

Kats v Agosto
2020 NY Slip Op 34226(U)
December 17, 2020
Supreme Court, New York County
Docket Number: 850027/12
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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RUDOLF KATS,

Plaintiff,

Index No. 850027/12

v

DECISION AND ORDER
SEQ 005

BLANCA AGOSTO, GREEN ERA CONSTRUCTION
CORP., and 20 MAIDEN LANE ASSOCIATES LLC,

Defendants.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this breach of contract and foreclosure action arising from a loan made by the plaintiff to the defendant Blanca Agosto ("Agosto"), the court, by an order dated May 5, 2020, granted the plaintiff's motions seeking, *inter alia*, summary judgment to the extent the plaintiff was granted leave to enter a judgment of foreclosure against Agosto, with the full amount of damages to be determined by David Dender, Esq., as referee. The court further granted the plaintiff's application for the appointment of a temporary receiver, to the extent that Dender was appointed as temporary receiver of the real property located at 127 East 106th Street in Manhattan.

Agosto now moves to renew her opposition to the plaintiffs' motions pursuant to CPLR 2221(e). The plaintiff opposes the

motion and cross moves to resettle or amend certain portions of the court's May 5, 2020, decision and order pertaining to the receivership. Agosto does not oppose the cross-motion. For the following reasons, Agosto's motion is denied and the plaintiff's cross-motion is granted.

II. DISCUSSION

Though Agosto cites only to CPLR 2221(e) as the legal basis for her motion and states in her notice of motion that she seeks to "renew" her opposition to the plaintiff's motions, she also refers to "re-argument" and the standards set forth in CPLR 2221(d) in her supporting papers on several occasions. To the extent Agosto's motion does intend to seek re-argument, such applications are governed by the thirty-day time limit imposed under CPLR 2221(d)(3). The plaintiff served a notice of entry on Agosto on June 4, 2020, and served notice of entry on Agosto's counsel on June 9, 2020, both via first class mail. Agosto did not file the instant motion until September 3, 2020.

However, Governor Andrew Cuomo's Executive Order 202.8, issued on March 20, 2020, directed, *inter alia*, that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state," be tolled until April 19, 2020. Subsequently, Governor Cuomo issued a

series of executive orders approximately every 30 days extending tolling through November 3, 2020. Accordingly, to the extent Agosto seeks leave to reargue, her motion is timely.

Nonetheless, Agosto's motion to reargue must be denied inasmuch as Agosto have not shown that the court overlooked or misapprehended any facts or relevant law that were presented to it in connection with the prior motion. See CPLR 2221(d)(2); William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971, 971 (1st Dept. 1984), quoting Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979).

As to the branch of Agosto's motion seeking leave to renew, a motion to renew may be granted where a party presents "new facts not offered on the prior motion[s] that would change the prior determination[s]," or demonstrates that "there has been a change in the law that would change the prior determination[s]." CPLR 2221(e)(2), (3); see Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979). However, "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Joseph v Simmons, 114 AD3d 644, 644 (2nd Dept. 2014), quoting Elder v Elder, 21 AD3d 1055, 1055 (2nd Dept. 2005). Agosto's motion for

renewal is denied insofar as she do not offer any new facts not offered in the prior motion that would change the prior determination. Nor has Agosto demonstrated that she exercised due diligence in making her initial factual presentation on the summary judgment motion.

Finally, as to the plaintiff's cross-motion, the plaintiff correctly points out that court erroneously included certain language inapplicable to the facts of this case in its decision and order dated May 5, 2020. Specifically, the court included references appropriate for a receivership case involving a plaintiff corporation which owned a residential cooperative. Here, the plaintiff is an individual mortgagee and Agosto is an individual who owns a five-family rental apartment building. The court also directed the receiver to obtain a bond in the amount of \$1,500,00.00. However, according to the plaintiff, the receiver in this case will collect annual rents for the subject property only totaling approximately \$100,000.00. The court acknowledged in its decision the unique facts of this case and the court's intention to appoint a receiver for the purpose of collecting rents and other profits.

"A motion for resettlement is designed not for substantive changes, but to correct errors or omissions in form, for clarification or to make the order conform more accurately to the decision." Simon v Mehryari, 16 AD3d 664 666 (2nd Dept. 2005);

see Gannon v Johnson Scale Co., 189 AD2d 1052 (3rd Dept. 1993); Foley v Roche, 68 AD2d 558 (1st Dept. 1979). The modifications sought by the plaintiff do not effect substantive changes to the court's decision. Rather, they would clarify an inconsistency between the court's decision and the decretal paragraphs. Accordingly, the decretal paragraphs are modified to the extent requested by the plaintiff.

