TZ Vista, LLC v Helmer
2025 NY Slip Op 35585(U)
January 13, 2025
Supreme Court, Rockland County
Docket Number: Index No. 030313/2020
Judge: Keith J. Cornell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

TZ VISTA, LLC, DCAK-MSA ARCHITECTURE & ENGINEERING, PC, DRAZEN CACKOVIC AND JULIA KHOMUT, Plaintiffs,	**DECISION & ORDER**
-against-	Index No. 030313/2020
WILLIAM HELMER, FOOT OF MAIN, LLC, HELMER CRONIN CONSTRUCTION, INC., Defendants.	Motion Sequence No. 17

Hon. Keith J. Cornell, A.J.S.C.

Before the Court is the Defendants' motion to reargue, seeking an order: (1) pursuant to CPLR 2221 (d) granting Defendant William Helmer ("Helmer") leave to reargue motions 13, 14, 15 and 16 which were decided pursuant to the Court's Decision and Order dated October 28, 2024, ("10/28/24 Decision and Order") and (2) upon reargument, denying Plaintiffs' motion 13 for a finding of contempt against William Helmer; and motion 15 for summary judgment; and granting Defendants' motion 14, for a finding of contempt against Drazen Cackovic, and 16 for summary judgment; and c) for such other, further or different relief as to this Court may seem just, proper and equitable. The Plaintiffs oppose this motion.

The following were read and considered: NYSCEF Doc Nos. 294-303.[1]

The Defendants move for an order pursuant to CPLR 2221 (d) for leave to reargue. The statute provides, in pertinent part, that such a motion "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). Defendants

[1] Additional NYSCEF documents are referenced within the text of this Decision and Order.

argue that this Court "misconstrued uncontroverted evidence" and "failed to understand the nature of the issues raised in motions 15 and 16 (Affidavit of W. Helmer, NYSCEF # 295).

The purpose of reargument is to provide "a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law." See Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979); see also CPLR 2221 (d)(2). "To succeed on a motion to reargue, the moving party must demonstrate that the court overlooked *controlling* decisions or *material* factual matters that were before the court on the underlying motion." Richardson v Lindenbaum & Young, 14 Misc 3d 1223(A) (Sup Ct 2007), *affd in part, appeal dismissed in part sub nom.* Richardson v Lindenbaum & Young, Pollack & Assoc., *PLLC*, 56 AD3d 645 (2d Dept 2008). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided," (*id.*) nor is reargument a proper forum to present arguments different from those originally asserted. See William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992) *lv. dismissed in part and denied in part* 80 NY2d 1005 (1992).

ORDER OF CONTEMPT

With regard to this Court's determination that Defendant Helmer is in contempt of Justice Puerto's July 14, 2023 order (the "Order"), Defendants argue that this Court ignored that these parties were in negotiations and that it was the Plaintiffs who did not want Helmer to make an offer as required by the Order and that Helmer accommodated Plaintiffs' desire and that, therefore, Helmer should not be found in contempt. Key to the discussion in this Court's 10/28/24 Decision and Order, however, was the recognition that the parties had, indeed, been engaged in some negotiations which ended in an impasse. Helmer, in effect, argues that it is unfair to him to have engaged in negotiations with the Plaintiffs and now to be found in contempt after he was trying to work out some arrangement with Plaintiffs. Here, the Court did not ignore or misconstrue the facts, it just sees things differently. Helmer is free to disagree with this Court, but this argument is just a rehash of the those made previously. Helmer's argument may go to the issue of penalty, but it does not go to the issue of liability. On the contrary, his argument supports the finding of liability for the contempt. Helmer never claims to have complied with the Order. In effect, he claims that there is a good excuse for that failure.

Helmer also argues that this Court overlooked the element of prejudice to the Plaintiffs—one of the elements of a finding of contempt. Again, Helmer is incorrect. This Court did not overlook that issue. The entire purpose of the Order was to attempt to put an end to the litigation and to do so, Justice Puerto required that Helmer make an offer to sell his interest in TZ Vista in accordance with paragraph 8.5 of the parties' operating agreement. That directive was in conjunction with the grant of summary judgment in the Plaintiffs' favor.

The purpose of the Order was to provide a path forward for the TZ Vista project to proceed. Justice Puerto determined that that Helmer was no longer interested in pursuing the objectives of the TZ Vista project. That Order required Helmer to sell or, alternatively, to buy in accordance with the operating agreement. The sine qua non of the Order was to separate these litigants. The prejudice to the Plaintiffs is self-evident because Helmer's involvement continues to hog-tie the TZ Vista project. Indeed, Justice Puerto was prescient, because that is exactly what has happened. The prejudice to the Plaintiffs is clear.

DEFENDANT'S MOTION FOR CONTEMPT

Helmer also seeks to reargue this Court's denial of his motion of contempt (Motion Seq 14). Here, he merely rehashes his arguments made previously. He disagrees with this Court's assessment but offers no reference to that which this Court supposedly overlooked or misapprehended. Helmer's indication that he cannot trust Plaintiff Cackovic and Helmer's belief that Cackovic is mismanaging the project is essentially the same line of argument made before, but the issue here is whether there is some matter that this Court overlooked or misapprehended. There is none. Helmer complains about Cackovic's management but that is not the issue. The issue is whether Cackovic violated the Order, not whether he is making business decisions with which Helmer disagrees. The Order placed only very circumscribed restrictions upon Cackovic. The relevant portion is reproduced here for ease:

> " And with respect to Motion Sequence 9, which was a notice of cross-motion which was defendant seeking an order to enjoin Plaintiff Cackovic from receiving rents or other income on behalf of TZ Vista, issuing any checks or other payments on behalf of TZ Vista, or maintaining or controlling any checking accounts other than the existing accounts of TZ Vista that was consented to by Plaintiffs at an earlier date. and so that's granted to the extent that it hasn't been agreed to." (Proceedings Transcript. NYSCEF#200. pg 4. lines 16-24). (See, this Court's Decision and Order, NYSCEF #286).

Based upon Helmer's presentation in the original Motion 14, this Court could decern no violation and there has been no showing now, that convinces this Court otherwise.

MOTIONS 15 AND 16

Helmer also asks this Court to take a second look at Motion Sequences 15 and 16. He argues that this Court did not understand his offer made to sell his TZ Vista interest because of the complexity involving the interplay between his TZ Vista interest and the value of the Foot of Main property (referred to as "Parcel 7"). He argues that it is not possible to convey a "simple" offer because Operating agreement paragraph 8.5 "is itself poorly and incorrectly drafted..." Thus, he argues that his offer to sell was an attempt to clarify and not complicate, but that this Court did not comprehend that reasoning.

Having reviewed all prior decisions and orders and having reexamined the operating agreement and this Court's 10/28/24 Decision and Order, the Court does not find that there was any matter which was overlooked or misapprehended. The terms of the operating agreement regarding the buy-sell provision in paragraph 8.5 are clear. The problem Helmer points to lies, not with the complexity of the agreement, but with what he regards as an error in the deal's terms.

The parties, however, established the deal terms and specifically provided the mechanism for a buy-out, if needed. Similarly, they established Helmer's and Foot of Main's obligation to transfer Parcel 7 and the calculation of Parcel 7's value and the payment timing. All parties are sophisticated businesspeople and, presumably, had professional guidance in negotiating the deal terms and analyzing what would happen under various scenarios according to the terms of the operating agreement.

Helmer has argued that the deal is basically not fair to him. But that is the deal he signed. Is Helmer correct that the operating agreement was poorly drafted? Perhaps, but three (3) years ago, Justice Berliner, in his Decision and Order on Motion Sequence #1 and #2 ("Berliner Order", NYSCEF #40), expressly addressed the obligation to convey Parcel 7 and specifically held that the "Operating agreement contains details of the calculation and schedule of payments for Parcel 7". Elsewhere in the Berliner Order, the Court wrote that the operating agreement "is clear and unambiguous, such that Defendant Foot of Main, LLC is obligated to transfer Parcel 7…." While the Court's reference there was as to the obligation to convey and not as to the calculation of the price, given the context of the entire decision it is unassailable that Justice Berliner recognized that Parcel 7 was to be conveyed and that the purchase price was to be calculated and paid in accordance with the provisions of Article Nine (OPTION TO PURCHASE) of the operating agreement.

Helmer also raises the argument that the buy-out paragraph of the operating agreement, paragraph 8.5 "is itself poorly and incorrectly drafted, which is why it is not possible to simply convey a price (a 'put') and trigger either an acceptance or a corresponding 'call'. I own 50% of TZ Vista. Drazen Cackovic owns 30%." Helmer explains that, considering the disparity in the percentages of ownership, the provision "is obviously incorrect, as Cackovic only has a 30% interest and [Helmer has] a 50% interest, so the price cannot be equal." (Helmer Aff'd, NYSCEF #295).

Helmer argues that this Court did not comprehend that the buy-out provision in paragraph 8.5 "is obviously incorrect" due to the ownership percentage disparity. He further argues that this Court did not comprehend that his offer to sell properly included a value for the Foot of Main Parcel 7. Helmer argues that the Berliner Order had previously rejected Plaintiff's position that Parcel 7 should not be included in a paragraph 8.5 sell offer and that the law of the case established that such value is properly a part of such a sell offer. This Court has searched high and low for any support in the Berliner Order for such a position. There is none. This is a particularly spurious argument.

In February 2022, Justice Berliner issued a partial order and judgment on motion sequence #2 (NYSCEF #61) which ordered that "TZ Vista LLC shall pay the purchase price for Parcel 7 in accordance with the terms set forth in Paragraph 9.2 of the Operating Agreement". Thus, an 8.5 buy-out and the payment for Parcel 7 pursuant to 9.2 are designed as two separate and distinct mechanisms. This Court did not overlook or misapprehend the decided issues. What the eventual payment for Parcel 7 will be remains to be seen, but how it is to be calculated is eminently clear.

Based upon the foregoing, it is

ORDERED, that Defendants' motion for leave to reargue motion Sequences 13, 14, 15 and 16 is GRANTED and; it is further,

ORDERED, that upon argument, the Defendants' motion is DENIED in its entirety; and it is further,

ORDERED, that the parties' attorneys shall appear for a conference (to be scheduled by separate Court Notice) with the Court for the purpose of scheduling the hearing contemplated in the 10/28/24 Decision and Order and discussion regarding further litigation scheduling.

The foregoing shall be the Decision and Order of the Court.

Dated: New City, New York
January 13, 2025

ENTER,

HON. KEITH J. CORNELL, A.J.S.C.

To: All Counsel via NYSCEF