

Prime Homes LLC v O'Reilly
2018 NY Slip Op 30223(U)
February 8, 2018
Supreme Court, New York County
Docket Number: 151308/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

PRIME HOMES LLC,
Plaintiff,
-against-

INDEX NO. 151308/2016
MOTION DATE 12/20/17
MOTION SEQ. NO. 006
MOTION CAL. NO.

BRIAN O'REILLY, L.H.U. DEVELOPMENT LLC,
NEW MY MANAGEMENT LLC, and S&S FUNDING, LLC,
Defendants.

The following papers, numbered 1 to 10 were read on this motion to reargue and cross-motion for default judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3; 4 - 6
Answering Affidavits — Exhibits	4-6; 7 - 8
Replying Affidavits	9, 10
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that Defendants L.H.U Development LLC ("LHU"), New My Management LLC ("New Management"), and S&S Funding, LLC's ("S&S," herein collectively the "Moving Defendants") motion for leave to reargue pursuant to CPLR §2221[d], and upon reargument, grant LHU's January 18, 2017 summary judgment motion (Motion Sequence 005), and deny Plaintiff's November 29, 2016 cross-motion to Amend the Complaint (Motion Sequence 004), is denied. Plaintiff's cross-motion for a default judgment against the Moving Defendants pursuant to CPLR §3215, is denied.

In 2012 Defendant Brian O'Reilly contracted with Plaintiff to sell his property located at 227 Edgecombe Avenue, New York, New York ("Property") to Plaintiff in a short sale for \$700,000. The closing was scheduled to take place within thirty (30) days from approval of the short sale by Mr. O'Reilly's mortgagee, which was approved June 26, 2012. However, Mr. O'Reilly did not convey the Property to Plaintiff as he was only a 2% owner of the Property at the time of the closing. His mother, Yvonne O'Reilly was the 98% owner of the Property at the time of the closing. In September of 2016, Mr. O'Reilly deeded the Property to Defendant New Management who mortgaged it to Defendant S&S.

Plaintiff commenced an earlier action against Mr. O'Reilly, under Index No.: 154505/2012 in Supreme Court, New York County, but discontinued the action on June 6, 2016. On February 17, 2016 Plaintiff commenced this action seeking (i) specific

performance of a contract between Defendant Brian O'Reilly and Plaintiff; (ii) quiet title and wipe the Memorandum of Contract from the land records; and (iii) a claim for tortious interference against LHU.

On November 29, 2016 Plaintiff filed a cross-motion to Mr. O'Reilly's motion for summary judgment against the Defendants seeking to add then non-parties New Management and S&S as Defendants to this action (Motion Sequence 004). On January 18, 2017 LHU moved for summary judgment while opposing Plaintiff's cross-motion (Motion Sequence 005). On May 8, 2017 this Court granted Plaintiff's cross-motion to amend the pleadings to add New Management and S&S as party Defendants, and denied LHU's motion for summary judgment (Cross-Motion Papers Ex. F).

The Moving Defendants now move for leave to reargue LHU's January 18, 2017 motion for summary judgment (Motion Sequence 005), and Plaintiff's November 29, 2016 cross-motion to Amend the Complaint (Motion Sequence 004) pursuant to CPLR §2221[d] and upon reargument, for an Order granting LHU's motion for summary judgment, and denying Plaintiff's cross-motion to Amend the Complaint . Plaintiff opposes the motion and cross-moves for a default judgment against the Moving Defendants, pursuant to CPLR §3215.

CPLR §2221[d] states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it "overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law" (Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010]. Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (Kent, *supra*; see also Ul Haque v Daddazio, 84 AD3d 940, 922 NYS2d 548 [2nd Dept. 2011]). The movant cannot merely restate previous arguments (*Id.*).

Upon a review of the papers in LHU's January 18, 2017 motion and Plaintiff's November 29, 2016 cross-motion, the Court finds it did not overlook any relevant facts or misapply controlling principles of law. The Moving Defendants again attempt to argue that the failure for the condition precedent to occur in the Alleged Contract between Mr. O'Reilly and Plaintiff should have provoked this Court to rely on New York holdings in *101123 LLC* and *Shepard*, and dismiss this action (*101123 LLC v Solis Realty LLC*, 23 AD3d 107, 801 NYS2d 31 [1st Dept. 2005]; see also *Shepard v Spring Hollow at Sagaponack*, 87 AD2d 126, 450 NYS2d 547 [2nd Dept. 1982]). However, the Court in the original papers considered these previously-made arguments and found them inapplicable here. Unlike in *101123 LLC*, the Plaintiff/buyer here had a colorable claim to specific performance at the time this action was commenced (See generally *101123 LLC*, *supra*). *Shepard* is inapplicable since the record before the Court here is

