

<b>Disa Realty, Inc. v Rao</b>
2014 NY Slip Op 33113(U)
May 7, 2014
Supreme Court, Queens County
Docket Number: 10206/2012
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

DISA REALTY, INC.,

Index

No. 10206 2012

Plaintiff,

-against-

Motion

Date January 29, 2014

KISHOR RAO A/K/A KISHOR K. RAO, et al.,

Defendants.

Motion

Cal. No. 38

Motion

Seq. No. 5

The following papers numbered 1 to 16 read on this motion by defendant Kishor Rao (defendant), for an order rearguing/renewing plaintiff's prior motion, resulting in the decision and subsequent order of this court dated February 27, 2013, and July 22, 2013, respectively, which granted plaintiff's motion for summary judgment (CPLR 2221 [d]); and on this cross motion by plaintiff for an order, inter alia, directing defendant to produce a policy of insurance.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
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Answering Affidavits - Exhibits .....	11-13
Reply Affidavits.....	14-16

Upon the foregoing papers it is ordered that the motion is denied.

In this action to foreclose a mortgage, defendant moves for an order granting leave pursuant to CPLR 2221 (d) and (e) to renew and reargue the decision and order of this court

dated February 27, 2013, which granted plaintiff's motion for summary judgment and for the appointment of a referee to compute.

A motion for leave to renew must be based upon new facts not presented on the prior motion that would alter the court's earlier determination (CPLR 2221 [e]). A movant on a motion to renew must demonstrate a reasonable justification for not placing such alleged additional facts before the court on the original motion (CPLR 2221 [e] [3]). The Second Department has repeatedly held that the additional evidence offered on a motion to renew must be either newly discovered or have been unavailable to the movant at the time of the prior application (*Winograd v Neiman Marcus Group*, 11 AD3d 455 [2004]; *Seltzer v City of New York*, 288 AD2d 207 [2001]; *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636 [2000]). Defendant takes the position that the prior decision and order of this court should be overturned or reversed because information which he deemed critical was not conveyed to the court, namely, transcripts and a report on same by an audio expert of personal conversations between defendant and Amarain (plaintiff's principal), contemporaneously taped by defendant, in which Amarain allegedly solicited and acknowledged receipt of payments on the subject mortgage in cash and in kind. The court finds that no new facts pertinent to the relief sought have been presented. "In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion" (*Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 [2007]). A motion "to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Renna v Gullo*, 19 AD3d 472, 473 [2005], quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 [1996]). The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion (*see Worrell v Parkway Estates, LLC*, 43 AD3d at 437). Here, in support of that branch of his motion which was for leave to renew, defendant submitted additional facts known to him at the time of the prior motion without demonstrating a reasonable justification for failing to submit them on the earlier motion (*see Renna v Gullo*, 19 AD3d at 472). The court also notes that regardless of whether the court had been in possession of such information, the result would have been no different.

Moreover, the report of the handwriting expert is similarly unavailing as it was incumbent upon defendant to procure such a report at the time of the initial motion. Defendant failed to establish, inter alia, that the purportedly newly discovered evidence could not have been discovered earlier through the exercise of due diligence (*see Sicurelli v Sicurelli*, 73 AD3d 735 [2010]; *Vogelgesang v Vogelgesang*, 71 AD3d 1132, 1133-1134 [2010]; *Sieger v Sieger*, 51 AD3d 1004, 1005 [2008]; *Matter of State Farm Ins. Co. v Colangelo*, 44 AD3d 868 [2007]).

Finally, with regards to the receipts defendant now seeks to submit, none of them are sufficient to justify reversal of the court's prior decision and subsequent order granting summary judgment since the receipts fail to raise a triable issue of fact as to Rao's default. Specifically, the second document, which was also submitted on the prior motion, is comprised of an undated purported receipt which "does not reference the mortgaged premises, and indicates that payment was made to a third party," as indicated by the court in its prior decision. The third and fourth documents, annexed as Exhibit "L," are checks which pre-date the purchase and assumption of the mortgage, are from HHCSRC (Holistic Health Care), to Rodolfo Amarain and third parties who are not the mortgagor or mortgagee and do not make any reference to the mortgage or property. The fifth new document identified by Rao as a "signed receipt" dated July 22, 2009, also makes no reference to the premises or the mortgage, does not state whether a payment has been made and if so, by who and further notes that: "this will be valid only until Oct. [sic] 2009. After this it will be invalid for legal matters." Thus, by its own terms, the document is expired. The sixth document is yet another "receipt," dated 7/22/09, which makes no reference to the mortgage or the property. The seventh through tenth new documents that defendant now wants this court to consider are comprised of checks from HHCSRC to a third party with a notation in the memo section of the checks that they are for "office repairs."

A motion to reargue is not based upon any new facts, but seeks to convince the court that it overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision (CPLR 2221[d]; *Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988] ). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided ( *William P. Pahl Equip. Corp. v Kassiss*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984] ), nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted ( *Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frisenda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979] ). Here, defendant failed to present any evidence that the court overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision. To the extent that defendant (again) asserts that he was not in default of the mortgage because he made monetary and in-kind payments which were not considered, the court properly considered this argument. In doing so, the court found that the contracts regarding the dietary supplements were contracts entered into with a corporate entity and not the defendant individually, and that defendant, by signing the assumption agreement, waived any potential setoffs.

Finally, the court also noted in its prior decision that “to the extent that [Rao] can demonstrate that certain payments were made and received by plaintiff post-default, a referee can certainly be appointed to determine the amount due herein and does not function as a reason for denial of summary judgment.” Since the court did not overlook or misapprehend the facts or the law, there is no basis for granting leave to reargue herein.

Accordingly, the motion to renew/reargue, is denied.

### Cross Motion

Plaintiff, on its cross motion, seeks to direct defendant to: (1) produce a policy of insurance covering the subject premises; (2) cure the insurance underwriting recommendations as set forth by plaintiff’s insurer; and (3) allow access to the premises to ensure compliance with said recommendations.

The mortgage document requires that defendant maintain insurance covering the premises. Notwithstanding, plaintiff states that it has been maintaining its own policy of insurance, same which would have been subject to cancellation if certain recommendations were not cured. Requests were made to defendant with respect to same and, when a response was unavailing, the policy was cancelled.

In opposition to the motion, defendant submits a copy of the policy, which covers the subject premises, with an effective dated of November 27, 2013 and an expiration date of November 27, 2014.

In reply, plaintiff avers that coverage was “deficient because it did not provide for replacement costs for the building.” Additionally, plaintiff requires access so that plaintiff may obtain its own policy.

It would appear from a review of the policy annexed to defendant’s opposition that “In the event of loss or damages covered by this policy, at our option, we will . . . pay the value of destroyed or damaged property” (Section G, Paragraph 5 [a] [1]).

Thus, as to the first branch of the cross motion, same is denied as moot inasmuch as defendant produced the policy, which is currently in effect. As to the second branch of the motion, plaintiff has not demonstrated why it is entitled to said relief, especially given the fact that its own policy (which had required that certain recommendations be cured) was, admittedly, cancelled. It follows that access to the property is not warranted given the above. Neither has plaintiff demonstrated that access to allow plaintiff to obtain a new policy is warranted given that the property is currently insured.

Accordingly, the respective motion and cross motion are denied.

Dated: May 7, 2014

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J.S.C.