

**Feeley v Gavin**

2016 NY Slip Op 30999(U)

February 9, 2016

Supreme Court, New York County

Docket Number: 151675/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

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PATRICIA J. FEELEY,

Plaintiff,

INDEX NO. 151675/13

-against-

GAYLE A. GAVIN,

Defendant.

-----X  
JOAN A. MADDEN, J.:

Defendant moves for an order pursuant to CPLR 2221(d)(2) granting leave to reargue the decision and order of this court dated October 21, 2014 to the extent it denied her motion to compel discovery of records pertaining to plaintiff's New York City police pension and other retirement accounts, and granted plaintiff's motion for removal and consolidation of the Civil Court summary holding proceeding.<sup>1</sup> Plaintiff opposes and cross-moves for leave to reargue the portion of the October 21, 2014 decision and order which denied her prior motion for summary judgment enforcing the parties Memorandum of Agreement dated July 29, 1998 and imposing a constructive trust as to plaintiff's joint ownership of the shares and proprietary lease for Apartment 5J at 35 West 90<sup>th</sup> Street, New York, New York.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts,

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<sup>1</sup>Notably, in her notice of motion and supporting affirmation and affidavit, defendant is not moving to reargue the portion of the court's prior decision and order which granted summary judgment dismissing her first counterclaim for imposition of a constructive trust on one-half the value of plaintiff's pension and retirement accounts. While defendant's reply papers may suggest otherwise, she is bound by the relief sought in her original motion papers.

or misapplied any controlling principle of law.” Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept 1979)/ Reargument, however, is not intended “to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application.” Id at 567-568.

In the exercise of the court’s discretion, leave to reargue is granted with respect to the denial of defendant’s prior motion to compel discovery, and upon reargument defendant’s discovery motion is granted as indicated below. In all other respects, leave to reargue is not warranted and the motion and cross-motion are denied.

The prior decision dismissed defendant’s first counterclaim for the imposition of a constructive trust on one-half of the value of plaintiff’s police pension and other retirement accounts. Citing Dee v. Rakower, 112 AD3d 204, 213 (2<sup>nd</sup> Dept 2013), the court concluded the Employee Retirement Income Security Act (“ERISA”) precludes the imposition of a constructive trust on a pension plan. The prior decision also denied as moot defendant’s discovery motion which sought to compel plaintiff to provide authorizations for her police pension and other retirements accounts, “since the requested disclosure relates to the dismissed counterclaim.”

Defendant is now moving to reargue the denial of her discovery motion, but not the dismissal of her first counterclaim for the imposition of a constructive trust. Defendant has established that government sponsored pension plans are exempt from ERISA. See 29 USC §§ 1002(32), 1003(b)(1); Rose v. Long Island Railroad Pension Plan, 828 F2d 910 (2<sup>nd</sup> Cit 19870, cert denied 485 US 936 (1988)). ERISA, therefore, presumably would not preclude the imposition of a constructive trust with respect to plaintiff’s New York City police pension and

any other government sponsored retirement account. For that reason, defendant argues, she is entitled to the information as to plaintiff's contributions to her police pension and other retirement accounts. Defendant, however, is not seeking such information in connection with her now dismissed counterclaim. As noted above, defendant is not moving to reargue the dismissal of the constructive trust counterclaim. Rather, defendant is simply seeking to reargue the denial of her discovery motion and is requesting the information as to plaintiff's police pension and other retirement accounts in connection with parties' agreement as to their financial arrangements and contributions towards present and future living expenses. Significantly, defendant alleges that she and plaintiff executed a "Memorandum of Agreement" dated July 29, 1998, and in accordance with that agreement she made substantial contributions towards the couple's living expenses and lifestyle, while plaintiff was to save towards their future retirement.

In opposition, plaintiff argues that defendant has no "legal claim" to her police pension and other retirement funds based on New York City Administrative Code §13-264. The court need not consider the effect of that provision in the context of the instant motion, since it is not dispositive of the discovery issue, and defendant is not seeking to reargue the dismissal of her constructive trust counterclaim.

The court concludes that the discovery as to plaintiff's police pension and other retirement accounts bears on defendant's claims with respect to the parties' alleged financial agreement and defendant is entitled to the information as to the amounts plaintiff contributed to those accounts during the period she and defendant lived together as a couple. Plaintiff shall therefore provide defendant with authorizations for the production of records showing her contributions to her police pension and other retirement accounts commencing from the date of

their alleged financial agreement, July 28, 1998, through the end of their relationship in October 2011. The court makes no determination as to the nature of plaintiff's other retirement accounts.

The balance of defendant's motion is denied and plaintiff's cross-motion is denied in its entirety. With the exception of the ERISA issue, neither defendant nor plaintiff has established that the court overlooked or misapprehended relevant facts, or misapplied any controlling principle of law. See Foley v. Roche, supra.

Accordingly, it is

ORDERED that defendant's motion for leave to reargue is granted with respect to the denial of defendant's prior motion to compel discovery, and upon reargument defendant's discovery motion is granted; and it is further

ORDERED that within 15 days of the date of this decision and order, plaintiff shall execute the necessary authorizations for the production of the records of her police pension and other retirement accounts showing her contributions during the period from July 28, 1998 through October 31, 2011; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a status conference on March 31, 2016 at 9:30 a.m.

DATED: February 9, 2016

ENTER:

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