

**Liberty Square Realty Corp. v Doe Fund, Inc.**

2019 NY Slip Op 34276(U)

November 21, 2019

Supreme Court, Bronx County

Docket Number: Index No. 302595/2011

Judge: Lewis J. Lubell

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----X  
Liberty Square Realty Corp.,

Plaintiff,

-against-

The Doe Fund, Inc., Boricua Village Housing  
Development Fund Co., Inc., et al.,

Defendants.  
-----X

DECISION AND ORDER  
Index No. 302595/2011

Hon. Lewis J. Lubell, J.S.C.:

Plaintiff's motions to vacate (Motion Sequence No. 18) and to reargue (Motion Sequence No. 19) the prior Order of this Court are consolidated for disposition and decided as follows.

This action concerns plaintiff's purchase at auction from the City of New York ("City") of the former Bronx Borough Courthouse ("former Courthouse") located at 513 E. 161st Street by deed dated December 22, 1998. Prior to the plaintiff's purchase, one of the adjacent streets (161<sup>st</sup> Street between Brook and Third Avenues) was demapped by the City as part of an urban renewal plan entitled the Melrose Commons Urban Renewal Plan (May 1994), which indicated that 161<sup>st</sup> Street, between Brook and Third Avenues, would be eliminated to form "developable land, mapped park or open space." Despite the fact that plaintiff purchased the former courthouse after the demapping of the adjacent street, plaintiff continues to assert that it purchased either the street or an easement in the street.

This Court (Order, April 30, 2018, Lubell, J.S.C.) previously rejected many of the plaintiff's claims. In particular, this Court assumed the truth of the plaintiff's

allegation that at the time of the conveyance, the City's closing attorney drew an irregularly shaped circle on a tax map around the parcel to indicate the property and easements that were being conveyed. The hand-drawn marking encompasses the surrounding streets as drawn on the map, including East 161<sup>st</sup> Street, and then extends outward from the irregularly shaped circle to encompass East 161<sup>st</sup> Street across Brook Avenue, up to Washington Avenue. This Court held that a deed, unambiguous on its face, cannot be varied by extrinsic evidence. Further, the Court noted that the drawing was unexplained and inexplicably extended to and encompassed 161<sup>st</sup> Street between Washington and Brook Avenues, which has no relation to the plaintiff's property. The document in itself it has no intrinsic meaning, and it created no ambiguity in the deed. The Terms of Sale specifically excluded any reliance by plaintiff on any oral or written representations as to the state of title and the property conveyed. The diagram could hardly be termed and "express easement" as it contained no words of conveyance, no demarcation of any easement or any other discernable property interest, and identified no parties or any other cognizable meaning. Lastly, the Court held in this regard that the representations of the closing attorney could hardly undo the filed map changes undertaken after numerous public hearings, by the duly appointed executive and legislative branches of New York City government, in accordance with the New York City Charter and the Administrative Code.

Plaintiff now moves to vacate the prior decision based on Judiciary Law § 21. That section provides, in full, that, "A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take

part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge." It is argued by the plaintiff that the conferencing of this motion, in chambers, by Justice McKeon, without any record of the conference having been made, constituted oral argument in court within the contemplation of the statute. It is undisputed that Justice McKeon was not available to decide the motion. It has been held that Judiciary Law § 21 does not categorically bar a second judge from ruling on a post trial CPLR 4404 motion where the trial judge become unavailable. (*Gayle v. Port Auth.*, 6 A.D.3d 183, 183, 775 N.Y.S.2d 2, 3 [1<sup>st</sup> Dept. 2004].) The Court of Appeals has also noted that where, as here, purely legal issues are involved, "this Court and the Appellate Divisions have rarely reversed on the basis of Judiciary Law § 21, or its predecessor statutes in a case where a substitute trial judge decided a purely legal question." (*People v. Hampton*, 21 N.Y.3d 277, 286, 992 N.E.2d 1059, 1065, 970 N.Y.S.2d 716, 722 [2013].)

Assuming that Judiciary Law § 21 applies to informal discussions during an off-the-record conference in chambers, the Court finds that the issue is now moot. This Court granted argument on the present motions, and now granted reargument on its prior decision herein. Accordingly, plaintiff has had a full and fair opportunity to have the motions decided *ab initio* following oral argument on the record.

On reargument, this Court adheres to its prior determination. This Court previously undertook a painstaking review of the relevant legal arguments, and finds no basis to depart from the reasoning expressed in its prior 16-page writing. The plaintiff's main arguments depend on its basic assertions that it had an interest in the demapped street arising out of the alleged actions of the City's closing

attorney. The plaintiff can point to no evidence of a conveyance, as it purchased only the courthouse parcel and not the already demapped street. The plaintiff's reliance on extrinsic evidence of an express easement (ambiguous scribbles on a tax map allegedly made at the closing by the City's attorney) to vary the agreement of the parties fails as a matter of law. The existence of an easement is inconsistent with the prior demapping of the adjacent street as part of an urban renewal plan.

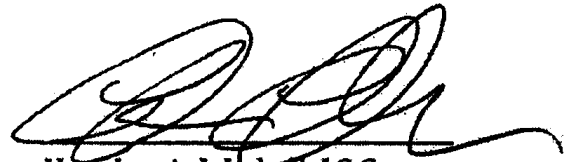
Accordingly, it is

ORDERED that the motion to vacate is denied as academic, and it is

ORDERED that the motion to reargue is granted, and on reargument, the Court adheres to its prior determination herein.

This constitutes the Decision and Order of the Court.

Dated: November 21, 2019



Hon. Lewis J. Lubell, J.S.C.