

Hamblin v Bishop-Sowerby
2022 NY Slip Op 33556(U)
October 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 1069/2019E
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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**SANDRA HAMBLIN, ANGELA GRIFFITH,
DONNA HAMBLIN, DAVID HAMBLIN,
MARK HAMBLIN, IAN HAMBLIN
& STEPHEN HAMBLIN,**

Plaintiffs,

-against-

**SONIA BISHOP-SOWERBY, NICOLE GRIFFITH,
and CEDRIC GRIFFITH,**

Defendants.

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DECISION / ORDER

Index No. 1069/2019E

Motion Seq. #2

**Recitation, as required by CPLR 2219(a) of the papers considered in the review of defendant
Bishop-Sowerby's motion to reargue**

Papers	NYSCEF
Notice of Motion, Affirmation and Affidavit Annexed.....	<u>3-13</u>
Answering Affidavits.....	<u>16</u>
Reply Affidavits.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant Sonia Bishop-Sowerby moves, in Motion Sequence #2, for leave to reargue the court's decision on motion sequence #1, which granted plaintiffs summary judgment in this partition action and appointed a referee to ascertain the parties' rights and to determine whether there are any liens or judgments on the property or against the parties.

This motion was filed on July 29, 2022. A month later, defendant Bishop-Sowerby changed attorneys. This motion was submitted without a request for oral argument. Thus, the court must assume that her new attorney adopts the motion and the arguments of the

prior attorney. Further, the new attorney has consented to e-filing, and thus this action is now an e-filed action.

Counsel states, in his affirmation in support, that the court's prior order "granted Plaintiff's motion for Summary Judgment, dismissed the answer of the Defendant, appointed a receiver, and ordered a sale of the property." This is not accurate. The court granted plaintiffs' motion for summary judgment and appointed a referee to determine the rights of the parties, meaning what each owner's share of ownership is, and whether there are any liens against the property or the owners, and to determine if the physical partition or sale of the property is the appropriate remedy. Plaintiffs made a prima facie case for summary judgment, providing the deeds and affidavits of heirship from some of the parties.

Counsel next states that in granting summary judgment, the court misapprehended the law and/or the facts, as the court dismissed the movant's answer, affirmative defenses and counterclaims, which "was not relief requested in the plaintiff's notice of motion." This too is inaccurate, as summary judgment on liability in a partition action means, essentially, that plaintiffs have established that they have an ownership interest in the property, that all of the parties with an interest in the property have been named and served, and thus the court has jurisdiction over them (see *Mi King Chew v La Chea*, 175 AD3d 675 [2d Dept 2019]). To the extent that defendant asserted counterclaims, they were dismissed in the prior order, as is explained therein. In brief, the first counterclaim related to a prior action, 5884/2011, which was ostensibly but defectively settled and discontinued in 2017, and could not be asserted in this action. In that ostensible settlement, Bishop-Sowerby was to purchase the property for a fixed price, but the agreement was an agreement to agree, that is, to enter into a sale contract, and this was never done. Plaintiff Sandra Hamblin's attorney sent a proposed contract to Bishop-Sowerby, and she never signed it. Further,

two of the parties with an interest in the property were never served with process in that action. Lastly, those parties who were served all appeared, consented to the partition, and waived service of papers other than the final judgment, which clearly contemplated a public auction sale. They did not consent to the “settlement”, which may not have been at market value. Had Bishop-Sowerby executed the contract, and had all of the owners also executed the contract, it would have been enforceable. But nobody executed the proposed contract of sale, and none of the ten owners came to court and moved to enforce that settlement, or to vacate it, and as such, it was abandoned.

The second counterclaim was for the imposition of a constructive trust, which is inapplicable to the facts herein. Specifically, "The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment" (*Fakiris v Fakiris*, 192 AD3d 993, 994 [2d Dept 2021]). Here, in the moving defendant’s answer, which was never filed with the court until it turned up as an exhibit to the prior motion, none of these elements are alleged. Defendant merely alleges that the settlement agreement in the prior action, which was discontinued, entitles her to a court order that plaintiffs transfer the property to her.

Plaintiffs’ attorney opposes the motion, and states “the Court was not mistaken in issuing its Decision and Order . . . this motion to Reargue and its ancillary Appeal is without merit. It is in direct contradiction to CPLR§2221(d) and is one more of defendant, Sonia Bishop-Sowerby's thirteen (13) year efforts of first surreptitiously acquiring ten (10) percent of title to the real property, sabotaging multiple efforts at settlement herein and thereafter continuing to enjoy and use said real property to the exclusion of the remaining ninety (90%) percent owners.”

A motion for leave to reargue is addressed to the sound discretion of the court

which issued the decision on the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at its earlier decision (Beverage Marketing USA, Inc. v South Beverage Co., Inc., 58 AD3d 657 [2d Dept 2009]); See CPLR § 2221. A motion for leave to reargue . . . shall not include any matters of fact not offered on the prior motion" and "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" (Mazinov v Rella, 79 AD3d 979, 980 [2d Dept 2010]; quoting McGill v Goldman, 261AD2d593, 594 [2d Dept 1999]; CPLR § 2221). Specifically, CPLR § 2221 sets forth as follows: (d) A motion for leave to reargue: 1. Shall be identified specifically as such; 2. 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; and 3. Shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

After a close reading of the evidence and facts presented to the court in this motion and in the initial moving papers, the court did not overlook or misapprehend any facts or law in reaching its decision.

Accordingly, the defendant's request for leave to reargue the Decision and Order is DENIED in all respects

This shall constitute the decision and order of the court.

Dated: October 18, 2022

ENTER :



Hon. Debra Silber, J.S.C.