

<b>Whitaker v Longobardi</b>
2019 NY Slip Op 31138(U)
April 25, 2019
Supreme Court, New York County
Docket Number: 157523/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 157523/2016

G. WARREN WHITAKER, AS ANCILLARY ADMINISTRATOR  
CTA OF THE ESTATE OF GIOVANNA LAPLACA AKA  
GIOVANNA COSTA,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION AND ORDER

VINCENT LONGOBARDI, JR.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79

were read on this motion for REARGUMENT and RECONSIDERATION

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this action, plaintiff G. Warren Whitaker (“Whitaker”) moves, pursuant to CPLR 2221, to reargue a prior decision of this Court dated February 9, 2018, which denied his prior motion for summary judgment against defendant Vincent Longobardi, Jr. (“Longobardi”). He further moves, in the alternative, to vacate the prior decision and to restore the action to the trial calendar so that the parties may proceed with discovery. Defendant opposes the motion. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion is **denied**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Giovanna LaPlaca (“Giovanna”) died on September 29, 2012. (Doc. 65 at 4.) On June 10, 2014, pursuant to a certificate of appointment of administrator issued by the Kings County

Surrogate's Court, Whitaker was appointed as administrator of the estate. (*Id.*) In his review of the estate records, Whitaker uncovered the following facts: In October of 2000, Giovanna executed a power of attorney in favor of Eddie Doran ("Doran"). (*Id.*) In February of 2012, Doran, acting through his power of attorney, transferred title for the premises located at 8101 11th Avenue in Brooklyn ("the premises") to defendant Longobardi for \$800,000. (*Id.* at 5.) The deed was recorded in the Office of the New York City Register (*id.* at 23–28), and the sale was secured by a mortgage (*id.* at 34–39). The mortgage provided for monthly payments over a period of five years (*id.* at 5), but Whitaker states that neither Giovanna nor the estate ever received any payments for the sale. (*Id.*)

In May of 2016, upon being apprised of his obligations under the mortgage, Longobardi acknowledged the transactions, but contended that he had tendered \$577,960 to Doran in October of 2013. (*Id.* at 6; *see also* Doc. 18.) According to Longobardi, however, the check was rejected (Doc. 18 at 1), and he was told that the estate would be in contact with him to collect the amount owing (*id.*). Attempts by Whitaker to resolve this dispute proved fruitless, which led to the commencement of this action in September of 2016. (Doc. 65 at 6.)

On September 9, 2016, Whitaker filed a summons and complaint against Longobardi demanding payment of the outstanding balance. (*Id.*) In the complaint, he asserted causes of action for breach of contract and unjust enrichment. (Doc. 64 at 5–8.) To date, the parties have not appeared for a discovery conference.

On February 25, 2017, based upon the loan documents and the debt that Longobardi owed to the estate, Whitaker filed a motion for summary judgment (motion sequence 001). (*See* Doc. 65 at 1–8.) In that motion, he argued that \$800,000 was due and owing "[b]ecause the Loan Documents provided for financing of only \$700,000" and "the balance of \$100,000 was also due

... at the time of the Closing.” (*Id.* at 7.) Moreover, although Longobardi claimed he owed only \$577,960, he provided no proof of that amount, in that “the Estate’s records show[ed] no payments of any principal or interest made to it prior to or subsequent to October 29, 2013 (the date of the purported tender [of Longobardi’s check]).” (*Id.*) Based upon these facts, as well as the fact that Longobardi acknowledged his indebtedness to the estate, Whitaker requested this Court to grant summary judgment in favor of the estate. (*See generally* Doc. 65.) In his reply papers for the underlying summary judgment motion, Whitaker reiterated these arguments. (*See* Doc. 67.)

In opposition, Longobardi argued that plaintiff had failed to make his prima facie case for summary judgment because Whitaker, who is an attorney, had “no personal knowledge as to whether any payments were made under the terms of the Mortgage” (Doc. 66 at 4–5) and because no discovery had been undertaken in the action (*id.* at 5–6). This Court also allowed Longobardi to submit a sur-reply. In the sur-reply, Longobardi submitted documents reflecting that the mortgage had been satisfied. (Doc. 68 at 3.) “This mortgage satisfaction was executed by the Sole Beneficiary” of the estate, Luigi LaPlaca (“Luigi”)—Giovanna’s brother (Doc. 63 at 4)—and LaPlaca allegedly executed a general release obviating Longobardi from his mortgage obligations. (*See* Doc. 68 at 2–4.) In other words, based on the purported satisfaction and release, Longobardi argued that this Court should dismiss the action. (*Id.* at 3.) He also contested Whitaker’s standing to bring the action because plaintiff was not in possession of the original promissory note. (*Id.* at 5–6.) He submitted an affidavit by Doran, wherein Doran stated that, pursuant to the power of attorney and under Giovanna’s direction, he transferred the original note to Luigi. (*Id.* at 12–13.)

