

**Bartlett Plaza LLC v Jose**

2024 NY Slip Op 33447(U)

September 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 527469/21

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 84, 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 12th day of September, 2024.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

-----X

BARTLETT PLAZA LLC,

Plaintiff,

-against-

Index No. 527469/21

JULIO JOSE, ROSALINDA JOSE, CORCORAN GROUP INC. A/K/A THE CORCORAN GROUP, and SAXON CAPITAL REALTY INC,

DECISION AND ORDER

motion seq. # 3

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

Opposing Affidavits (Affirmations)

Affidavits/ Affirmations in Reply

70-71

73-74

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Upon the foregoing papers, and after oral argument, plaintiff Bartlett Plaza LLC (plaintiff) moves for an order, pursuant to CPLR § 2221 (d), granting leave to reargue an order of this court, dated November 13, 2023, which granted, in part, defendants Julio Jose and Rosalinda Jose’s (the Joses) motion for summary judgment and granted the cross-motion of defendant Corcoran Group a/k/a The Corcoran Group (Corcoran) for summary judgment and, upon reargument, denying said motion and cross-motion.

Plaintiff commenced this action seeking damages for fraud and breach of contract relating to its purchase of the Joses' commercial property located at 130-132 Bartlett Street in Brooklyn. The subject property was advertised for sale by the Joses through a listing by Corcoran, their real estate agent. The listing indicated that the property housed an active two-bay auto mechanic garage, but that the premises could be "delivered vacant" or that the "tenants [were] willing to sign [a] short term lease with [the] new owners." On February 5, 2020, the Joses entered into a Contract of Sale with plaintiff, by its principal Martin Jacobowitz, wherein the Joses agreed to sell the property to plaintiff for the purchase price of \$4,000,000.

When the parties entered into the Contract of Sale, the subject property was occupied by an auto repair shop doing business as Robel & Sons Auto Repair, Corp. (Robel). The business was not owned or controlled by the Joses, but rather by a third-party named Robel De La Cruz, Jr. (De La Cruz). Plaintiff and the Joses closed title on January 21, 2021. However, Robel remained in possession of the auto repair shop following closing, resulting in monetary damages allegedly suffered by plaintiff to secure Robel's vacating of the property.

In its complaint, plaintiff sets forth causes of action against the Joses for fraud, breach of contract and contractual attorneys' fees as well as a cause of action against Corcoran for negligence. With respect to its fraud claim, plaintiff alleged that "[s]hortly after Closing, contrary to the representations made by Defendants, Plaintiff discovered that Defendants were not actually in possession of the Premises;" that "Defendant represented on numerous occasions that no tenants occupied the Premises and that

Defendants were in sole possession of the space;” that “Defendant[s]’ representations were knowingly false, as [De La Cruz] was in possession and operating a business from the garage space in the Premises;” that “[a]s a result of Plaintiff’s reliance of Defendant[s]’ intentional misrepresentations, Plaintiff was forced to negotiate with [De La Cruz] to gain possession of the Premises;” and that “[i]n order to remove [De La Cruz], Plaintiff was forced to pay \$350,000.00 for his move” (Complaint, NYSCEF Doc No. 1, at 5-7). As to the negligence claim against Corcoran, plaintiff alleged that Corcoran “knew or should have known that the occupant at the Premises was a third-party and not the Sellers” and that “Corcoran negligently advertised the property without a tenant and permitted the Contract to continue stating that no tenant occupied the Premises.”

The Joses and Corcoran moved and cross-moved, respectively, for summary judgment dismissing plaintiff’s complaint. In opposition to the Joses’ motion for summary judgment, plaintiff argued that discovery was necessary; that the Joses misrepresented the leasehold status of the tenancy at the premises. Plaintiff also alleged that the Joses misrepresented that they alone possessed the subject property and/or owned or controlled Robel; and that the property would be delivered vacant at the time of closing. Plaintiff cited to numerous provisions in the Contract of Sale and appurtenant agreements promising that there were no tenants at the property and that the property would be delivered vacant. Plaintiff argued, in opposition to Corcoran’s cross-motion for summary judgment, that Corcoran owed and breached a duty to it since the company helped to actively conceal the true tenant and possessor of the property.