unclear as to whether Mr. O'Reilly's inability to deliver the Property at the time of closing was not self-created, as was the case in *Shepard* (see generally, *Shepard, supra*). The Moving Defendants motion for reargument is an attempt to present the same arguments and case law made in their original motion, where the Court held that *S.E.S.* applies to this action instead since "the defect ha[d] disappeared at the time of the trial and the court can then give an effective judgment for the equitable relief demanded" (*S.E.S. Imps., Inc. v Pappalardo*, 53 NY2d 455, 442 NYS2d 453, 425 NE2d 841 [1981]). The Moving Defendants' motion to reargue is denied.

"When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, ... , the plaintiff may seek a default judgment against him" (CPLR §3215). Plaintiff need only establish that a viable cause of action exists because the defaulting defendants have "admitted all traversable allegations in the complaint, including the basic allegation of liability" (*Al Fayed v Barak*, 39 AD3d 371, 833 NYS2d 500 [1st Dept. 2007]). A defendant opposing entry of a default judgment must demonstrate both a reasonable excuse and meritorious defense (*New Media Holding Co. LLC v. Kagalovsky*, 97 AD3d 463, 949 NYS2d 22 [1st Dept 2012]). Whether an excuse is reasonable is a determination committed to the sound discretion of the court (*Matter of Hye-Young Chon v Country-Wide Ins. Co.*, 22 AD3d 849, 803 NYS2d 699 [2005]).

Plaintiff's cross-motion for a default judgment pursuant to CPLR 3215 is denied, as premature. Since the Moving Defendants moved to appeal the Court's May 18, 2017 Order (NYCSEF Docket No.: 119) and also moved to reargue the Court's Order (Motion Sequence 006), a final order was never issued. With no final order issued, the Court's thirty-day deadline never began to run. With the denial of the Moving Defendants motion to reargue, the Moving Defendants now have thirty (30) days to serve an Answer to the Amended Complaint.

The Court finds that the Moving Defendants have waived any objections to Plaintiff's service of the Amended Complaint since the "defendant[s] [have] participate[d] in [this] lawsuit on the merits, [indicating their] intention to submit to the court's jurisdiction over the action" (*Rubino v New York*, 145 AD2d 285, 538 NYS2d 547 [1st Dept. 1989]). New Management and S&S, retaining the same counsel as LHU, have appeared multiple times before the Court. New Management and S&S appeared to appeal the Court's May 8, 2017 Order. On September 6, 2017 New Management and S&S appeared for a Preliminary Court Conference to create a discovery schedule for this action (NYCSEF Docket No.: 133). New Management and S&S also appeared in this motion seeking to reargue this Court's May 8, 2017 Order. The Court finds that New Management and S&S have substantively appeared without ever raising objections to service of the Amended Complaint. Therefore, they have waived any objections to personal jurisdiction based on insufficient service in this action.

Accordingly, it is ORDERED, that Defendants L.H.U. Development LLC, New My Management LLC and S&S Funding, LLC's motion for leave to reargue LHU's January 18, 2017 motion for summary judgment (Motion Sequence 005) and Plaintiff's November 29, 2016 cross-motion to Amend the Complaint (Motion Sequence 004) pursuant to CPLR §2221[d], is denied, and it is further,

ORDERED, that Plaintiff's cross-motion for a default judgment against Defendants L.H.U. Development LLC, New My Management LLC and S&S Funding, LLC pursuant to CPLR §3215, is denied, and it is further,

ORDERED, that the Amended Summons and Complaint annexed to the Plaintiff's cross-motion papers as Exhibit I are deemed served upon Defendants L.H.U. Development LLC, New My Management LLC and S&S Funding, LLC, and it is further,

ORDERED, that Defendants L.H.U. Development LLC, New My Management LLC and S&S Funding, LLC shall serve an Answer to the Amended Complaint within thirty (30) days from the date of service of this Order, and it is further

ORDERED, that the parties appear for a Compliance Conference in IAS Part 13 located at 71 Thomas Street, Room 210, New York, New York 10013 on April 11, 2018 at 9:30 a.m.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**



**MANUEL J. MENDEZ
J.S.C.**

Dated: February 8, 2018

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE