

**Ballys Mgt. & Capital LLC v First Korean Church of
N.Y.**

2019 NY Slip Op 32901(U)

August 21, 2019

Supreme Court, Queens County

Docket Number: 711422/2017

Judge: Marguerite A. Grays

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4

BALLYS MANAGEMENT AND CAPITAL LLC,

Index
Number 711422/2017

Plaintiff(s)

-against-

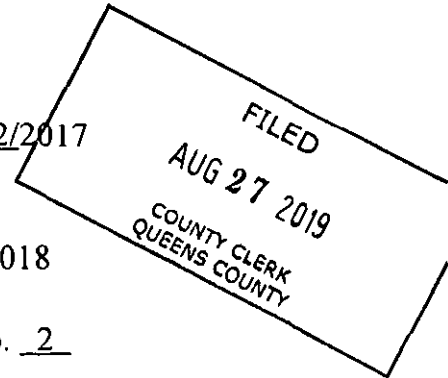
Motion
Date May 28, 2018

FIRST KOREAN CHURCH OF NEW YORK
and RICHARD SEI OUNG YOON.

Motion Cal. No. 2

Defendant(s)

Motion Seq. No. 7



X

The following papers numbered EF253 to EF278 read on this motion by plaintiff to renew/reargue the decision of the court dated January 31, 2019, which granted defendants First Korean Church of New York and Richard Sei Oung Yoon (herein, collectively “the Church”), summary judgment dismissing the complaint, and denied plaintiff’s cross-motion for summary judgment in its favor on the fourth, tenth and eleventh causes of action in the complaint, pursuant to CPLR §3212. Plaintiff also seeks to vacate the Order dated January 31, 2019, and the Judgment entered on March 8, 2019, on the grounds of fraud, misconduct and improper conduct, pursuant to CPLR §5015[a][3].

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF253-EF274
Answering Affidavits - Exhibits	EF276-EF277
Reply Affidavits	EF278

Upon the foregoing papers it is ordered that this motion is determined as follows:

This is an action for, *inter alia*, specific performance of a contract to sell real property and for a judgment declaring that the contract is binding and enforceable. Plaintiff and defendant entered into a contract for the sale of property located at 35-06/14 Parsons Boulevard, Flushing, New York 11357. The contract is dated October 1, 2014, and was subject to a prior contract of sale with Chun Peter Dong. Dong refused to pay the appraised value of the property and brought an action for specific performance seeking to obtain court approval to purchase the property for less than its appraised value. In a decision and order dated May 11, 2015, the Court held that the church could not sell its property for less than

its appraised value (Brathwaite-Nelson, J.). The decision was affirmed by the Appellate Division, Second Department on June 21, 2017. Thereafter, on August 31, 2017, a Judgment was entered on the Appellate Division Decision and Order.

Plaintiff brought a prior action seeking specific performance of the contract of sale. The Court (Taylor, J.), held that plaintiff's attempt to obtain specific performance of the contract before its contract became the "prime contract" was premature. Bally's contract could not become the "prime contract" until after there was a Decision and Order by the Appellate Division, Second Department. Plaintiff appealed that decision, and while the appeal was pending, brought the instant action. The Appellate Division, Second Department ultimately held that the Dong contract was null and void, thus rendering the Bally's contract the "prime contract."

On August 21, 2017, plaintiff filed a new Summons and Complaint, and moved by Order to Show Cause, for essentially the same relief as requested in the prior action, to wit, specific performance of the contract of sale dated October 1, 2014. Bally's sought, *inter alia*, to enjoin defendant Church from selling the property, from entering into a contract for the sale of the Property with another third-party or from taking any action adverse to its interests, prior to a determination on the merits of the instant action. Based on the submissions of the parties, the Court granted the Order to Show Cause.

