Matter of Wydra v Brach
2014 NY Slip Op 33817(U)
June 5, 2014
Supreme Court, Kings County
Docket Number: 27286/10
Judge: Jack M. Battaglia
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 59

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IN THE MATTER OF THE ARBITRATION OF CERTAIN CONTROVERSIES Between EDWARD WYDRA, MARTIN WYDRA, ARDYW LLC a/k/a ARDYW, DAHILL LLC, HEWES LLC, 250 EAST 30TH ST. REALTY CORP. a/k/a 250 EAST 30TH STREET REALTY CORP., 2M DEVELOPMENT LLC, SOUTHWOODS DRIVE ESTATES LLC, SOUTHWOODS OWNERS LLC a/k/a SOUTHWOODS LLC, 4 PAN a/k/a PAN PLACE LLC, J & H REALTY LLC, JOHAR EQUITY LLC and MEW EQUITY LLC,

Petitioners,

-against-

MENDEL BRACH, MOSHE ROTH a/k/a MOZES ROTH, NEW HEWES TENANT LLC, HEWES STANDING LLC, HEWES STANDING LLC and LODGE ROAD LLC, a joint venture, HEWES STANDING 2 LLC, HEWES VIEWS LLC, 4217-4223 NU, LLC a/k/a NEW UTRECHT LLC, CIMARRON LAKE ESTATES LLC, QUALITY ESTATES, LLC, FRANSKILL DEVELOPMENT LLC, FLUSHING PLACE INC. a/k/a FLUSHING PLACE, L.L.C., BEDFORD PLACE, INC. a/k/a BEDFORD PLACE, L.L.C., 405 BEFORD AVENUE DEVELOPMENT CORP., HEWES VIEWS INC., 222 SKILLMAN LLC, 222 SKILLMAN I LLC, 652 PARK LLC, 420 MARCY LLC a/k/a 420 MARCY AVENUE, LLC, FRANKWINK PROPERTIES, LLC, 189 SPENCER LLC, 416 BEDFORD AVENUE, L.L.C. a/k/a 401 BEDFORD LLC and 519 MARCY LLC a/k/a 519 MARCY AVENUE, LLC,

Respondents,

MARCY TOWER, LLC AND JPMORGAN CHASE, N.A.,

Intervenors/Respondents.

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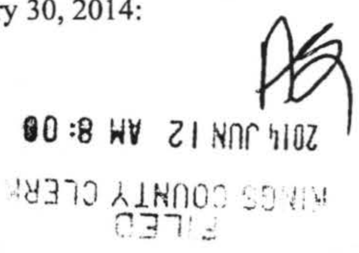
Index No. 27286/10
Motion Calendar Nos. 42, 43
May 19, 2014

DECISION AND ORDER
Jack M. Battaglia
Justice, Supreme Court

Recitation in accordance with CPLR 2219 (a) of the papers submitted on Petitioners' motion for an order "pursuant to CPLR 2221 granting Renewal and/or Reargument" with respect to this Court's Decision, Order & Judgment dated January 30, 2014:

- Notice of Motion



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KINGS COUNTY CLERK
FILED

Affirmation in Support of Motion to Renew and/or Reargue Decision Dated January 30, 2014
Exhibits A-H
- Exhibit 1 to Affirmation in Support of Motion to Renew and/or Reargue Decision Dated January 30, 2014
(Exhibits A-Z)
- Affirmation on Behalf of Marcy Tower LLC in Opposition to Petitioners' Motion to Renew and/or Reargue the January 30, 2014 Decision, Order and Judgment of this Court
Exhibits 1-2
- Affirmation in Support of Intervenor/Respondent JPMorgan Chase Bank, N.A.'s Opposition to Petitioners' Motion to Renew and/or Reargue
Exhibits 1-14
- Reply in Support of Motion to Renew and/or Reargue Decision dated January 30, 2014 for Dismissal of Motion to Intervene
Exhibits 1-5

The complex business relationships and transactions between and among, on the one hand, petitioners Edward Wydra, Martin Wydra, and 12 juridical entities that they own, and, on the other hand, respondents Mendel Brach, Moshe Roth a/k/a Mozes Roth, and the 21 juridical entities that one or both of them own, have spawned a number of actions in this court. For present purposes, the most significant are the instant Article 75 proceeding and an action commenced by the two Wydras and one of their entities, Mew Equity LLC, with respect to real property located at 519 Marcy Avenue, Brooklyn, *i.e., Mew Equity LLC, Martin Wydra and Edward Wydra v Sutton Land Services, L.L.C. et al.* (25882/10) (the "Mew Equity Action").