In its November 13, 2023 decision, the court determined that plaintiff failed to raise an issue of fact as to whether its reliance on the alleged misrepresentations were justifiable, which showing was required to sustain a fraud claim. The court stated:

“As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm’s length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it” (*UST Private Equity Invs. Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]). Plaintiff does not allege that it made an inquiry or took steps to ascertain who owned Robel, nor does it submit proof that the alleged misrepresentation as to possession was a matter peculiarly within the Joses’ knowledge or that there were no means readily available by which plaintiff could have determined its truth. Thus, under the circumstances, even if there was a misrepresentation by the Joses as to possession or ownership of Robel, plaintiff failed to show that its reliance on the alleged misrepresentation was justifiable (*see Shui Ching Chan v Bay Ridge Park Hill Realty*, 213 AD2d 467, 469 [2d Dept 1995]; *Parkway Woods v Petco Enters.*, 201 AD2d 713, 713 [2d Dept 1994]; *Callahan v Miller*, 194 AD2d 904, 905-906 [3d Dept 1993])” (Decision and Order, November 13, 2023, NYSCEF Doc No 67, at 8).

The court accordingly granted the Joses’ motion for summary judgment to the extent of dismissing the first cause of action for fraud.

With respect to Corcoran’s cross-motion for summary judgment, the court noted that “‘New York imposes no duty on either the seller or the seller’s agent to disclose any information concerning the premises unless there is a confidential or fiduciary relationship between the parties or some conduct on the part of the seller which constitutes active concealment’ (*Glazer v LoPreste*, 278 AD2d 198, 198 [2d Dept 2000]),” and that to establish active concealment, “it must be shown, in effect, ‘that the

seller or the seller's agents thwarted [the purchaser's] efforts to fulfill [its] responsibilities fixed by the doctrine of caveat emptor' (*Perez-Faringer v Heilman*, 95 AD3d 853, 854 [2d Dept 2012], quoting *Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005])" (Decision and Order, November 13, 2023, NYSCEF Doc No 67, at 12). The court found that Corcoran established that it did not actively thwart plaintiff from discovering that Robel was a third-party tenant owned and operated by De La Cruz, and that plaintiff's affidavit was insufficient to raise an issue of fact.

Accordingly, the court granted Corcoran's cross-motion for summary judgment.

Plaintiff subsequently brought the instant motion for leave to reargue the court's November 13, 2023 decision and order with respect to the aforesaid dispositions.

The determination to grant leave to reargue lies within the sound discretion of the court (*see Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019]). 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]). For example, reargument may properly lie where a court dismissed an action on limitations grounds based upon a mistaken accrual date, or where a court based a decision upon case law or statutory law which was not applicable to the particular facts and/or causes of action at issue. 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 Jaspar Holdings, LLC v Gotham Trading Partners*


#1, LLC, 186 AD3d 582, 584 [2d Dept 2020]; 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]). In other words, a reargument motion is not a vehicle for the movant to repeat its prior arguments because it is dissatisfied or disagrees with the court's analysis of the facts and evidence, or otherwise seeks to take "another bite of the apple" (*Weaver v Weaver*, 198 AD3d 1140, 1144 [3d Dept 2021]).

Here, plaintiff has not shown that any facts or law were overlooked or misapprehended by the court. Rather, a review of the motion papers reveals that plaintiff is setting forth the same points which were contained in its prior opposition, and seeking a second opportunity to argue the same issues already previously considered and decided by the court, which is an improper basis for a reargument motion (see *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984]).

As a result, plaintiff's motion for reargument is granted, and upon reargument, is denied.

The foregoing constitutes the Decision and Order of the court.

ENTER,



HON. CAROLYN E. WADE  
JUSTICE OF THE SUPREME COURT

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FILED  
KINGS COUNTY CLERK