III. CONCLUSION

In light of the foregoing, it is

ORDERED that Blanca Agosto's motion pursuant to CPLR 2221 is denied; and it is further,

ORDERED that the plaintiff's motion to resettle or amend the court's May 5, 2020, Decision and Order is granted as set forth below; and it is further,

ORDERED that the seventh decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that the receiver is authorized to retain the services of a managing agent or real estate management corporation in connection with the day-to-day management of the subject property, such managing agent or real estate management corporation to be entitled to reasonable fees in the management of the corporation and the property,"

is hereby amended to read, as follows,

"ORDERED that the receiver is authorized to retain the services of a managing agent or real estate management corporation in connection with the day-to-day management of the subject property, such managing agent or real estate management corporation to be entitled to reasonable fees in the management of the property";

and it is further,

ORDERED that the eighth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that, before entering upon his duties, the receiver shall be sworn to faithfully and fairly discharge the trust committed to him and shall execute to the People of the State of New York and with the Clerk of this court an oath and undertaking with sufficient sureties, in the sum of \$1,500,000, which may be in the form of an insurance policy or insurance bond, the costs of which shall be borne by Defendant Agosto, conditioned upon the faithful discharge of his duties as such receiver,"

is hereby amended to read, as follows,

"ORDERED that, before entering upon his duties, the receiver shall be sworn to faithfully and fairly discharge the trust committed to him and shall execute

to the People of the State of New York and with the Clerk of this court an oath and undertaking with sufficient sureties, in the sum of \$100,000.00, which may be in the form of an insurance policy or insurance bond, the costs of which shall be borne by Defendant Agosto, conditioned upon the faithful discharge of his duties as such receiver";

and it is further,

ORDERED that the ninth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that the receiver be and hereby is directed to demand, collect, and receive from the occupants, tenants, and/or licensees in possession of the subject property, or other persons liable therefor, all the rents, maintenance fees, assessments, and license fees now due and unpaid or hereafter to become fixed and due,"

is hereby amended to read, as follows,

"ORDERED that the receiver be and hereby is directed to demand, collect, and receive from the occupants, tenants, and/or licensees in possession of the subject property, or other persons liable therefor, all the rents, assessments, and license fees now due and unpaid or hereafter to become fixed and due";

and it is further,

ORDERED that the tenth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that the receiver may institute and prosecute suits for the collection of rent, maintenance fees, assessments, and license fees, and other charges now due or hereafter to become due or fixed, and summary proceedings for the removal of any tenants, tenant-shareholders, or licensees or other persons therefrom,"

is hereby amended to read, as follows,

"ORDERED that the receiver may institute and prosecute suits for the collection of rent, assessments, and license fees, and other charges now due or hereafter to become due or fixed, and summary proceedings for the removal of any tenants, subtenants, or licensees or other persons therefrom";

and it is further,

ORDERED that the thirteenth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that the receiver shall not incur any expenses on his own behalf, including fees and commissions due to him or his attorney, in excess of \$2,500.00, and is prohibited from incurring obligations in excess of the

monies in his hands without further order of the court or the consent of the defendants' attorney, except, however, that the receiver is permitted to incur expenses above and beyond such monies collected for the purposes of procuring the necessary insurance, as described above, and in securing bond and surety, as described above, provided that, if the receiver expends money for the cost of obtaining that insurance, bond, and surety, that money shall be reimbursed to him by the plaintiff,"

is hereby amended to read, as follows,

"ORDERED that the receiver shall not incur any expenses on his own behalf, including fees and commissions due to him or his attorney, in excess of \$2,500.00, and is prohibited from incurring obligations in excess of the monies in his hands without further order of the court or the consent of the plaintiff's attorney, except, however, that the receiver is permitted to incur expenses above and beyond such monies collected for the purposes of procuring the necessary insurance, as described above, and in securing bond and surety, as described above, provided that, if the receiver expends money for the cost of obtaining that insurance, bond, and surety, that money shall be reimbursed to him by

the plaintiff, which may be recouped as a cost of litigation";

and it is further,

ORDERED that the fifteenth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that the depository shall send monthly statements of deposits into and withdrawals from the account of the depositor receiver to the receiver and the attorney for the petitioner,"

is hereby amended to read, as follows,

"ORDERED that the depository shall send monthly statements of deposits into and withdrawals from the account of the depositor receiver to the receiver and the attorney for the plaintiff";

and it is further,

ORDERED that the sixteenth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that the receiver is authorized to pay the taxes, assessments, water charges, sewer rents and charges, and charges for electricity, as well as the operational expenses of the subject property, and the cost of all insurance required by the terms of the cooperative corporation's by-laws or operating agreement, provided that, if the receiver expends money

for any of those expenses, that money shall be reimbursed to him by the petitioner, and the receiver may, after notice to the defendants, (a) rent or lease units in the subject property for terms not exceeding two years, (b) approve the sale of shares and issue a proprietary lease referable to an ownership interest in those units, (c) make secure the subject property and safeguard it from the elements and from acts of theft or vandalism, (d) comply with all requirements of any department or other authority having jurisdiction, (e) take such further action that a prudent owner or manager would with respect to the subject property to preserve its value,"

is hereby amended to read, as follows,

"ORDERED that the receiver is authorized to pay the taxes, assessments, water charges, sewer rents and charges, and charges for electricity, as well as the operational expenses of the subject property, and the cost of property and liability insurance, provided that, if the receiver expends money for any of those expenses not covered by rents collected, that money shall be reimbursed to him by the plaintiff, which may be recouped by plaintiff as a cost of litigation, and the receiver may (a) rent or lease units in the subject

property for terms not exceeding two years, (b) make secure the subject property and safeguard it from the elements and from acts of theft or vandalism, (c) comply with all requirements of any department or other authority having jurisdiction, (d) take such further action that a prudent owner or manager would with respect to the subject property to preserve its value"; and it is further,

ORDERED that the seventeenth decretal paragraph of the court's May 5, 2020, Decision and Order, which currently reads, "ORDERED that the tenants, tenant-shareholders, licensees, or other persons in possession of the units in the subject property attorn to the receiver and turn over to him all rents, license fees, and other charges of such property now due and unpaid or that may hereafter become due to the plaintiff corporation; and that, during the pendency of this proceeding, the plaintiff corporation and any person purporting to act on its authority, and their agents, other than those designated or retained by the receiver, be, and hereby are, enjoined and restrained from (a) collecting the rents, license fees, and other charges of the subject property, (b) contracting to lease, rent, license, partition, or sell the subject property or any portion

thereof, (c) approving or disapproving sales of shares in the plaintiff corporation referable to apartment units in the subject property or issuing proprietary leases in connection therewith, (d) interfering with the receiver or in any way with the subject property or its possession, (e) transferring or removing or in any way disturbing any of the occupants thereof,"

is hereby amended to read, as follows,

"ORDERED that the tenants, subtenants, licensees, or other persons in possession of the units in the subject property attorn to the receiver and turn over to him all rents, license fees, and other charges of such property now due and unpaid or that may hereafter become due pursuant to existing leases, sub-leases, tenancies, occupancies, or license agreements; and that, during the pendency of this proceeding, the defendant, Blanca Agosto, and any person purporting to act on her authority, and their agents, other than those designated or retained by the receiver, be, and hereby are, enjoined and restrained from (a) collecting the rents, license fees, and other charges of the subject property, (b) contracting to lease, rent, license, partition, or sell the subject property or any portion thereof, (c) interfering with the receiver or

in any way with the subject property or its possession,
or (d) transferring or removing or in any way
disturbing any of the occupants thereof";

and it is further,

ORDERED that the eighteenth decretal paragraph of the
court's May 5, 2020, Decision and Order, which currently reads,

"ORDERED that all tenants, tenant-shareholders
occupants, employees, and licensees of the property and
other persons liable for the rents be and hereby are
enjoined and restrained from paying any rent or license
fees or other charges for such property to any person
or corporation other than the receiver or his
designees,"

is hereby amended to read, as follows,

"ORDERED that all tenants, subtenants, occupants,
employees, and licensees of the property and other
persons liable for the rents be and hereby are enjoined
and restrained from paying any rent or license fees or
other charges for such property to any person or
corporation other than the receiver or his designees";

and it is further,

ORDERED that the parties shall appear for a telephonic
settlement conference pursuant to AO/232/20 and AO/157/20 on
January 7, 2021, at 12:30 p.m.; and it is further,

ORDERED that, except with respect to the court's directive that the parties appear for a settlement conference on January 7, 2021, the effect of this decision and order shall be stayed until January 8, 2021.

This constitutes the Decision and Order of the court.

Dated: December 17, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON