rear Space and the adjoining property. According to Coney Realty, Kings Highway cannot occupy the adjoining property without also occupying the Rear Space.

Discussion

A motion for leave to reargue is addressed to the sound discretion of the court and may be granted only upon a showing by the movant that the court overlooked or misapprehended facts or law, or mistakenly arrived at its earlier decision (*see* CPLR 2221 [d] [2]; *see generally* *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1992]). It is not designed to provide the unsuccessful party with further opportunity to reargue once again the very issues previously decided, or to advance a new theory of law (*see generally* *Foley v Roche*, 68 AD2d 558 [1979]; *see also* *Woody's Lbr. Co. v Jayram Realty Corp.*, 30 AD3d 590 [2006]; *Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2005]; *Spatola v Tarcher*, 293 AD2d 523 [2002]). An order denying a motion to reargue is not appealable (*see* *Rivera v Cambridge Mut. Ins. Co.*, 136 AD2d 104 [1998]).

The Court, in its discretion, denies Coney Realty's leave for reargument. In doing so, the Court finds that Coney Realty has failed to demonstrate any matters of fact or law that were allegedly overlooked or misapprehended by the court in determining the prior motion (*see* CPLR 2221 [d] [2]). Contrary to Coney Realty's contention, the Court's determination was not mistakenly based on its belief that a lis pendens had been filed in the foreclosure action, and/or that the dispute over the possession, use, and enjoyment of the Rear Space had previously been determined by the foreclosure action. Rather, the Court canceled the lis pendens on the adjoining property in accordance with CPLR 6514 (a), which provides for mandatory cancellation of a notice of pendency when the action has been "abated."

Accordingly, the balance of Coney Realty's motion which requests reargument of that aspect of the prior order which vacated the lis pendens is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



OCT 10 2014

J. S. C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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FILED
2014 OCT 28 AM 4:00
KINGS COUNTY CLERK
