

Ellington Owners Corp v 200 Bradhurst Devs. LLC
2020 NY Slip Op 31465(U)
April 6, 2020
Supreme Court, New York County
Docket Number: 155143/2018
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

**ELLINGTON OWNERS CORP and THE BOARD OF
MANAGERS OF THE ELLINGTON CONDOMINIUM,**

INDEX No.: 155143/2018

MOT. DATE: 1/16/2020

Plaintiffs,

MOT. SEQ. No.: 008

-against-

**DECISION + ORDER ON
MOTION**

**200 BRADHURST DEVELOPERS LLC, DUVERNAY
ELLINGTON LLC, DUVERNAY + BROOKS LLC, PENNROSE
PROPERTIES, LLC d/b/a PENROSE PROPERTIES OF
PENNSYLVANIA, WEST MANOR CONSTRUCTION CORP.,
THE BLUESTONE ORGANIZATION, INC. and NYC PARTNERSHIP
HOUSING DEVELOPMENT FUND COMPANY, INC.,**

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142
were read on this motion to/for RESETTLE ORDER/REARGUMENT

Defendant West Manor Construction Corp. (“West Manor”) moves to resettle the court’s October 9, 2019 Order to clarify whether plaintiff may seek damages for alleged defects in the construction or only for the property damage or, in the alternative, reargue the Order (Def. Br. at 1 [NYSCEF Doc. No. 135]).

A motion to resettle is designed to correct errors or omissions as to form or for clarification (*Ansonia Assoc. v Ansonia Tenants Coalition*, 171 AD2d 411 [1st Dept 1991]; *Foley v Roche*, 68 AD2d 558, 566 [1st Dept 1979]). West Manor requests that the court clarify its October 9, 2019 Decision and Order to the extent it denied defendant’s motion to dismiss the causes of action against it for negligence (ninth cause of action) and property damage (tenth cause of action) (Def. Br. at 1). It requests that the court make clear whether it denied West Manor’s motion in full or granted it with regard to the claim for construction defect and denied it with regard to the claim for property damage (*id.* at 1–2). Defendant argues that, if the Order is not resettled to clarify that plaintiff is only allowed to seek damages regarding property damage

and no construction defect, a motion to reargue based on the court's misapprehension of the law and facts should be granted (*id.* at 2; *see* CPLR § 2221 (d); *Loris v S&W Realty Corp.*, 16 AD3d 729 [3d Dept 2005]). Defendant argues that its motion is timely as it has been made within thirty days after service of a copy of the Order determining the prior motion (Def. Br. at 2; *see* CPLR § 2221 (d)).

Plaintiffs Ellington Owners Corp. (“Residential Unit Owner”) and The Board of Managers of Ellington Condominium (the “Board”) (collectively, “plaintiffs”) oppose the motion for clarification or leave to reargue, and cross-move for leave to reargue dismissal of plaintiffs’ ninth and tenth causes of action against The Bluestone Organization, Inc. (“Bluestone,” together with West Manor, the “Contractor Defendants”) (Pl. Br. at 1 [NYSCEF Doc. No. 141]). Plaintiffs argue that, upon reargument, the court should hold that plaintiffs sufficiently stated claims against Bluestone because their complaint which seeks to pierce the corporate veil is “not totally devoid of solid, nonconclusory allegations” (Pl. Br. at 3–6; *Bd. of Managers of Arches at Cobble Hill Condo. v Hicks & Warren, LLC*, 18 Misc3d 1103(A), at &7 [Sup Ct Kings County 2007]; *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]). Plaintiffs further argue that even without being afforded discovery, they have sufficiently pled facts to pierce the corporate veil of West Manor and pursue claims against Bluestone (*See UBS Sec. LLC v Highland Capital Mgmt., L.P.*, 93 AD3d 489, 490 [1st Dept 2012]); *Olivieri Const. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 767 [2d Dept 2016]). Consequently, plaintiffs argue their cross-motion to reargue should be granted.

Plaintiffs next argue that West Manor’s motion for clarification or to reargue should be denied (Pl. Br. at 7). They assert that the court did not overlook or misapprehend any facts in its Order when denying West Manor’s motion to dismiss and that West Manor seeks to “invent a distinction” between the damages plaintiffs seek for property damage and negligent construction (Pl. Br. at 8–9). Plaintiffs argue that, without first repairing the negligently constructed work, plaintiffs will continue to suffer property damage (Pl. Br. at 9; (*see e.g. Gordon v Bd. of Managers of 18 E. 12th St. Condominium*, 35 Misc3d 1214(A), at *9 [Sup Ct New York County 2012]; *Mark v Eshkar*, 194 AD2d 356 [1st Dept 1993]; *see also e.g. IFD Construction Corp. v Corddry et al.*, 253 AD2d 89 [1st Dept 1999])).

In reply, defendant West Manor reiterates that the court should resettle its Order to clarify whether it denied West Manor’s motion in full or granted it with regard to the claim for

construction defect and denied it with regard to the claims for property damage (Def. Reply at 2 [NYSCEF Doc. No. 142]; *see Ansonia Assoc. v Ansonia Tenants Coalition*, 171 AD2d 411 [1st Dept 1991]; *Foley*, 68 AD2d at 566).

Defendant Bluestone opposes plaintiffs' motion to reargue dismissal of Bluestone from this action, arguing first that plaintiffs' motion is untimely as it was not submitted within thirty days of service of a copy of the order determining the prior motion and written notice of entry (Def. Reply at 1, 3; CPLR § 2221 (d)(3); *Mazario v Snitow Kanfer Holtzer & Millus LLP*, 2018 WL 6739091 [Sup Ct New York County 2018]). Bluestone next argues that it has submitted sufficient documentary evidence demonstrating that plaintiffs' claims should be dismissed and that a reargument motion is not designed to afford an unsuccessful party successive opportunities to reargue previously decided issues (Def. Reply at 3; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]).

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see CPLR § 2221; Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro*, 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola*, 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

Here, both defendant's motions and plaintiffs' cross-motion must be denied. First, defendant West Manor's motion was not a proper motion for resettlement as "resettlement of an order is a procedure designed solely to correct errors or omissions as to form" and "may not be used to effect a substantive change in or to amplify the prior decision of the court" (*Foley*, 68 AD2d at 566). Next, both defendant's and plaintiffs' separate motions to reargue must be denied

as neither party is able to point to a cognizable misapprehension of either law or facts. Further, as defendant Bluestone correctly argues, plaintiffs' motion to reargue was not brought in a timely manner as required by CPLR § 2221(d).

ACCORDINGLY, defendants' motions to settle and to reargue and plaintiffs' cross motion to reargue are **DENIED**.

This shall constitute the decision and order of the Court.

4/6/2020
DATE

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE