

**Hempstead Hous. Auth. v Middle County Resources
Mgt., Inc.**

2021 NY Slip Op 33922(U)

September 30, 2021

Supreme Court, Nassau County

Docket Number: Index No. 610877/2019

Judge: Sharon M.J. Gianelli

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

X

HEMPSTEAD HOUSING AUTHORITY,

Plaintiff,

-against-

MIDDLE COUNTY RESOURCES MANAGEMENT, INC.
MIDDLE COUNTY RESOURCES MANAGEMENT -
PARKSIDE LLC, and DAN HESTER,

Defendants,

and

D & F DEVELOPMENT GROUP, LLC and
PGV, LLC,

Stakeholder Defendants.

X

Papers submitted:

Motion Seq. 004

Plaintiff's Notice of Motion, Affirmation, Exhibits and
Memorandum of Law in Support _____ X
Defendants' Affirmation and Exhibits in Opposition _____ X
Plaintiff's Affirmation in Reply _____ X

Motion Seq. 005

Defendants' Notice of Motion, Affirmation, Affidavit and
Exhibits in Support _____ X
Plaintiff's Affirmation, Memo of Law and Exhibit in Opposition _____ X
Defendant's Affirmation in Reply _____ X

Motion Seq. No. 004 – Motion to Compel

This is Plaintiff Hempstead Housing Authority's motion for an Order pursuant to CPLR
3124 compelling Defendants Middle County Resources Management, Inc., Middle
County Resources Management-Parkside LLC, and Dan Hester to produce documents,

respond to interrogatories and appear for a deposition pursuant to the Pretrial Conference Order and the discovery demands served in this action, or in the alternative, pursuant to CPLR 3126, precluding Defendants from offering evidence in support of their defenses at the trial of this action, together with the costs and disbursements of this motion.

Mot. Seq. No. 005 – Motion to Renew/Reargue

This is Defendants Middle County Resources Management, Inc. (hereinafter, “MCRM”), Middle County Resources Management-Parkside LLC (hereinafter “MRCM-LLC”), and Dan Hester’s (hereinafter “Hester”) motion for an Order pursuant to CPLR 2221 to: (1) renew and reargue the Decision of Hon. Sharon Gianelli, dated January 9, 2020, which granted Plaintiff’s Order to Show Cause (hereinafter “OTSC”) enjoining Defendants from making any further demands to stakeholder Defendants D & F Development Group, LLC (hereinafter “D & F”) and PGV, LLC (hereinafter “PGV”) for the turnover of development fees or other funds owed Defendants related to the Parkside Garden Vistas project during the pendency of this action; requiring the Stakeholder Defendants to continue to hold development fees and any other funds owed to Defendants related to the Parkside Garden Villas project that would otherwise be payable to Defendants, pending further order of the Court; and denying Defendants’ motion to dismiss, and upon renewal reversing the Decision; vacating Plaintiff’s Notice to Admit dated February 26, 2021; and granting an award of costs and financial sanctions for frivolous conduct in civil litigation.

Background/Facts

The underlying action herein was commenced by the filing of a Summons and Complaint on August 8, 2019. An Amended Complaint was filed on February 29, 2020. An Answer was filed on August 5, 2020. It is one to recover public funds allegedly misappropriated by Defendants that were intended to be used by Plaintiff for a community in need and seeks to impose a constructive trust on certain development funds payable to Defendant MCRM Inc and/or MCRM LLC and/or Dan Hester.

Plaintiff seeks to have the Court take jurisdiction of these funds, consisting of development fees for a housing project development. Specifically, Plaintiff is seeking the imposition of a constructive trust on funds withheld from stakeholder parties and on any future funds coming into their hands. Further, Plaintiff is alleging causes of action for Breach of Fiduciary Duty, Breach of Contract, Conversion, Fraudulent Concealment and relief under CPLR §1006, and seek punitive damages and attorneys' fees.

