Prinsecita Esther Corp. v David

2024 NY Slip Op 32059(U)

June 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 2230/2016

Judge: Ingrid Joseph

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 83, 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 14th day of June, 2024.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

---X

PRINSECITA ESTHER CORP., CHARLES RUTENBERG REALTY, INTER REALTY,

Plaintiffs,

Index No.: 2230/2016

-against-

DALE O. DAVID a/k/a DALE DAVIDS, PRINSECITA ESTHER NJ a/k/a PRINSECITA ESTHER CORP., HALLMARK ABSTRACT SERVICE, LLC SOLOMON JACOBOWITZ, JACKIE'S REALTY & HOME DEVELOPMENT, NEW WORLD WIDE REALTY,

Defendants.

---X

DECISION & ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation/Exhibits....................................	50 – 56
Affirmation in Opposition/Memorandum of Law/Exhibits............	57 – 65
Reply Affirmation/Exhibits..	68 – 75
Surreply..	76

Plaintiffs Prinsecita Esther Corp. ("PEC"), Charles Rutenberg Realty and Inter Realty (collectively, "Plaintiffs") move for an order (1) allowing reargument and renewal of its motion to vacate the default judgment and (2) restoring the matter to the Court's calendar (Mot. Seq. No. 5). Defendants Prinsecita Esther NJ a/k/a Prinsecita Esther Corp. ("PENJ") and Solomon Jacobowitz (collectively, the "Defendants") oppose the motion on the grounds that it is procedurally defective, and Plaintiff failed to demonstrate a basis for reargument or renewal.

This matter arises out of a failed real estate transaction. In their amended complaint, Plaintiffs allege that defendant Dale O. David ("David") owned a residential property located at

174 Chestnut Street in Brooklyn, New York (the "Property"). Plaintiffs further allege that David engaged the services of Inter Realty to sell the Property. Bernardo Rodriguez, as director of PEC, was "in contact" with Charles Rutenberg Realty to act as the buyer's agent in connection with the purchase of the Property. In May 2014, Plaintiffs aver that PEC and David entered into a contract of sale and PEC paid approximately $15,000 as down payment. Plaintiffs contend that David never scheduled a closing, despite the condition precedent of receiving short sale approval and the multiple attempts by PEC to schedule a closing date. Thereafter, Plaintiffs claim that David sold the Property to PENJ, pursuant to a deed dated March 23, 2015. According to Plaintiffs, David issued a letter to Shellpoint Mortgage advising that the new seller's agent was defendant Jackie Realty & Home Development and the new buyer's agent was defendant New World Wide Realty. Plaintiffs assert that after the closing took place, the broker's commissions checks were issued to these two entities, rather than Charles Rutenberg Realty and Inter Realty. In their complaint, Plaintiffs asserted causes of action for: (1) breach of contract/specific performance; (2) fraud; (3) intentional misrepresentation; (4) unjust enrichment; (5) conspiracy to commit fraud; and (6) aiding and abetting a fraud.[1]

Defendants PENJ and Jacobowitz previously filed a motion to strike the amended complaint, pursuant to CPLR 3126, or, alternatively, compel Plaintiffs to respond to outstanding discovery, pursuant to CPLR 3124 (Mot. Seq. No. 3). By order dated March 3, 2022 (the "March 2022 Order"), Justice Lawrence Knipel granted Defendants' unopposed motion to the extent that the action was dismissed, finding that Plaintiffs failed to respond to Defendants' discovery demands in violation of two compliance conference orders. Thereafter, Plaintiffs filed a motion to vacate the dismissal under CPLR 3216 (Mot. Seq. No. 4). Defendants opposed the motion. In an order dated October 12, 2023 (the "October 2023 Order"), this Court denied Plaintiff's motion to vacate since Plaintiffs brought this motion more than one year after notice of entry of the March 2022 Order and failed to show either a reasonable excuse or meritorious defense. Plaintiffs now seek to renew and reargue their previous motion.

In their motion for leave to reargue, Plaintiffs state that the Court "perhaps overlooked" their "meritorious defenses [because they] were not clearly captioned in the previous filing"

[1] Pursuant to an order dated October 20, 2017 by Justice Wavny Toussaint, the first and seventh causes of action were dismiss but Plaintiff was granted leave to replead the first (breach of contract/specific performance) (NYSCEF Doc No. 55).

(NYSCEF Doc No. 51, ¶ 8). First, Plaintiffs claim that it had a meritorious defense to Defendants' motion to strike. Plaintiffs contend that it had, in fact, produced all the discovery in their possession as early as October 2021. Further, Plaintiff asserts that they engaged in diligent efforts to obtain additional discovery and have since exchanged them. Second, Plaintiffs aver that the Court overlooked another meritorious defense, namely, that there were less severe sanctions available for a discovery violation. Third, Plaintiffs assert that their counsel did not receive notice of the motion and was not served or have knowledge of the motion because of (i) a change in the handling attorney and (2) a technical error in that counsel lost access to the account that was linked to NYSCEF and was thus not receiving electronic notifications. With respect to a reasonable excuse, Plaintiffs assert that the prior handling attorney left the firm due to the COVID-19 pandemic and the email associated with the NYSCEF account for the new attorney was not working. This new attorney, according to Plaintiffs, was only able to monitor the case through eCourts and was unaware that there was a motion filed and that the case had been dismissed. Moreover, Plaintiffs contend that under CPLR 317, the time to file a motion to vacate begins to run from the date counsel obtained knowledge of the entry of a judgment, not the date that the judgment was entered.

With respect to its request for renewal, Plaintiffs submit an affidavit of a prior attorney, Evelyn Abiola, Esq. According to Plaintiffs, "it took considerable amount of effort to contact previous counsel and obtain from them an affidavit" (NYSCEF Doc No. 51, ¶ 56). Plaintiffs assert that this affidavit was "not available previously due to difficulty in being able to content [*sic*] previous counsel" (*id.* at ¶ 9). In her affidavit, Ms. Abiola states that she "had to discontinue [her] work with" the firm during the COVID-19 pandemic, without specifying a specific date (NYSCEF Doc No. 52, ¶ 4). While at the firm, she "was following the case personally; but [she did] not recall if Attorney Kevin Golding, Esq. was receiving notices" from NYSCEF because the account was linked to an email she was informed no longer worked (*id.* at ¶ 6).

In opposition, Defendants argue that the motion should be denied because (1) it is procedurally defective since it did not attach or refer the October 2023 Order or the underlying papers leading to such order; and (2) it does not meet the legal standard for either reargument or renewal. Though Plaintiffs assert that they produced discovery, Defendants argue that Plaintiffs have, in fact, never produced an item of discovery in response to their demands. In addition, Defendants assert that in its original motion, Plaintiffs cited to law office failure in failing to submit responses to Defendants' discovery demands. According to Defendants, Plaintiffs failure to

specifically identify any matter of fact or law allegedly overlooked or misapprehended is fatal to its motion seeking reargument. Defendants further claim that Plaintiffs ignore that their counsel's firm was served with Notice of Entry of the March 2022 Order via NYSCEF and by mail.

In reply, Plaintiffs argue that their time to reply to Defendants' discovery demands and file a motion to vacate was tolled by the "entire duration" of the COVID-19 pandemic by 461 days pursuant to various executive orders (NYSCEF Doc No. 68, ¶ 30). According to Plaintiffs, their time to respond did not expire until June 24, 2021. In addition, Plaintiffs contend that the alleged law office failure is a one-time occurrence which resulted in no prejudice to Defendants. Moreover, Plaintiffs ask that the Court accept their "belated discovery responses . . . at this time" and argue that their failure to provide documents did not affect Defendants' defenses and their ability to defend themselves (*id.* at ¶¶ 31, 36). Plaintiffs further assert that since the court granted Defendants' motion to renew their prior motion to dismiss, the Court "should extend the same discretion and leniency to the plaintiffs" (*id.* at ¶ 47).

In their surreply, Defendants claim that not only is Plaintiffs' attempt to produce discovery with their reply papers improper, but it also contradicts Plaintiffs' counsel assertion in their moving papers that Plaintiffs had already responded to Defendants' discovery demands. However, even if the Court were to consider Plaintiffs' belated responses, Defendants contend that they are utterly deficient. Further, Defendants argue that Plaintiffs impermissibly asserted a new claim in their reply papers—executive orders tolled Plaintiffs' time to respond for 461 days. Defendants assert that tolling ended on November 3, 2020. Assuming arguendo that the executive orders applied to the exchange of discovery, Defendants assert that tolling began just seven days prior to the discovery deadline set forth in the March 6, 2020 compliance conference order. Thus, once tolling ended Defendants argue that Plaintiffs only had until November 10, 2020 to comply. However, even if tolling ended June 24, 2021 (as they argue they did), Defendants note that Plaintiffs would have had until July 1, 2021 to provide discovery and they did not.

The decision to grant leave to renew or reargue is at the sound discretion of the court (*see Rodney v New York Pyrotechnic Prod. Co.*, 112 AD2d 410, 411 [2d Dept 1985] [internal citation omitted]; *Gold v Gold*, 53 AD3d 485, 487 [2d Dept 2008]). As an initial matter, the Court finds that Plaintiffs' motion is procedurally defective. Where a motion is electronically filed, CPLR 2214 (c) does not require the movant to include copies of papers that were previously filed; however, the party "may make reference to them, giving the docket numbers on the e-filing