The Church then moved for summary judgment in its favor, declaring that the contract was not binding and enforceable. Plaintiff cross-moved for summary judgment on its fourth, tenth and eleventh causes of action. In a Memorandum decision dated September 10, 2018, this Court granted the motion and denied the cross-motion as moot. Plaintiff moved to reargue, renew and vacate the Memorandum decision. While the motion to reargue/renew and vacate was pending, an Order dated January 31, 2019 was entered directing the relief granted in the September 10, 2018 Memorandum decision. Subsequently, in an Order dated March 14, 2019, the Court denied, without prejudice and with leave to renew, plaintiff's motion to reargue/renew and vacate.

By the instant motion, plaintiff seeks leave to reargue/renew the January 31, 2019 decision, which granted defendants' motion for summary judgment for reasons discussed at length in the court's Memorandum Decision dated September 10, 2018. Alternatively, plaintiff seeks to vacate the Order dated January 31, 2019, and the Judgment entered on March 8, 2019, pursuant to CPLR §5015[a][3]. The motion is opposed by the Church.

A motion for leave to reargue is directed to the trial Court's discretion and, to warrant reargument, the moving party must demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law (*see* CPLR

§2221[d]; *Robinson v Viani*, 140 AD3d 845, 847 [2016]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2015]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2014]). Plaintiff has failed to show that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (see *Robinson v Viani*, 140 AD3d at 847). Plaintiff merely reiterates the arguments previously rejected by the Court. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage, Inc. v Home Insurance Co.*, 99 AD2d 971 [1984]), or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558 [1979]). Therefore, that branch of the plaintiff's motion which is for leave to reargue is denied (see *Nicolia v Nicolio*, 84 AD3d 1327 [2011]; *Diorio v City of New York*, 202 AD2d 625 [1994]).

“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” (*Lindbergh v SHLO 54, LLC*, 128 AD3d 642, 644–645 [2015] [internal quotation marks omitted] [emphasis supplied]; see CPLR §2221[e][2], [3]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 890–891 [2015]; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 585–586 [2012]). Here, plaintiff proffered no newly-discovered facts that were not previously known to plaintiff and that, if known, would have resulted in a different determination. In its affidavit from counsel, plaintiff merely submits that the Church's By-Laws were “not authenticated”; that Dr. Yoon's deposition allegedly shows that the Trustees voted to approve the sale; and that “the congregation acquiesced to allow the ‘founder/pastor/trustee President Yoon’ to make all decisions relating to the sale of the property.” It is noted that, aside from a partial deposition transcript of Yoon, plaintiff did not proffer proof of these contentions. Furthermore, plaintiff failed to set forth a reasonable justification for failing to present the “new facts” on the original motion (see *Cioffi v S.M. Foods, Inc.*, 129 AD3d at 890–891; *Abrams v Berelson*, 94 AD3d 782, 783–784 [2012]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d 759, 760 [2007]).

Finally, as to the branch of plaintiff's motion to vacate the Order of this Court dated January 31, 2019, plaintiff has presented no evidence that the January 31, 2019 Order or the March 8, 2019 Judgment were procured by fraud, misrepresentation or other misconduct (see *Rossrock Fund II, L.P. v Norlin Corp.*, 128 AD3d 1046, 1047 [2015]). To prevail on a motion pursuant to CPLR §5015 (a) (3) to vacate an order granting summary judgment, the proponent must establish that the opponent procured the order and the judgment by fraud, misrepresentation, or other misconduct (see *Wells Fargo Bank N.A. v Hornes*, 94 AD3d 755 [2012]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2011]; *Tribeca Lending Corp. v Crawford*, 79 AD3d 1018 [2010]).

Accordingly, the branch of the plaintiff's motion granting leave to reargue is denied.

The branch of the plaintiff's motion granting renewal is denied.

The branch of the plaintiff's motion for an Order vacating the judgment is also denied.

Dated:

AUG 21 2019



J.S.C.

FILED
AUG 27 2019
COUNTY CLERK
QUEENS COUNTY