On February 9, 2018, this Court rendered a decision denying Whitaker’s summary judgment motion (“the prior decision”). (Doc. 71.) This Court reasoned: “[Longobardi’s]

submission of the satisfaction of mortgage establishes, beyond any doubt, that [Whitaker's] action on the alleged debt represented thereby fails." (*Id.* at 2.) Thus, this Court dismissed the action. (*Id.*)

Whitaker now moves, pursuant to CPLR 2221, to reargue the prior decision, or, in the alternative, to vacate the prior decision and to restore the action to the trial calendar so that the parties may proceed with discovery (motion sequence 002). (Doc. 62.) He argues that summary judgment should have been granted in the estate's favor because Longobardi never disputed his liability under the loan documents: "[I]n his opposition, Longobardi only contested the *amount* of his liability . . . ." (Doc. 63 at 5.) Moreover, he asserts that Doran's power of attorney did not authorize him to transfer the loan documents, such as the promissory note, to Luigi: "It seems clear that Doran knew his legal limitation in October 2013, as evidenced by his refusal to accept Longobardi's tender to him of a check for \$577,960. This fact alone, and the implicit acknowledgement that it was the Estate which still held the Loan Documents, should have adequately rebutted the claim to the contrary in the Sur-Reply." (*Id.* at 6.)

In the alternative, Whitaker maintains that the prior decision should be vacated—thereby restoring this action to this Court's trial calendar—because the sur-reply created issues of fact. (*Id.* at 7.) In support of this contention, Whitaker makes use of Longobardi's opposition to the underlying summary judgment motion: that "too many issues of fact [exist] where there's been absolutely zero discovery in this case." (*Id.*)

In opposition to the instant motion, Longobardi reiterates his prior position that plaintiff lacks standing to bring this action. (Doc. 73 at 1.) He insists that Luigi was the universal heir under Giovanna's will and, pursuant to documents and court filings in the Kings County Surrogate's Court, that Luigi, not Whitaker, is therefore in charge of the estate. (*Id.* at 1–2.) Longobardi cites New York Surrogate's Court Procedure Act § 1601, which provides "that ancillary administration

shall be granted in this state only when there is an actual administration in the domiciliary jurisdiction.” Thus, it is Longobardi’s position that “ancillary administration in New York is merely a corollary to estate proceedings in Italy, and [that Whitaker] may not act independent of any administration of the estate in Italy.” (*Id.* at 3.) Longobardi’s opposition further represents that Luigi died in April of 2017 and that his death was brought to the attention of the Second Department in a pending action. (*Id.*) Because the Second Department stayed the pending action until the appointment of a successor representative in Italy, Longobardi asserts that this Court should stay this action until such new representative is appointed.<sup>1</sup> (*Id.*) Last, he argues that the prior decision properly dismissed the action upon the submitted evidence—specifically, Longobardi’s payment of the note to Luigi, satisfaction of the mortgage, possession of the note by Longobardi, and Luigi’s release of Longobardi’s obligations under the mortgage. (*Id.* at 4–5.)

In reply, Whitaker maintains that he has standing to maintain this action because, “[a]t the time this action was commenced, [he] had been granted the authority by the Surrogate’s Court to act as the ancillary administrator of the Estate, as there was property in New York that needed to be administered in connection with the administration of the estate in Italy.” (Doc. 77 at 2.) Luigi’s subsequent death does not divest this Court of jurisdiction, he asserts. (*Id.*) Last, he argues that the stay in the Second Department’s pending action should not result in a stay in the instant action, and that Longobardi had been aware for a long time of Luigi’s death prior to the instant motion. (*Id.* at 3.)

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<sup>1</sup> This Court has independently verified with the Second Department that the pending action in that Department was stayed in March of 2018 due to the death of Giovanna’s Italian administrator.

**LEGAL CONCLUSIONS:**

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

Plaintiff has not established that, in issuing the prior decision, this Court overlooked a relevant fact or controlling principle of law. The basis of the prior decision was that Whitaker could no longer maintain this action because Longobardi had established his payment, and thereby his satisfaction, of the debt. (Doc. 71.) While this Court did not specifically refer to these documents in the prior order, they were submitted with Longobardi’s sur-reply and they show that he received a release for satisfying the mortgage: Document 51 (or Exhibit C to the sur-reply) establishes a receipt of payment in the amount of \$649,993.00 from Longobardi to Luigi. This transaction was approved by both Luigi and Vinicio LaPlaca (“Vinicio”) on March 28, 2017.<sup>2</sup> (Doc. 51.) Document 52 is a March 28, 2017 discharge of the mortgage and is signed by Vinicio on behalf of Luigi. Document 54 is a general release signed by Vinicio on behalf of Luigi releasing Longobardi from “any and all claims made in connection with Estate of Giovanna Costa LaPlaca.” It is also dated March 28, 2017. (Doc. 54.) All of these events occurred prior to the alleged death in April of 2017 of Luigi, who, as the Italian administrator of Giovanna’s estate, had the authority

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<sup>2</sup> Document 50 shows that Luigi had granted a general power of attorney to Vinicio on November 28, 2012.

to execute such documents. (*See generally Morgan Capital LLC v Salomon Bros. Realty Corp.*, 16 AD3d 189 [1st Dept 2005] (breach of mortgage commitment dismissed where the lender's obligations were released).) Last, although Whitaker was not granted leave to submit a sur-sur-reply in his underlying summary judgment motion, to the extent he raises any new arguments in his instant motion for reargument, this Court finds them unpersuasive. Thus, this Court properly decided in the prior decision that Longobardi is no longer liable under the mortgage.

In accordance with the foregoing, it is hereby:

**ORDERED** that plaintiff G. Warren Whitaker's motion for reargument on the prior summary judgment motion against defendant Vincent Longobardi, Jr. is denied, and this Court adheres to its original decision; and it is further

**ORDERED** that, within 30 days of the uploading of this order to NYSCEF, plaintiff's counsel is directed to serve a copy of this order, with notice of entry, on defendant's counsel and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

**ORDERED** that this constitutes the decision and order of this Court.

4/25/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE