

Morales v Zherka

2014 NY Slip Op 33754(U)

October 27, 2014

Supreme Court, Westchester County

Docket Number: 69022/2012

Judge: James V. Brands

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

GENARO MORALES, X

Plaintiff,

DECISION AND ORDER
ON TWO MOTIONS
Index# 69022/2012 (Westchester)

-against-

Motion Seq. #9, 10

SELIM ZHERKA, ABCZ CORP., THREE
AMIGOS SJL, INC., CT REALTY HOLDINGS
AND MANAGEMENT, INC., MARSHALL
APARTMENTS, LLC, CT METRO HOLDINGS I CORP.,
CT METRO HOLDINGS II CORP., the ZHERKA
FAMILY IRREVOCABLE TRUST, and
SILAS INVESTMENTS I LLC,

Defendants.

X

The following papers were read and considered on Zherka's motion to vacate two prior court decisions (**Motion Seq. 9**).

NOTICE OF MOTION TO VACATE DECISION AND ORDER
AFFIDAVIT IN SUPPORT OF MOTION TO VACATE DECISION AND ORDER
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE DECISION & ORDER
EXHIBITS A-D

PLAINTIFF'S AFFIRMATION IN OPPOSITION
EXHIBIT A

REPLY AFFIDAVIT

The history in this matter previously before Justice Scheinkman is set forth in his Decision and Order dated January 10, 2014 and such facts are incorporated by reference in the interest of judicial economy. Pro se defendant Selim ("Sam") Zherka filed the instant motion pursuant to CPLR 5015(a) to vacate the prior decision dated January 10, 2014 [Motion Seq. No.

2] and decision dated March 7, 2014¹ [Motion Seq. No. 5] issued by Judge Scheinkman (Supreme Court, Westchester County) based on Zherka's allegations that said decisions were issued despite that judge's prior recusal and case reassignment to a different judge, and based on alleged violations of judicial misconduct.

In order to vacate a prior court decision pursuant to CPLR 5015(a), the movant must prove any one of the enumerated factors set forth in CPLR 5015(a)(1) through CPLR 5015(a)(5), which include an excusable default of movant, newly-discovered evidence yielding a different result, misconduct of an adverse party, lack of jurisdiction, or reversal, modification or vacatur of a prior judgment or order upon which it is based. (*Id.*). Zherka's motion papers fail to provide any evidentiary proof in admissible form to support any of the statutory factors set forth in CPLR 5015(a) to warrant vacatur of the above-referenced prior decisions. Contrary to Zherka's claim, the subject decisions were issued on dates which were prior to the time Zherka raised any objection to the assigned justice and the Order of Recusal dated May 5, 2014. Zherka's general allegations of prior judicial misconduct are not a proper basis for vacatur under CPLR 5015.

Based on the foregoing, it is hereby

ORDERED that Zherka's motion is denied. (Motion Seq. 9).

The following papers were read and considered on non-party witness Dominica O'Neill's motion to reargue the amended decision and order dated August 12, 2014 (**Motion Seq. 10**).

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS 1-5

AFFIRMATION IN OPPOSITION

AFFIRMATION IN REPLY

Counsel for the non-party witness Dominica O'Neill moves to reargue this court's amended decision dated August 12, 2014² which directed O'Neill to appear for a non-party deposition on September 22, 2014 to provided limited testimony regarding "her position in

¹ Although Zherka's notice of motion referenced a prior decision dated March 7, 2014, a review of the New York State Court Electronic Filings ("NYSCEF") system shows such decision was actually rendered on March 11, 2014.

² The court's prior order dated July 25, 2014 directed O'Neill's deposition to be conducted on August 25, 2014; which order was amended to extend the deposition dated to September 22, 2014.

entities related to this matter, her authority to sign the \$50,000 check, the circumstances surrounding her signing that check, and her understanding regarding the existence of any alleged global settlement agreement” (Id., citing the prior court decision dated July 25, 2014). Counsel argues that O’Neill provided such testimony at two prior depositions held on April 23rd and June 24th.

This motion is rendered moot. Pursuant to the Amended Decision and Order dated August 12, 2014, counsel produced the non-party Dominica O’Neill for a further deposition conducted on September 22, 2014. Whether or not such deposition was completed to the satisfaction of the plaintiff who subpoenaed O’Neill’s deposition is not presently before this court. Notwithstanding the foregoing, the motion is procedurally defective since counsel failed to submit the complete record of the underlying motion. The motion is also without merit since a motion to reargue cannot be utilized as a means to re-argue the same contentions as in the underlying motion which were already determined by the court. Furthermore, counsel failed to cite any substantive misapprehension of law or fact that would have changed the prior determination.

Based on the foregoing, it is hereby

ORDERED that non-party witness Dominica O’Neill’s motion to reargue the amended decision and order dated August 12, 2014 is denied (Motion Seq. 10). It is further

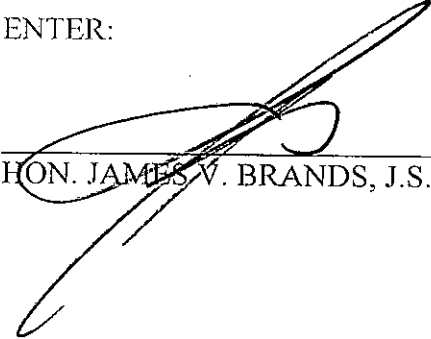
ORDERED that counsel and pro se litigant are reminded that trial is scheduled for February 23, 2015 at 10:00a.m.

Any relief not specifically granted is denied.

The foregoing constitutes the decision and order of this court.

Dated: October 27, 2014
Poughkeepsie, New York

ENTER:


HON. JAMES V. BRANDS, J.S.C.

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Pursuant to C.P.L.R. Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.