The Court notes that there was a prior action brought by Plaintiff and as against Defendants in the Supreme Court, Nassau County, under Index No. 609679/2016 (hereinafter referred to as the "Prior Action"). The prior action sought the following relief:

(a) that the Court direct Respondent Middle Country Resources Management Inc. (hereinafter referred to as "MCRM") and its President, Respondent Dan Hester (hereinafter referred to as "Hester") produce and permit Petitioner Hempstead Housing Authority (hereinafter referred to as "HHA") and/or its attorneys to inspect and copy the books and records of MCRM and its subsidiary Middle County Resources Management — Parkside LLC (hereinafter referred to as "Parkside");

(b) that the Court direct the Respondents to account for all proceeds derived from the Parkside Gardens Housing Development, and retaining jurisdiction to supervise that accounting; (c) granting judgment to HHA for all sums found to be due from respondents; (d) enjoining respondents from taking any action to amend the By-Laws of MCRM and, inter alia, taking any action with respect to the purported amended By-Laws; (e) declaring that the valid By-Laws of MCRM are those authenticated by the affidavit of Respondent Hester in the disposed matter of Andrews v. MCRM under Index No. 016979/2009; and (f) enjoining Respondent Hester from taking any funds from MCRM and/or Parkside, except pursuant to a valid compensation agreement for the reasonable value of this services.

After multiple conferences and argument on the record, an Order was issued dated June 13, 2019 (*Bucaria, J.*). The Order held:

Accordingly, based upon this Court's previous Order and a review of the By-Laws of MCRM and the complete submissions of the parties herein, MCRM shall produce and permit HHA and/or its attorneys to inspect and copy the books and records of MCRM and its subsidiary Parkside within thirty (30) days of the date of this Order and it is further Ordered, if not already produced, that MCRM and Parkside shall produce the by-laws, books and records and Form 990's of MCRM and Parkside within thirty (30) days of the date of this Order.

Further, the prior June 13, 2019 Order held:

Accordingly, the respondents are enjoined from taking any action to amend the 1997 By-Laws of MCRM; the 1997 By-Laws are valid By-Laws; and the respondent's alleged June 5, 2018 amended By-Laws of MCRM are hereby considered null and void. Further, based upon the failure of Mr. Hester to answer any questions at his deposition, invoking the Fifth Amendment against self-incrimination, and upon the bank statements provided by petitioners which are not addressed whatsoever in respondent's opposition papers, Mr. Dan Hester is hereby enjoined from taking any funds from MCRM and/or Parkside, except pursuant to a valid compensation agreement for the reasonable value of this services.

Finally, the prior June 13, 2019 Order held:

Finally, petitioner's motion for summary judgment as to an accounting is granted. MCRM as a subsidiary to HHA is in a confidential relationship with HHA and HHA is clearly a party in interest; MCRM was entrusted with the handling of funds on its

*own behalf and on behalf of the HHA; MCRM has requested an accounting from HHA to no avail and petitioner is left with no other adequate remedy at law. (See, Unitel Telecard Distrib. Corp. v. Nunez, 2010 N.Y. Slip Op. 33785[U], *5 (Sup Ct. NY County 2010), aff'd, 90 A.D.3d 568 [1st Dept. 2011]).*

Petitioner's request for this Court to retain jurisdiction over this matter and supervise the accounting is denied and petitioner's request for a judgment as to all amounts that may be due to HHA pursuant to said accounting is also denied as vague and not ripe for decision by this Court.

After the institution of the underlying action, Petitioner moved by Order to Show Cause for a Preliminary Injunction and Respondents cross-moved for dismissal of the action.

The Court granted the preliminary injunction and denied the motion for dismissal via an Order of this Court dated January 8, 2020 (*Gianelli, J.*) which stated:

ORDERED that Plaintiff's motion for a preliminary injunction made by Order to Show Cause be and the same is hereby granted, and Defendants MIDDLE COUNTY RESOURCES MANAGEMENT, INC., MIDDLE COUNTY RESOURCES MANAGEMENT — PARKSIDE LLC and DAN HESTER are hereby enjoined from making any further demands to the Stakeholder Defendants D & F DEVELOPMENT GROUP, LLC PGV, LLC for the turnover of development fees or other funds related to the Parkside Garden Vistas project during the pendency of this action, and Stakeholder Defendants, D & F DEVELOPMENT GROUP, LLC and PGV, LLC are hereby ordered to continue to hold development fees and any other funds related to the Parkside Garden Villas project that would otherwise be payable to the Defendants, pending further order of this Court, and

Defendants' motion to dismiss this action is denied.

