

<b>RSD857 LLC v Wright</b>
2022 NY Slip Op 32268(U)
July 13, 2022
Supreme Court, New York County
Docket Number: Index No. 160679/2020
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

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

PRESENT: HON. PAUL A. GOETZ PART 47

*Justice*

-----X

RSD857 LLC,

Plaintiff,

- v -

ALBERT WRIGHT, KIHEIM TILLMAN, JOHN DOE, JANE  
DOE

Defendants.

-----X

INDEX NO. 160679/2020

MOTION DATE N/A

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this ejectment action involving a residential building located at 857 Riverside Drive in Manhattan (the property), defendants move pursuant to CPLR 2221(d) and (e) for leave to reargue and/or renew plaintiff's motion for summary judgment and upon re-argument and/or renewal, to vacate the June 1, 2021, order granting summary judgment in favor of plaintiff and judgment of ejectment.

Defendant Wright and his now estranged wife, non-party Doreen Green purchased the property approximately twenty years ago. During the 2008 financial crisis, Wright and Green experienced financial difficulty and a foreclosure action was commenced against them relating to the property in 2017 (*Deutsch Bank Nat. Trust Co. v. Green et al*, NY Co. SC Index No. 850088/2017). During the pendency of the foreclosure action, Michael Petrokansky, the sole member of plaintiff RSD857 LLC, approached Wright in his front yard to inquire about purchasing the property through a short sale (Affidavit of Albert Wright sworn to on January 4,

2022, para. 14; Affidavit of Michael Petrokansky sworn to on February 10, 2022, paras. 1, 5). At the time, the total amount of debt that was owed to the foreclosing lender was approximately \$1,732,275 (Affirmation of K. Scott Kohanowski dated January 5, 2022, para. 22).

Petrokansky assisted Wright and Green in preparing and submitting a short sale application to the lender (Wright Aff. Para 21). In connection with the short sale, an appraisal of the property was submitted to the lender with the short sale application. The appraisal, which was prepared by John Viscusi, stated that the value of the property as of January 18, 2019 was \$825,000 (Kohanowski Aff., para. 16, Exh. D [appraisal]). The short sale application was approved by the foreclosing lender and the sale closed on October 28, 2019 for the sum of \$975,000 (Kohanowski Aff., para 23; Petrokansky Aff., para 23). The foreclosure action was then discontinued on December 6, 2019 (Index No. 850088/2017, NYSCEF Doc. 61). In connection with the short sale, Wright and Green signed a surrender agreement whereby they acknowledged that they could not remain in possession of the property. (NYSCEF Doc. 7).

While Green vacated the property in or around May 2020, Wright refused to vacate, resulting in the commencement of this ejectment action in December 2020 as well as plaintiff's motion for a preliminary injunction seeking immediate access to the property, and an order enjoining defendant and their invitees from entering the property. The motion was granted in part by order dated March 1, 2021, which provided plaintiff with access to secure the portions of the property not occupied by defendants. Plaintiff then moved for summary judgment on its first cause of action for ejectment as well as on liability on its remaining causes of action for damages, which was granted by order and judgment dated and entered on June 1, 2021. The New York City Sheriff did not enforce the ejectment order because of the continuing eviction and foreclosure moratorium, which expired on January 15, 2022.

In October 2021, the New York State Attorney General's Bureau of Consumer Frauds and Protection referred this matter to the City Bar Justice Center, which conducted an investigation into the sale. On January 5, 2022, defendants, now represented by the City Bar Justice Center, moved by order to show cause seeking leave to reargue and/or renew plaintiff's prior motion for summary judgment and upon re-argument and/or renewal, to vacate the court's June 1, 2021 order and judgment of ejectment. On January 6, 2022, the court granted defendants' application for a temporary restraining order to stay the enforcement of the ejectment order.

To the extent defendants' motion seeks to reargue the prior motion for summary judgment, it is untimely as it was filed more than thirty days after service of the order with notice of entry on June 1, 2021 and a notice of appeal was not timely filed by defendants (CPLR 2221(d)(3); *Garcia v. Jesuits of Fordham, Inc.*, 6 A.D.3d 163 [1<sup>st</sup> Dep't 2004]). Considering the defendants' motion as a motion to renew, under CPLR 2221(e), the motion must be based upon new facts not offered on the prior motion that would change the prior determination and must contain a reasonable justification for the failure to present such facts on the prior motion. "A motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention" (*Tishman Const. Corp. of New York v. City of New York*, 280 A.D.2d 374, 376 [1<sup>st</sup> Dep't 2001]). However, this requirement is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Id.*). Indeed, even if the vigorous requirements for renewal are not met, such relief may be granted "so as not to defeat substantial fairness" (*Toscani v. One Bryant Park, LLC*, 139 A.D.3d 644 [1<sup>st</sup> Dep't 2016] [citing *Tishman*]).

Here, defendants submit two new significant facts which would have changed the prior determination on plaintiff's summary judgment motion. First, defendants submit a forensic analysis of the appraisal submitted in connection with the short sale (Kohanowski Aff., Exh. E). The forensic analysis found several serious errors in the appraisal, including the statement by the appraiser claiming that the highest and best use of the property was the current use. Indeed, the property was very valuable as a development site and Petrokansky filed for the necessary approvals to demolish the property in order to build a large apartment building. Based on this, as well as other errors, the analysis found that the property was substantially under appraised for \$825,000 and was in fact worth between \$3,000,000 - \$5,000,000. This analysis supports defendants' defenses and counterclaims based on fraud and undermines plaintiff's ownership of the property, as a predicate for maintaining an ejectment claim (*See Goldenberg v. Friedman*, 191 A.D.3d 641 [2d Dep't 2021] [property purchased in a short sale for consideration that was far less than both the outstanding balance on the mortgage and the market value of the property was probative as one of several "badges of fraud" under the Debtor and Creditor Law]).

In addition, defendants also submit in support of their motion to renew, additional evidence of Wright's sight impairment and inability to read fine print. While defendants introduced some evidence as to Wright's condition in opposition to the motion for summary judgment, the affidavit from Wright was written in the third person and was vague and unspecific (NYSCEF Doc. 55). However, Wright's new attorney from the City Bar Justice Center was able to persuade him to submit to an examination regarding the extent of his impairment and now submits in support of the motion two letters from licensed physicians who state that Wright is legally blind and relies on the assistance of others for many routine activities, including reading (Kohanowski Aff., para. 7-8, Exh. A). Wright's sight impairment also creates

an issue of fact as to his defenses and counterclaims of fraud sufficient to defeat plaintiff's motion for summary judgment.

Plaintiff argues that defendants' motion to renew should be denied because defendants have not provided any explanation why it was not presented in opposition to plaintiff's motion for summary judgment. However, as defendants aptly explain in their reply papers, these new facts were obtained with great difficulty, requiring defendants' counsel to engage in extensive investigations, legal counseling, and interviews regarding a factually complicated matter; all indicia that defendants exercised due diligence in attempting to produce the newly discovered evidence. Thus, defendants' motion to renew must be granted so as not to "defeat substantive fairness" (*See Corporan v. Dennis*, 117 A.D.3d 601 [1<sup>st</sup> Dep't 2014] [motion to renew was properly granted so as not to defeat substantive fairness based on supplemental affirmation by defendant's expert]).

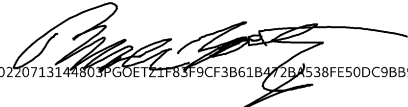
Plaintiff also argues that renewal is unavailable here as the court entered a final judgment of ejectment. A motion to renew pursuant to CPLR 2221 is generally not the proper procedural vehicle to address a final judgment and instead, an application to vacate a final judgment must be brought pursuant to CPLR 5015 (*Alliance to End Chickens as Kaporos v. New York City Police Department*, 201 A.D.3d 431, 431-32 [1<sup>st</sup> Dep't 2022]). While defendants' order to show cause only seeks to reargue/renew under CPLR 2221, their papers address vacating the court's order and judgment pursuant to CPLR 5015(a)(2) and (3) and the court has the discretion to treat it as such (CPLR 2001; *Mehler v. Jones*, 181 A.D.3d 535 [1<sup>st</sup> Dep't 2020]).

Under CPLR 5015(a)(2), a party can move to vacate a judgment based on newly discovered evidence. A motion to vacate a judgment is roughly analogous to a motion to renew under CPLR 2221(e) seeking to undo an order on the basis of "newly-discovered evidence" (*See*

Siegel & Connors, New York Practice, Section 428 [6<sup>th</sup> ed. 2018]). As with CPLR 2221(e), the movant under CPLR 5015(a)(2) must show that the evidence could not have been discovered earlier through the exercise of due diligence, and that the newly discovered evidence would probably have produced a different result (*Wall Street Mortg. Bankers Ltd. V. Rodgers*, 148 A.D.3d 1088 [2d Dep’t 2017]). Here, as discussed above, the discovery of the new facts concerning the appraisal and the extent of Wright’s sight impairment required extensive investigation and counseling by defendants’ attorneys’, which was undertaken with due diligence once the matter was referred to the City Bar Justice Center. Further, plaintiff’s prior motion for summary judgment was filed prior to any discovery in this matter, and, given the great difficulty of obtaining these new facts, defendants amply demonstrated that they could not have been discovered before their opposition to plaintiff’s motion was due. These new facts are sufficient to raise a material issue of fact with respect to the ownership of the property, which would probably have resulted in the denial of plaintiff’s motion for summary judgment on its ejectment cause of action (*See 247 East 32<sup>nd</sup> LLC v. Gasparich*, 95 A.D.3d 790 [1<sup>st</sup> Dep’t 2012]).

Accordingly, it is

ORDERED that the defendants’ motion is granted to the extent that the court’s order and judgment dated June 1, 2021 is vacated and the plaintiff’s motion for summary judgment is denied as defendants raised an issue of fact as to the ownership of the property.

  
20220713144803PGOETZ1F83F9CF3B61B472B4538FE50DC9BB91C

<u>7/13/2022</u> DATE					<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<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