

**Maranga v Herbert**

2020 NY Slip Op 33413(U)

October 20, 2020

Supreme Court, New York County

Docket Number: 150144/19

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MARGARET MARANGA and ADAM OYUNGE

INDEX NO. : 150144/19

- v -

MOT. DATE

DAVID FREDERICK HERBERT

MOT. SEQ. NO. 004

The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s). _____
Replying Affidavits	ECFS DOC No(s). _____

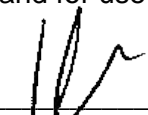
This case, which arises from a holdover proceeding brought by defendant against plaintiffs in the Housing Part of the New York City Civil Court in connection with a condominium unit located at 641 Third Avenue, unit 5H, New York, New York (the "unit"), has a tortured procedural history. In a decision/order dated March 13, 2019, this court denied plaintiffs' motion to remove the housing court proceeding and consolidate it with this action and also denied defendant's cross-motion for use and occupancy without prejudice to renewal before the housing court. Thereafter, in a judgment entered May 15, 2019, the Honorable Sabrina B. Kraus awarded possession to defendant after a nonjury trial. Judge Kraus' judgment was then reversed by the Appellate Term in a decision/order filed October 25, 2019 without prejudice to any future proceedings, stating:

Exercising our authority to review the record developed at a the nonjury trial, and accepting the court's fully supported findings of fact and credibility, including its finding that [defendant] agreed that [plaintiffs] "could live in the subject premises until [Adam] was emancipated," we find that Civil Court should have dismissed the proceeding as premature. Adam had not yet turned 21 when this proceeding was commenced and petitioner offered insufficient evidence at trial that Adam was "old enough to be on his own." In the circumstances presented, the petition was prematurely commenced and should have been dismissed without prejudice. Since Adam has since turned 21 years of age, our disposition is without prejudice to any future proceedings. We reach no other issue.

(Internal citations omitted.)

Most recently, in a decision/order dated April 22, 2020, this court *inter alia* granted defendant's motion for leave to file and serve an amended answer with counterclaims and for use and occupancy and directed plaintiffs to pay \$1,100 per month commencing June 1, 2019.

Dated: 10/20/20

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  
 FIDUCIARY APPOINTMENT  REFERENCE

Defendant now moves for partial summary judgment on his first counterclaim for ejectment and a final judgment of possession of the apartment located at 641 Third Avenue, Unit 5H, New York, NY, as against both plaintiffs along with the immediate issuance of an order of ejectment and a warrant of eviction. Defendant further seeks a money judgment in the amount of \$11,000 representing unpaid use and occupancy and an order of ejectment and warrant of eviction based upon plaintiffs' failure to pay use and occupancy. Defendant further seeks an order "[r]evising the court's prior *pendente lite* use and occupancy order from \$1,100 per month to \$4,950 per month based upon the current equities...", directing plaintiffs' to replead their reply to defendant's counterclaims so they respond to each of defendant's allegations and dismissing plaintiffs' first, second and third affirmative defenses to defendant's counterclaims as well as for summary judgment dismissing plaintiffs' amended verified complaint.

Meanwhile, plaintiffs oppose the motion and cross-move to vacate the court's April 28, 2020 decision/order that granted defendant's motion to serve and file a Second Amended Verified Answer with Counterclaims, and ordered plaintiffs to pay defendant use and occupancy, on the grounds that the order was procured by fraud, misrepresentation, or other misconduct of an adverse party. Plaintiffs further seek summary judgment dismissing defendants' first, second, and third counterclaims arguing that those claims fail to state a cause of action upon which relief can be granted. Defendant opposes the cross-motion.

Issue has been joined as to the pleadings which the parties move for CPLR § 3212 relief upon and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

The court will first consider the parties requests to reargue and vacate the prior motions to the extent that the court set use and occupancy at \$1,100 per month and granted defendant's motion to amend and for use and occupancy.

Defendant's motion asking this court to recalculate use and occupancy is essentially a motion to reargue. A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (see CPLR § 2221[d][2]). In order to succeed motion for reargument, the movant must demonstrate that the Court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to re-litigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; see also *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 [1st Dept 2005]).

"[A]n occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties" (*Eighteen Associates, LLC v. Nanjim Leasig Corp.*, 257 AD2d 559 [2d Dept 1999]). There can be no dispute as to whether plaintiffs should pay use and occupancy during the pendency of this action. This court set that amount at \$1,100 per month since that was the amount set by housing court. The "law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*Glaze Teriyaki, LLC . MacArthur Properties I, LLC*, 155 Ad3d 427 [1st Dept 2017] quoting *People v. Evans*, 94 NY2d 499 [2000]). Law of the case can apply to use and occupancy determinations (*Cromwell v. Le Sannom Bldg. Corp.*, 222 AD2d 307 [1st Dept 1995]).

While not technically a court of coordinate jurisdiction, the housing court was in the same position to determine what amount defendant was entitled to for use and occupancy of the apartment. Because the court does not find that it overlooked any facts or misapprehend the law when it set use and occupancy at \$1,100, the court declines that branch of defendant's motion to redetermine such amount.

Plaintiffs' motion to have this court revisit defendant's prior motion to amend and set use and occupancy is brought pursuant to CPLR § 5015[a][3], which provides in relevant part:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

...

3. fraud, misrepresentation, or other misconduct of an adverse party;...

A party's misrepresentations to the court may warrant vacatur of the resultant court order (*Nachman v. Nachman*, 274 AD2d 313 [1st Dept 2000]).

Plaintiffs argue that defendant's prior motion should have been denied because "[d]efendant had transferred ownership of the [u]nit to the David F. Herbert and Marilyn J. Herbert Living Trust (the "Trust") on July 2, 2019, more than five months before [d]efendant made his motion to amend."

In a sworn affidavit, defendant states in pertinent part:

Contrary to the inflammatory accusations of Ms. Maranga and her attorney, I did not transfer the deed to the apartment in order to avoid plaintiffs' claims but, rather, I conveyed the deed as part of basic estate planning at the suggestion of my California trust and estates attorney who had advised me that it would prudent to review and update my estate plan given the length of time which had elapsed since I created my estate plan in 1999. I did not discuss the underlying lawsuit with my California counsel as I did not have reason to believe it was relevant to my estate planning.

Defendant further maintains that he did not tell his counsel in this action about the transfer because he "had no understanding that anything that my California attorney was doing had any relationship to this lawsuit" and he thought he "continued to own" the unit. Defendant otherwise denies that the transfer was an attempt to thwart plaintiffs' claims.

On this record, there can be no dispute that defendant is not entitled to use and occupancy of the unit since he does not own it anymore. Whether defendant was aware of that fact, or even fully appreciated the effect of his conveyance of the unit to a trust, he is no longer a proper party to seek any relief in connection with the unit.

The court rejects defendants' fruitless effort to couch defendant's misrepresentation to the court as merely an "innocent mistake." The legal effects of defendant's conveyance are significant. It would have certainly behooved defendant to consult with his counsel in this action about his estate plans and the court views defendant's representation that he thought he still owned the apartment incredulously. Defense counsel complains that "plaintiffs seek to compel defendant to start over, yet again. The more efficient and just result would be to permit the defendant to correct his mistake." Defense counsel then asks the court to fix defendant's misrepresentation by allowing him to file an amended pleading "speaking to the transfer and adding the trust as a defendant" or "permit the current pleading to stand upon condition the defendant rescind the transfer of the apartment to the trust."

Defendant's requests for relief in the face of plaintiff's cross-motion to vacate are not properly noticed. Further, defendant has not submitted a proposed amended pleading "speaking" to the trust and adding it as a defendant to the court. This alone is grounds to deny that application. As for the trust, defense counsel has annexed 154 pages of trust documents for the court to sift through and analyze defendant's representations. The way the parties have litigated this action is a waste of judicial resources. Defendant's attempt to blame plaintiffs for moving for relief upon learning of defendant's misrepresentation is a misdirection. Otherwise, the court declines to direct defendant to rescind the transfer of the unit, which defendant could have done on his own accord. The court notes that the original motion was

made in July 2020, defendant's opposition to the cross-motion was filed in August and defendant has not brought any other applications since then.

Based upon the foregoing, the court finds that defendant's misrepresentation of his ownership interest in the unit warrants an order vacating the prior motion to amend his answer and grant defendant use and occupancy.

As a result, the balance of defendant's motion must be denied as moot.

### Conclusion

Accordingly, it is hereby

**ORDERED** that defendant's motion is denied; and it is further

**ORDERED** that plaintiffs' cross-motion is granted to the extent that the court's order dated April 22, 2000 is vacated to the extent that it granted defendant's motion to amend his answer and an award of use and occupancy from plaintiffs.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/20/20  
New York, New York

So Ordered

  
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**Hon. Lynn R. Kotler, J.S.C.**