Defendants then moved for an extension of time to file an Answer which was granted by this Court pursuant to an Order dated August 3, 2020 (*Gianelli, J.*)

Motion Seq. No. 004

Plaintiff now moves this Court for an Order compelling Defendants to produce documents, respond to interrogatories and appear for a deposition pursuant to the Pretrial Conference Order and the discovery demands served in this action, or in the alternative, pursuant to CPLR §3126, precluding Defendants from offering evidence in support of their defenses at the trial of this action, together with the costs and disbursements of this motion.

Plaintiff argues that its motion to compel discovery should be granted. Plaintiff states that the Preliminary Conference Order in this case, entered on September 9, 2020, provides that demands for discovery and inspection were to be served by October 15, 2020; and further provided that the deposition of Defendant Hester would take place on December 3, 2020 at 10:00 a.m.

Plaintiff alleges that Plaintiff served a Notice for Production of Documents on October 15, 2020, with twelve numbered requests. Plaintiff further claims that Defendants' responses, served on November 9, 2020, included seven general objections, and specific objections to each request, and that no documents were produced.

Plaintiff states that the nature of Defendants' objections is as follows:

“Defendants object to this demand on the basis that Plaintiff illegally seized possession of the books and records of Defendants and continue to withhold access to these records from Defendants and accordingly, Defendants are unable to properly respond to this demand.”

Plaintiff further states that this is a reference to Defendants' claim that Cornell Bozier, a since-convicted former Chairman of Plaintiff HHA, dis-possessed Defendant MCRM Inc. and MCRM LLC from their office and took possession of their records in March 2010.

On December 30, 2020, Plaintiff also served interrogatories to which Defendant objected "*on the basis that this information was requested in a prior pending proceeding*". Defendant also objects on the basis "*Defendants also object to this interrogatory on the basis that Plaintiff illegally seized possession of the books and records of Defendants and continue to withhold access to these records from Defendants and accordingly, Defendants are unable to properly respond to this interrogatory.*" Along with Defendants' failure to produce any documentation, Plaintiff is also seeking the deposition of Defendant Hester.

In Opposition, Defendants argue that they should not be compelled to produce any discovery, including appear for depositions based on the motion to renew and reargue filed on March 18, 2021, as well as the appeal, which was filed January 14, 2020, and fully submitted on February 2, 2021.

Further, Defendants argue that the claims by Plaintiff regarding discovery are misrepresentations as evidenced by the fact that Plaintiff attached more than 500 pages of Defendants' documents to its Notice to Admit.

Finally, with respect to the production of documents, Defendants argue that its books and records are in the possession of Plaintiff as a consequence of the illegal actions of a former president of Plaintiff. With respect to Defendant Hester's deposition, Defendants argue that his health is "precarious" and that Defendant Hester should not be forced to compromise his health when Plaintiff has already had a deposition on the alleged issues in this case, albeit in the prior action. Defendants argue that unresolved issues remain in the prior action, which necessitate the dismissal of this action.

In Reply, Plaintiff argues that discovery obtained from other sources, including bank subpoenas, does not relieve Defendants of their discovery obligations. Further, Plaintiff argues that the discovery demands are not limited to the time that the purported seizure of the records took place. Specifically, "the purported seizure of records occurred in March 2010, while the TD Bank statements cover the period from January 2014 through March 2018."

With respect to the deposition of Defendant Hester, Plaintiff argues that the production of a witness in a prior action does not relieve Defendant of his obligation to submit to a deposition in this action. Additionally, Plaintiff argues that Defendant Hester asserted his Fifth Amendment right not to answer every question at the prior deposition, except with respect to his name and address. Further, Plaintiff argues that accommodations can be made for Defendant Hester's health concerns including a virtual deposition.

Motion Seq. 005

Defendant now moves for an Order:

1. *For Renewal and Re-argument of the decision of Hon. Sharon Gianelli, dated January 9, 2020 (hereinafter referred to as “Decision”) which*
 - a. *granted Plaintiff’s Order to Show Cause (hereinafter referred to as “OSTC”) which:*
 - i. *enjoined the Defendants from making any further demands to the stakeholder Defendants D & F DEVELOPMENT GROUP, and PGV, LLC (hereinafter referred to as the “Stakeholder Defendants”) for the payment of development fees or other funds owed to the Defendants related to the Parkside Garden Vistas project during the pendency of this action, and*
 - ii. *required the Stakeholder Defendants, to continue to hold development fees and any other funds owed to the Defendants related to the Parkside Garden Villas project that would otherwise be payable to the Defendants, pending further Order of this Court, and*
 - b. *denied Defendants’ motion to dismiss (“Dismiss Motion”),*
2. *Upon Renewal, reversing the Decision of protection pursuant to CPLR § 3122 vacating the Notice to Admit of Plaintiff dated February 26, 2021; and*
3. *granting an award of costs and the imposition of financial sanctions for frivolous conduct in civil litigation.*

Defendant argues that its motion for renewal and re-argument should be granted.

In support of its application for renewal Defendants assert that the “new fact” that is being presented to the Court is that following investigation by the District Attorney, no charges were brought against defendant Hester or the corporate Defendants.

Defendants argue that on the basis of these facts, which were not available at the time of the consideration of the underlying decision, the Court should grant renewal of Defendants motion to dismiss.

Defendants' Motion to Dismiss

Defendants argue that upon granting its motion to renew and reargue, this matter should be dismissed based on a failure to state a cause of action. Defendants again argue that fees at issue in this case are owed to Defendant MCRM-LLC pursuant to an agreement dated on or about December 20, 2007, between Defendant MCRM-LLC and the Stakeholder Defendants for the management and operation of an 80-unit affordable apartment development located at 75 Laurel Avenue, Hempstead, New York, known as Parkside Garden Villas.

Plaintiff entered into a long-term lease in which it transferred ". . .all equitable and beneficial interest in the land, existing buildings and Apartment Development. . ." of the Project to the Stakeholder Defendant PGV, LLC, a limited liability company organized and existing under the laws of the state of New York.

In exchange for the grant of the lease of the Property, Stakeholder Defendant PGV, LLC agreed to pay Plaintiff the sum of five hundred thousand dollars (\$500,000.00). Neither Defendant MCRM-LLC nor Defendant MCRM, INC is a party to the Lease Agreement and neither have any rights or obligations thereunder to Plaintiff. Defendants further argue that Plaintiff does not meet the elements necessary for the imposition of a constructive trust. Defendants also argue that without the elements necessary for a constructive trust, the claims of unjust enrichment also fail. Moreover, Defendants claim that the second cause of action of breach of fiduciary duty must fail as there is no duty owed and no fiduciary relationship. Additionally, Defendant argues that Plaintiff's

breach of contract cause of action must be dismissed as there is no proof of contract or privity between the parties.

Defendants allege that Plaintiff's conversion and fraudulent concealment claims also fail as Plaintiff has failed to establish entitlement to a Judgment based on conversion.

Finally, Defendant argues that Plaintiff's arguments regarding CPLR §1006 are moot.

Upon renewal, Defendant also requests the vacature of the preliminary injunction.

Defendant argues that Plaintiff has not established an entitlement to a preliminary injunction.

Additionally, Defendant is seeking a protective order which would relieve Defendant from its failure to respond to Plaintiff Notice to Admit. Defendant argues that the Notice to Admit must be stricken as Defendant is unable to admit or deny authenticity of records, it is improper, the Plaintiff already has the documents it seeks, and includes matters irrelevant to the prosecution or defense of the items included.

Defendants also argue that the Notice to Admit must be stricken as it should only be used for the limited purpose of disposing of uncontroverted questions of fact and should not be used in lieu of other disclosure. Finally, Defendants argue that the Notice to Admit should be stricken as the questions posed are either irrelevant or go to the heart of the dispute.

In Opposition, Plaintiff argues that Defendants' motion to renew and reargue should be denied on several grounds. First, Plaintiff contends that it is untimely. Second, Plaintiff defends that Defendants do not raise facts allegedly overlooked or misapprehended by the court, as required by CPLR 2221(d). Plaintiff also opposes dismissal.

Analysis/Law

Mot. Seq. No. 005

CPLR 2221 provides opportunity for a party to renew and reargue a court's decision and order. It prescribes that,

“a motion for leave to renew shall (a) be based upon new facts not offered on the prior motion that would change the prior determination or (b) demonstrate that there has been a change in the law that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion.”

Defendants argue that Plaintiff's support for its application for an injunction was based upon Plaintiff's allegations that Defendant Dan Hester used a corporate credit card and corporate checks from Defendants MCRM Inc. and MCRM LLC to divert funds to himself, his relatives and others, and to pay his personal expenses. Defendants contend that new facts have emerged since the Court issued its Decision and Order in Plaintiff's favor in reliance on this information, namely that the matter was referred to the Nassau County District Attorney's Office for investigation. In support of their motion to renew and reargue, Defendants submitted an affirmation of “Hon. Gerald Carter, Retired Supreme Court Judge”, who affirmed that he represented Defendant Hester before the inquiry conducted by Nassau County District Attorney Office and following its investigation the District Attorney declined to bring criminal charges against Defendant

Hester. The Court notes that the burden of proof in a criminal matter is significantly higher than that in a civil matter and the decision to decline to criminally prosecute Defendant Hester is not tantamount to clearance of civil culpability, nor a bar to civil prosecution. Notwithstanding this “new fact” of the prosecution declination, the arguments previously made to the Court and currently made to the Court otherwise remain essentially the same. “Re-argument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided...or to present arguments different from those originally asserted.” *Matter of Setters v. AI Props. & Devs. (USA) Corp.*, 139 AD3d 492 (1st Dept. 2016). Moreover, the Court’s determination upon which this motion to renew and reargue is premised was not so reliant on a criminal prosecution of Defendant Hester as to warrant a reversal of its determination in the face of a declination to prosecute Defendant Hester. The parties provided the Court ample other facts and information to warrant the determination reached.

Mot. Seq. No. 005

CPLR 3101(a) allows discovery of “all matters material and necessary in the prosecution or defense of an action”. The facts above demonstrate that Defendants have not complied with Plaintiff’s discovery demands. In such an instance, the Court may compel such compliance or make such orders as are just and reasonable, pursuant to *CPLR 3126*. The background as set forth above illustrates the contentious history of this matter and makes clear that discovery will not proceed timely and in accordance with the rules as prescribed in the absence of a court order. The arguments proffered by Defendants have been previously considered and here again considered. The discovery demands by

Plaintiff are appropriately within the statutory prescriptions as referenced above and Defendants' opposing arguments, having been considered, fall short for award of the relief sought.

Accordingly, upon consideration of all submissions,

It is

ORDERED, that Plaintiff Hempstead Housing Authority's motion for an Order pursuant to CPLR 3124 compelling Defendants Middle County Resources Management, Inc., Middle County Resources Management-Parkside LLC, and Dan Hester to produce documents, respond to interrogatories and appear for a deposition pursuant to the Pretrial Conference Order and the discovery demands served in this action pursuant to CPLR 3126, is Granted; and

It is

ORDERED, that Plaintiff Hempstead Housing Authority's motion in the alternative for an Order precluding Defendants from offering evidence in support of their defenses at the trial of this action, together with the costs and disbursements of this motion, is Denied; and

It is

ORDERED, that Defendants Middle County Resources Management, Inc. (hereinafter, "MCRM"), Middle County Resources Management-Parkside LLC (hereinafter "MRCM-LLC"), and Dan Hester's (hereinafter "Hester") motion for an Order pursuant to CPLR

2221 to renew and reargue the Court’s Decision and Order, dated January 9, 2020,
is Granted; and

It is

ORDERED, that the Court having granted the above adheres to its prior decision, dated
January 9, 2020; and

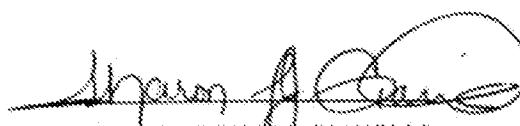
It is

ORDERED, Defendants’ motion for an Order of the Court vacating Plaintiff’s Notice to
Admit dated February 26, 2021 and granting an award of costs and financial sanctions
for frivolous conduct in civil litigation, is Denied.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
September 30, 2021


HON. SHARON R. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies
thereof shall be deemed original.

ENTERED

Oct 04 2021

NASSAU COUNTY
COUNTY CLERK’S OFFICE