Although Petitioners' instant motion seeks an order "pursuant to CPLR 2221 granting Renewal and/or Reargument" with respect to this Court's Decision, Order & Judgment dated January 30, 2014 (*see* Notice of Motion dated April 2, 2014), the history of both this Article 75 proceeding and the Mew Equity Action is important, if not necessary, as context.

Petitioners commenced this Article 75 proceeding on November 4, 2010, seeking confirmation of an arbitration award of The Beth Din Kollel HaRabbonim Rabbinical Court, designated Decision of the Bais Din and "dated as of September 22, 2010" (the "First Beth Din Award.") One of the petitioners is Mew Equity LLC, and one of the mortgaged properties subject to the dispute is 519 Marcy Avenue. With a Decision, Order, and Judgment dated September 12, 2011, this Court vacated the First Beth Din Award, and remitted the matter to The Beth Din of Kollel HaRabbonim (the "Rabbinical Court") for rehearing as to the issues raised in the Decision, Order, and Judgment, none of which is immediately pertinent to this motion. (*See* 32 Misc 3d 1241 [A], 2011 NY Slip Op 51664 [U] [Sup Ct, Kings County 2011].)

On October 20, 2010, notwithstanding the pendency of the beth din proceeding the Mew Equity Action was commenced. The action relates to a 2003 loan for $1.8 million, secured by a

mortgage on several parcels of real property, including 519 Marcy Avenue. In 2005, title to 519 Marcy Avenue was transferred to defendant Marcy Tower LLC, and mortgages on the property were given to the predecessor in interest of defendant JP Morgan Chase Bank National Association ("Chase"). Plaintiffs seek a declaration that the deed of the property at 519 Marcy to defendant Marcy Tower is invalid, and that their mortgage has priority over all of the Chase mortgages.

A Decision and Order dated February 14, 2012 determined several motions in the Mew Equity Action, including motions pursuant to CPLR 3211 for dismissal as against defendants Marcy Tower and Chase. (*See* 34 Misc 3d 1224 [A], 2012 NY Slip Op 50217 [U] [Sup Ct, Kings County 2012].) Among other things, the Court denied the dismissal motions. The action was stayed to the extent it involved claims or counterclaims between Martin and Edward Wydra, on the one hand, and defendants Mendel Brach and Moshe Roth a/k/a Moses Roth, on the other, pending final resolution of the beth din arbitration. Since, however, "it [did] not appear that the respective interests of defendant Marcy Tower LLC, the current owner of the property [at 519 Marcy Avenue], or defendant [Chase], as mortgagee, [would] be affected" by the beth din arbitration, the action would not be stayed "[t]o the extent . . . that this action would determine those interests as they relate to any interests of Plaintiffs, or any co-defendant for that matter."

In August 2012, the Rabbinical Court issued a Decision, Ruling and Award (the "Second Beth Din Award") that addressed the issues raised in the Decision, Order, and Judgment with respect to the First Beth Din Award.

With a Decision and Order dated November 27, 2012, the Court decided several motions in the Mew Equity Action, giving preclusive effect to the Second Beth Din Award even though Plaintiffs there, Petitioners here, had not commenced a proceeding to confirm the Second Beth Din Award. (*See* 37 Misc 3d 1225 [A] 2012 NY Slip Op 52161 [U] [Sup Ct, Kings County 2012].) Among other things, the Court granted Plaintiffs' motion to dismiss all of Mendel Brach's and Moshe Roth's counterclaims. Defendants and Counterclaim Plaintiffs filed a Notice of Appeal on October 25, 2013.

On July 31, 2013, upon Respondents' appeal, the Second Department affirmed this Court's determination to vacate the First Beth Din Award and remit the matter for rehearing "before the same rabbinical court arbitration panel as made the award." (*See* 108 AD3d 776, 776 [2d Dept 2013].) The court stated that Respondents (appellants there) "failed to demonstrate bias on the part of the rabbinical court arbitrators," and that Respondents' "remaining contentions are without merit." (*See id.)* As discussed below, the July 31, 2013 decision and order was later vacated and replaced (*see* 114 AD3d 865 [2d Dept 2014].)

With a Decision and Order dated November 1, 2013, the Court decided several motions in the Mew Equity Action, including further motions by defendants Marcy Tower and Chase for dismissal pursuant to CPLR 3211. The Court found no reason to allow successive motions to dismiss pursuant to CPLR 3211. Notices of Appeal have been filed by Marcy Tower and Chase, dated, respectively, January 8, 2014 and January 14, 2014.

By Decision, Order & Judgment dated January 30, 2014, this Court granted Petitioners' application to confirm, as modified by the Court, the Second Beth Din Award. (*See* 42 Misc 3d 1218 [A], 2014 NY Slip Op 50085 [U] [Sup Ct, Kings County 2014].) Also granting a motion to intervene by Chase and Marcy Tower, the Court held:

> "The branch of JP Morgan Chase, N.A.'s and Marcy Tower LLC's motion seeking to intervene is granted to the extent that within thirty (30) days after the date of this Decision, Order & Judgment, they serve a properly verified pleading in the form of the Proposed Intervenors' Verified Response to Petition to Confirm Arbitration Award, which is attached as Appendix A to the Affirmation of Jon Hollis in Support of Motion to Intervene and to Partially Vacate Arbitration Award. A copy of the Decision, Order & Judgment is being mailed to all parties on this day.
>
> The branch of JP Morgan Chase, N.A.'s and Marcy Tower LLC's motion seeking to partially vacate the Second Award is granted. The cross-motion of Respondents seeking to vacate the Second Award in its entirety is denied, and the application of Petitioners to confirm the Second Award is granted only to the extent that the Second Award is confirmed as modified. The Second Award shall be modified to delete the following provisions:
>
> 'f. The Rabbinical Court further finds that the March 2, 2005 Letter from Martin Wydra "to whom it may concern" did not effectively release 519 Marcy Avenue from the lien created by the $1,800,000 Mortgage and that 519 Marcy Avenue has not been released from the lien created by the $1,800,00 Mortgage.'
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> . . .
>
> '1. The 519 Marcy Lien
>
> I) 420 Marcy LLC, 519 Marcy LLC a/k/a 519 Marcy Avenue LLC, Frankwink Properties, LLC, 222 Skillman LLC, 189 Spencer LLC and 416 Bedford Avenue, L.L.C. are deemed obligated and encumbered, as the case may be, pursuant to the terms and conditions of the $1,800,000 Mortgage as if timely and duly perfected.
>
> ii) Defendants Brach and Roth are hereby directed to act with all reasonable dispatch and take or authorize all lawful actions, at their own expense, to cause the records of the clerk of the County of Kings, New York, to reflect and effectuate the foregoing finding."

(Decision, Order & Judgment dated January 30, 2014.)

Notices of Appeal from this Court's January 30, 2014 Decision, Order & Judgment have been filed by both Petitioners and Respondents, dated, respectively, March 20, 2014 and March 21, 2013 [*sic*].

On February 19, 2014, the Second Department recalled and vacated its prior decision and order, and substituted a decision and order that was substantially identical to the prior one, with the addition of a statement that "petitioners did not waive their right to a rehearing before the arbitration panel, and the Supreme Court properly directed such a rehearing." (*See* 114 AD3d 865, 866 [2d Dept 2014].) As this Court noted in its January 30, 2014 Decision, Order & Judgment with respect to the Second Beth Din Award, in the Second Department Respondents (appellants there) had argued to the appellate court that "by commencing the Mew Equity Action, Petitioners waived their right to arbitration before the Rabbinical Court."

With a Decision and Order dated April 25, 2014 in the Mew Equity Action, this Court denied a motion by defendants Mendel Brach and Moshe Roth for reargument of this Court's November 27, 2012 Decision and Order that dismissed their counterclaims against Plaintiffs.

This recitation of history should demonstrate that questions as to the relationship between the issues to be determined in this Article 75 proceeding and the Mew Equity Action have been present since the commencement of both by Petitioners/Plaintiffs, respectively. Indeed, in the January 2014 Decision, Order & Judgment that Petitioners request be reconsidered, the Court quoted from its Decision and Order dated February 14, 2012 in the Mew Equity Action, as follows:

> "Although the property at 519 Marcy Avenue may ultimately be the subject of a confirmed beth din award (again, defendants 222 Skillman LLC, 625 Park, LLC and 519 Marcy LLC a/k/a 519 Marcy Avenue LLC were named respondents in the CPLR Article 75 proceedings), it does not appear that the respective interests of defendant Marcy Tower LLC, the current owner of the property, or defendant JP Morgan Chase Bank National Association, as mortgagee, will be affected. To the extent, therefore, that this action would determine those interests as they relate to any interests of Plaintiffs, or any co-defendant for that matter, there seems no reason to stay the action pending final resolution of the beth din arbitration."

As the Court also noted in the January 2014 ruling, "there is nothing in the First [Beth Din] Award that specifically addressed the property at 519 Marcy Avenue," and that "[b]y instituting the Mew Equity Action, Petitioners implicitly recognize that the issues reflected in the [Second Beth Din Award that relate to 519 Marcy Avenue] are appropriately resolved in that Action."

Petitioners cannot ignore the significance of the Mew Equity Action by now designating it the "Sutton Lawsuit" (*see* Affirmation in Support of Motion to Renew and/or Reargue Decision Dated January 30, 2014 ["Affirmation in Support"] ¶ 10) by reference to one of 13 named

Defendants in that action, and one that does not purport to have any interest in the property at 519 Marcy Avenue, rather than by reference to the three Plaintiffs or five Defendants who are also parties to this proceeding. The designation is, at best, disingenuous.

Petitioners seek "Renewal and/or Reargument" (*see* Notice of Motion dated April 2, 2014) primarily as to the Court's determinations granting the motion to intervene of Chase and Marcy Tower, and vacating provisions in the Second Beth Din Award that relate to the property at 519 Marcy Avenue (the "519 Marcy Provisions.") To the extent the motion seeks modification of the Court's November 27, 2012 Decision and Order in the Mew Equity Action, it must be denied for the simple and obvious reason that the relief is not being sought in that action. The Court also notes that the purported error was not called to the Court's attention when it ruled in Plaintiffs' favor in granting preclusive effect to the Second Beth Din Award and dismissing the counterclaims against them.

"A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought." (CPLR 2221[f].) Petitioners' motion fails to comply, and is, therefore, procedurally defective. (*See LaFiosca v LaFiosca*, 31 Misc 3d 973, 976 [Sup Ct, Nassau County 2011].) Rather than dismiss on that ground, which would likely only lead to another motion, the Court will instead focus on whether Petitioners rely on "new facts," which in particular distinguishes a motion for leave to reargue (*see* CPLR 2221[d][2]) from a motion for leave to renew (*see* CPLR 2221[e][2].)

As to intervention, Petitioners' motion is based essentially on the contention that Chase and Marcy Tower have, respectively, "committed" or "participated in" a "fraud on the Court in misrepresenting [Chase's] standing to intervene" (*see* Affirmation in Support ¶ 3.) Specifically, Petitioners contend that any interest Chase may have had in mortgages against 519 Marcy Avenue were transferred to Signature Bank by an Assignment of Mortgage dated January 10, 2012 that was recorded on January 26, 2012, and that both Chase and Marcy Tower knowingly misrepresented Chase's interest to the Court.

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." (CPLR 2221[d][2].) Nowhere in Petitioners' Affirmation in Support does the Court find any reference to any paper submitted on the prior motion that would have even suggested to the Court that Chase may have transferred its interest in any 519 Marcy mortgages at any time prior to the Chase/Marcy Tower motion to intervene.

In the absence of anything submitted on the prior motion that the Court could have "overlooked or misapprehended," there is no basis for leave to reargue the motion to intervene.

"A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3].) A transfer of Chase's interest in any of the mortgages would qualify as "new facts," and the Court will assume that

such "new facts" might have changed the Court's determination as to intervention (*but see* CPLR 1018.)

Petitioners' proferred "reasonable explanation" for not presenting Chase's alleged lack of interest on the prior motion is that "they were led to believe that [Chase] did own the . . . Mortgages at the time of Proposed Intervenors' motion to intervene, particularly since this court was still entertaining motions for summary judgment" in the Mew Equity Action. (*See* Affirmation in Support ¶ 21.) But Petitioners acknowledge – indeed, they rely upon – a letter from Chase's counsel dated May 6, 2013 to Plaintiff's counsel in the Mew Equity Action, in which Chase advised Plaintiffs of the assignment of the mortgages to Signature Bank (*see id.*, ¶ 10.)

Petitioners contention that they cannot be charged with notice of the transfer because Chase's counsel's letter was sent to Plaintiffs' counsel in the Mew Equity Action, and not to Petitioners' counsel in this proceeding, is specious. The parties are the parties. And subsequent to Chase's counsel's May 2013 letter, this Court was asked to dismiss the Mew Equity Action as against Chase and Marcy Tower, which prompted a motion by Plaintiffs with respect to an alleged "release" of 519 Marcy Avenue from a mortgage held by plaintiff Mew Equity LLC. Those motions, which were determined by this Court's November 1, 2013 Decision and Order, would have presented an obvious opportunity to address any question as to Chase's interest.

Moreover, the May 2013 letter from Chase's counsel in the Mew Equity Action requested that Plaintiffs execute a stipulation that would have provided for substitution of Signature Bank for Chase on Plaintiffs' cause of action for declaratory relief against Chase and Marcy Tower. Petitioners are silent as to any response from Plaintiffs' counsel. The Court cannot believe that, given the history of this proceeding and the Mew Equity Action, competent and diligent counsel for Petitioners/Plaintiffs would not have communicated with each other as to such an important matter, and the Court has been given no reason to suspect that either Petitioners' counsel or Plaintiffs' counsel are not either competent or diligent.

To the extent that Petitioners contend that the interest of Marcy Tower in 519 Marcy Avenue is "too remote" to support intervention (*see* Affirmation in Support ¶ 2) because "there are many other issues in the [Mew Equity Action] which need to be resolved in plaintiffs' favor before the court grants priority to the [Mew Equity] Mortgage over Marcy Tower's title" (*see id.*, ¶ 22), Petitioners make no showing that the contention was raised on the prior motion and "overlooked or misapprehended" by the Court.

To the extent that Petitioners' motion seeks leave to reargue or to renew this Court's determination to allow Chase and Marcy Tower to intervene, the motion is denied. Petitioners fail to establish a ground for either reargument or renewal as to that determination.

Petitioners also seek leave to reargue or to renew this Court's determination that the Second Beth Din Award must be modified by vacating the 519 Marcy Provisions. Here, again, however, nowhere in the Affirmation in Support is there reference to anything in the papers submitted on the

prior motion that was "overlooked or misapprehended" by the Court (*see* CPLR 2221[a][2].) Nor does the Court discern anything that might qualify as "new facts" accompanied by "reasonable justification for the failure to present such facts on the prior motion" (*see* CPLR 2221[e][2], [3].)

Petitioners have not convinced this Court that its determination on the prior motion that "[s]ince neither Marcy Tower nor [Chase] were parties to the arbitration, the subject matter of the 519 Marcy Provisions was not properly submitted to the Rabbinical Court, and those provisions of the award are 'invalid' " (*quoting Hirsch v Hirsch*, 4 AD3d 451, 453 [2d Dept 2004]) should be re-examined. Nor do Petitioners challenge the Court's statement in the prior decision that, "[b]y instituting the Mew Equity Action, Petitioners implicitly recognize that the issues reflected in the 519 Marcy Provisions are appropriately resolved in that action."

Petitioners may be correct that "there remain other elements of the ownership and the priority of mortgages in the [Mew Equity Action] which the Court in that matter must determine in favor of the plaintiffs in [that action] before the property interests of either [Chase or Marcy Tower] is threatened." (*See* Affirmation in Support ¶ 40.) The Court's determination on the prior motion will allow the proper resolution of those issues by the participation of all parties that claim an interest in 519 Marcy Avenue, without undermining the interests of those parties who agreed to arbitrate. As the Court stated:

> "Neither Petitioners nor Respondents make any showing that the 519 Marcy Provisions are 'intertwined' with the other provisions of the Second Award (*see Hirsch v Hirsch*, 4 AD3d at 453), or that deletion of the 519 Marcy Provisions would affect the merits on any of the other issues determined by the Rabbinical Court (*see* CPLR 7511[c].)
>
> The Court recognizes that it has given collateral estoppel effect to the Second Award insofar as it addressed issues that were the subject of Mendel Brach's and Moshe Roth's counterclaims in the Mew Equity Action. However, none of Brach's and Roth's counterclaims in the Mew Equity Action appear related to the property at 519 Marcy Avenue, and, therefore, the Court did not, and had no reason to, give collateral estoppel effect to the 519 Marcy Provisions. (*See Mew Equity LLC v Sutton Land Services*, 37 Misc 3d 1225 [A], 2012 NY Slip Op 52161, * 3 ['Plaintiffs and Counterclaim Defendants sufficiently demonstrate that the Second Award resolves in their favor all of the counterclaims'].) As such, deletion of the 519 Marcy Provisions from the Second Award does not impact this Court's prior determination to give collateral estoppel effect to other portions of the Second Award that did not affect the interests of nonparties to the arbitration.

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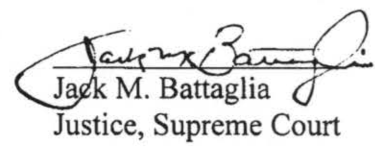
The Court has considered whether a judgment might properly be drafted short of modification of the Second Award and determined that, at the least, the possibilities of confusion are such as to threaten the interests of JPMC and Marcy Tower." (Decision, Order & Judgment dated January 30, 2014.)

Petitioners' motion for "Renewal and/or Reargument" is denied in its entirety.

June 5, 2014



Jack M. Battaglia
Justice, Supreme Court

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