system" (CPLR 2214 [c]). Here, Plaintiffs failed to attach or identify the October 2023 Order that is the basis of their motion to renew and reargue until their reply was submitted (*Jungreis v Rubin & Rothman, LLC*, Sup Ct, Kings County, Jan. 18, 2024, Knipel, J., index No. 501188/2022 [court previously "noted that [w]hen moving to reargue, movant should annex decision upon which reargument is sought, as well as underlying motion papers"] [internal quotation marks omitted]). In addition, Plaintiff did not attach or reference by their NYSCEF docket numbers the papers submitted in their original motion (*see Cripps v Dibisceglie*, 172 AD3d 1305, 1306 [2d Dept 2019]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 687, 688 [2d Dept 2014]). Even after Defendants raised the issue of procedural defect in their opposition, Plaintiffs' reply merely attaches a copy of the Notice of Motion of its original motion. While Plaintiff's motion is procedurally defective, their omissions are not fatal (*see* CPLR 2001; *Ruda v Yeshaye*, Sup Ct, Kings County, Oct. 29, 2021, Rivera, J., index No. 509904/2020] ["[T]he failure to include [the prior motion papers] with the order to show cause is at most a mere irregularity and may be disregarded pursuant to CPLR 2001"]; *Matter of Nazor v NY City Loft Bd.*, 179 AD3d 609, 611 [1st Dept 2020] [finding that "Supreme Court providently exercised its discretion in entertaining landlord's renewal motion, notwithstanding the lack of strict compliance with CPLR 2214 (c)"]). Accordingly, the Court will now address the merits of Plaintiffs' motion.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). In addition, the movant is required to show "reasonable justification for failure to present such facts on the prior motion" (CPLR 2221 [e] [3]).

In support of the branch of their motion seeking leave to renew, Plaintiffs contend that they experienced difficulty in contacting Ms. Abiola. However, Plaintiffs failed to "set[] forth [any] specific efforts that [they] made to procure" her affidavit (*Bronson v Jacobs*, 204 AD3d 531, 531 [1st Dept 2022]; *Wang v LaFrieda*, 189 AD3d 732, 732 [1st Dept 2020] ["While plaintiffs made some vague assertions regarding their attempts to contact [the affiant] earlier, they have not put forth any specific information regarding their efforts to locate her or to obtain the affidavit"]). Renewal is not warranted where, as here, an "affidavit [is] submitted without demonstrating a reasonable justification for failing to submit it on the prior motion" (*JPMorgan Chase Bank N.A. v EY Bay Ridge, LLC*, 212 AD3d 794 [2d Dept 2023]).

The Court now turns to the branch of Plaintiffs' motion seeking leave to reargue. 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]). Moreover, 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] [internal citations omitted]). Accordingly, the movant must demonstrate in what manner the court, in rendering its original determination, overlooked or misapprehended the relevant facts or law and cannot include facts not offered on the prior motion (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). Upon the court's review of the merits of the movant's arguments, the motion for reargument is essentially granted (*see McNamara v Rockland Cnty. Patrolmen's Benevolent Ass'n., Inc.*, 302 AD2d 435, 436 [2d Dept 2003]).

The Court will not consider Plaintiffs' argument regarding any COVID-19 tolling since it was raised for the first time in their reply papers and thus, "could not have been 'overlooked or misapprehended' by the [court] in the first instance" (*People v D'Alessandro*, 13 NY3d 216, 219 [2009]).

With respect to a reasonable excuse, Plaintiffs hang their hat on a technical error. Even accepting that the email address on NYSCEF was no longer accessible to Plaintiffs' counsel, Plaintiffs were not served solely through electronic filing. Defendants have proffered an affidavit of service indicating that Notice of Entry was also mailed to counsel's office. Plaintiffs' papers do not rebut service by mail.

Turning now to the issue of a meritorious defense, the Court finds Plaintiffs' papers wholly contradictory. Plaintiffs' affirmation in support is replete with references to compliance with discovery (Plaintiffs "did in fact provide all of the discovery that was in their possession" [NYSCEF Doc No. 51, ¶ 10]; "discovery has already been provided" [*id.* at ¶ 16]; "all of the relevant and pertinent documents . . . were provided to the Defendant as early as October of 2021" [*id.* at ¶ 32]; "Plaintiff has already provided more than 300 pages of evidence" [*id.* at ¶ 37]; and "[d]iscovery was provided as requested and in a timely manner" [*id.* at ¶ 40]). However, Plaintiffs failed to attach any affidavits of service reflecting that any of the documents attached as "Exhibit E" were exchanged with Defendants. In their reply papers, Plaintiffs argue that their time to

respond to Defendants' discovery demands must be tolled (NYSCEF Doc No. 68, ¶¶ 5-6, 10). However, if discovery had been timely exchanged as Plaintiffs argue, then this argument is superfluous (and improperly raised in reply). A further reading of the reply, however, reveals why Plaintiffs felt the need to provide justification. Their reply states that they "submit their belated discovery responses to defendants' discovery demands at this time" and request that the court "accept these responses at this late time" (*id.* at ¶ 31). The Court declines to consider the sufficiency of Plaintiffs' responses.

After careful review of the documents submitted, the Court finds that Plaintiffs failed to identify any facts or law allegedly overlooked or misapprehended. Plaintiffs further attempted to inappropriately include new arguments for the first time here. Even if the Court accepted that tolling due to COVID-19 was applicable, Plaintiffs' reasonable excuse and meritorious defense have no merit.

Accordingly, it is hereby

ORDERED, that the portion of Plaintiff's motion for leave to renew is denied; and it is further

ORDERED, that the portion of Plaintiff's motion for leave to reargue is granted; and upon reargument, the Court adheres to its original determination.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice