

Reich v Redley

2022 NY Slip Op 32064(U)

June 30, 2022

Supreme Court, Kings County

Docket Number: Index No. 4633/08

Judge: Lawrence Knipel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of June, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

ALEXANDER REICH,

Plaintiff,

-against-

Index No. 4633/08

DWIGHT REDLEY, et al.,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	7-9
Opposing Affidavits (Affirmations) _____	15
Affidavits/ Affirmations in Reply _____	_____
Other Papers: _____	_____

Upon the foregoing papers, defendant Dwight Redley moves for an order, pursuant to CPLR 2221, granting reargument of an order of this court, dated August 4, 2021, which denied defendant's motion to vacate a judgment of foreclosure and dismiss the instant action.

Plaintiff commenced this action to foreclose a mortgage encumbering defendant's commercial property at 950 Utica Avenue in Brooklyn. Following defendant's default in answering, this court issued an order of reference dated January 12, 2009. Defendant's

motion to vacate his default and for leave to serve an answer was denied by order of this court dated December 9, 2009. By order dated August 20, 2010, defendant's motion to renew his prior motion to vacate his default was denied and plaintiff's cross motion for a judgment of foreclosure was granted. A judgment of foreclosure was issued on March 23, 2011. By order dated June 27, 2012, the Appellate Division, Second Department affirmed this court's December 9, 2009 order denying defendant's motion to vacate his default and August 20, 2010 order denying defendant's motion to renew (*Reich v Redley*, 96 AD3d 1038 [2d Dept 2012]). The Appellate Division found that defendant "failed to establish a reasonable excuse for his default since the only excuse he proffered was that he was not served with process" (*id.* at 1039, quoting *Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 221 [2d Dept 2011]).

Defendant previously moved, pursuant to CPLR 5105 (a) (3), to vacate the judgment of foreclosure and dismiss the complaint on the basis of fraud. In the August 4, 2021 order denying the motion, this court stated that defendant was not entitled to vacate the judgment of foreclosure under CPLR 5015 (a) (3) as he did not establish a reasonable excuse for his default in answering the complaint. The court found that defendant's default in answering precluded any defense of payment, and noted that while defendant alleged making payments in satisfaction of the judgment, any right to redeem the property was extinguished upon the foreclosure sale in 2019. Defendant moves to reargue the August 4, 2021 order, claiming that this court misapprehended or overlooked his arguments that the judgment of foreclosure was satisfied and that the judgment was vacated pursuant to a 2014 stipulation with plaintiff.

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221 [d] [2]; *see Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019]). While the determination to grant leave to reargue lies within the sound discretion of the court (*see Degraw Constr. Group, Inc.*, 178 AD3d at 773; *Barnett v Smith*, 64 AD3d 669, 670-671 [2d Dept 2009]), a motion for leave to reargue “is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see Degraw Constr. Group, Inc.*, 178 AD3d at 773; *Woody’s Lbr. Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 593 [2d Dept 2006]; *Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

The instant motion for reargument must be denied as defendant has not electronically filed the original motion papers along with the application (*see CPLR 2214 [c]*; *All Am. Moving & Stor., Inc. v Andrews*, 31 Misc 3d 1214[A], 2011 NY Slip Op 50668[U] [Sup Ct, Bronx County 2011]; *Cohen v Romanoff*, 27 Misc 3d 1208[A], 2010 NY Slip Op 50627[U] [Sup Ct, Kings County 2010]; *J.D.M. Import Co., Inc. v Hartstein*, 2008 NY Slip Op 30668[U] [Sup Ct, NY County 2008]). The court does not retain the papers following the disposition of an application “and should not be compelled to retrieve the clerk’s file in connection with its consideration of subsequent motions” (*Sheedy v Pataki*, 236 AD2d 92, 97 [3d Dept 1997], *lv denied* 91 NY2d 805 [1998]). Without the ability to reference defendant’s arguments in the original motion papers, a


proper determination cannot be made whether the court misapprehended or overlooked those arguments (*see generally Gerhardt v New York City Tr. Auth.*, 8 AD3d 427 [2d Dept 2004]).

Nonetheless, it is clear from the August 4, 2021 order that the court did consider defendant's argument that it made payments to plaintiff toward satisfaction of the judgment (NYSCEF Doc No 10 at 5-6). Defendant's contention that the judgment of foreclosure was vacated pursuant to stipulations with plaintiff (submitted as exhibits to defendant's motion [NYSCEF Doc No 13]) is unavailing. The 2012 stipulation does not contain an express agreement by plaintiff to vacate the judgment, but rather a promise by plaintiff to vacate the judgment if certain payments were made by defendant pursuant to a schedule. In a subsequent 2014 stipulation, plaintiff only agreed to forebear auctioning the property if defendant made certain payments pursuant to a schedule. By signing the 2014 stipulation, defendant and his attorney acknowledged the existence of the judgment of foreclosure and plaintiff's right to proceed to sale.

Accordingly, defendant's motion for reargument is denied.

The foregoing constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to read "L. S. C.", written over a horizontal line.

Justice Lawrence Knipel