

SUFFOLK COUNTY SIXTH DISTRICT COURT
PATCHOGUE, NEW YORK

OAK NECK LANE ASSOCIATION, INC.,

Plaintiff,

- against -

ANTHONY PECORALE,

Defendant.

HON. STEPHEN L. UKEILEY, J.D.C.

INDEX NO. BRC 755-08

Motion Date: October 29, 2009

Upon the following papers numbered 1 to 5 read on this motion by Plaintiff to reargue
Notice of Motion XXXXXXXXXXXX and supporting papers 1 and 2
Notice of Cross-Motion and supporting papers _____
Answering Affidavits and supporting papers 4
Replying Affidavits and supporting papers 5
Filed papers 3
Other papers _____

(and after hearing counsel in support of and opposed to the motion)

A motion to re-argue pursuant to CPLR § 2221, made within thirty (30) days following service of a copy of the Order determining the prior 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)).¹ Motions for reargument are left to the sound discretion of the Court which decided the prior motion (Viola v. City of New York, 13 A.D.3d 439, 440 (2d Dep't 2004), leave denied, 5 N.Y.3d 706 (2005)).

Plaintiff's motion for reargument is based upon its assertion that the Court misapprehended matters of law in denying its motion. According to Plaintiff, summary judgment was not predicated upon Defendant's "membership" within the Plaintiff incorporated property association. Rather, Plaintiff contends that Defendant's undisputed ownership of property within the private community it services established liability and Defendant's responsibility to pay his proportionate share of the costs incurred by Plaintiff in maintaining the community property therein. Based upon a review of the record, the Court exercises its discretion and grants Plaintiff leave to reargue (Viola, supra, 13 A.D.3d at 440).

¹ A review of the Court's file demonstrates that the instant motion was timely made within the thirty (30) day period following service of Notice of Entry.

Oak Neck Lane Assoc., Inc. v. Anthony Pecorale
BRC 08-755
Motion to Reargue

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law (see CPLR § 3212; Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597-98 (1980)). Once the moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (See Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 794 (1988)).

Upon reargument, Plaintiff made a *prima facie* showing of entitlement to judgment as a matter of law. It was undisputed that Defendant is an owner in the community in which the Plaintiff homeowners' association services, and, in fact, he had previously made payment of annual dues to the homeowners' association until he "elected to opt out of his membership" by letter dated June 28, 2007. Plaintiff disputes whether an owner may "opt out" of the homeowners' association, but that issue need not be decided here. The law is established that "[w]here there is knowledge that a private community's homeowners' association provides facilities and services for the benefit of community residents, the purchase of property there may manifest acceptance of conditions of ownership, among them payment for facilities and services offered" (Seaview Assoc. of Fire Island, NY v. Williams, 69 N.Y.2d 987, 989, 517 N.Y.S.2d 709 (1987)).

The purchase in the community thus results in a quasi or implied-in-fact contract which includes "[a]n obligation to pay a proportionate share of the full cost of maintaining those facilities and services, not merely the reasonable value of those actually used by any particular resident" (*Id.*). In Patchogue Properties, Inc. v. Saccio, the Appellate Term for the 9th & 10th Judicial Districts expressly held that this obligation may be extended to property owners within the private community who were not members of the community association (185 Misc.2d 380, 712 N.Y.S.2d 737 [App. Term 2000]). The test is whether the property owner had "actual or constructive knowledge of the private nature of the community" (*Id.*, 185 Misc.2d at 382, 712 N.Y.S.2d at 739 (internal citation omitted)). Significantly, prior payment to the property association has been held to be sufficient notice of the private nature of the community (*Id.*; see Douglas Manor Assoc., Inc. v. Alimaras, 215 A.D.2d 522, 524, 626 N.Y.S.2d 552, 554 (2d Dep't 1995) (affirming trial court's granting of summary judgment in favor of plaintiff homeowner association for unpaid association dues where the property owners "either made adjustments at closing of title or paid money directly to the [homeowners' association] in compliance with the mandates of the covenants and restrictions") (emphasis added)).

In the instant matter, Plaintiff introduced evidence in the form of the Certificate of Incorporation of Oak Neck Lane Association, Inc., which was filed with the Department of State in

Oak Neck Lane Assoc., Inc. v. Anthony Pecorale
BRC 08-755
Motion to Reargue

or about May 1954, and a Deed Restriction, which was recorded with the Suffolk County Clerk's Office, dated November 9, 1964, that states, in pertinent part, the roads within the community where Defendant is a property owner and Plaintiff homeowners' association provides services are "private roads" maintained by the homeowners within the community and not the local government (Town of Islip). The Deed Restriction specifically provides,

[T]hat the purchasers of homes within this subdivision shall provide all services, requisite to the maintenance of Celano Lane [Defendant owns 15 Celano Lane], Carolee Court, and Oak Neck Lane, including, but not limited to, the cleaning, snow removal, and the road repair at their own cost and expense; and shall post a sign to indicate the same, which sign shall meet with the approval of the Town Engineering Department . . . (Id.) (emphasis added).

The Deed Restriction further states that the covenants and restrictions therein "shall be covenants attached to and running with the land" (Id.). Moreover, it was undisputed that Defendant had previously paid association dues thereby satisfying the notice of a private community requirement (Patchogue Properties, Inc. v. Saccio, supra).

The aforementioned documentation overwhelmingly rebukes Defendant's unsubstantiated contention that the roadway is a "public roadway". The Court notes that Defendant failed to introduce any evidence that the Deed Restriction has been amended and/or otherwise modified. Moreover, Defendant relies on inadmissible hearsay contained in the one sentence report purportedly prepared by Baretta Realty Skyline, dated April 23, 2009, which states in its entirety, "As per the Department of Highways, the above mentioned street [15 Celano Lane] is a public street", and speculative and conclusory assertions, which are insufficient to raise a triable issue of fact which would defeat summary judgment (See generally Hanly v. Quaker Chemical Co., Inc., 29 A.D.3d 860, 818 N.Y.S.2d 96 (2d Dep't 2006); Barry v. Chelsea Yacht Club, 15 A.D.3d 323, 790 N.Y.S.2d 33 (2d Dep't 2005) (citations omitted)). In addition, the deed submitted by Defendant, which reflects an intra-familial transfer in 2002, is of no moment since Defendant has owned the property from 1967 during which time he has "paid annual dues" to Plaintiff homeowners' association.

Defendant's argument that he should not be liable because he denied his membership in the homeowners' association due to alleged "inappropriate allocation of funds, secrecy and unethical tactics, failure to perform failure to properly bid, and violations of its own laws" is further of no avail here, but he "[m]ay conceivably have remedies available to him in a court of equity in a proceeding to enjoin the plaintiff corporation, which remedies . . . are not available to the Defendant in the District Court, because of jurisdictional limitations. Furthermore, if the claim is that the board of directors has acted in an arbitrary and capricious manner, this type of proceeding can be utilized to air such a complaint (Patchogue Properties, Inc. v. Cirillo, 54 Misc.2d 863, 283 N.Y.S.2d 560 [Dist. Ct. Suffolk Cty. 1967]). Consequently, Defendant has failed to raise a triable issue of fact that

Oak Neck Lane Assoc., Inc. v. Anthony Pecorale
BRC 08-755
Motion to Reargue

would defeat summary judgment.

Based on the foregoing, the Court finds that Defendant has failed to raise any triable issues of fact which would preclude summary judgment on the Third Cause of Action set forth in the Complaint for unjust enrichment. To the extent Plaintiff asserted a claim for breach of contract in the First Cause of Action, that cause of action is severed and dismissed since there was no evidence of an express contract and liability has been predicated upon a quasi-contract claim (See generally Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 807 N.Y.S.2d 583 (2005)). The Court further severs and dismisses the Second Cause of Action for an account stated as Plaintiff failed to demonstrate that Defendant did not object to its statements. Finally, Plaintiff's request for a hearing to determine the proper amount of damages, including costs and reasonable attorney's fees, if any, is granted to the extent a hearing shall be held on the date and time indicated below to determine such amounts.

This constitutes the Decision and Order of the Court.

Dated: December 7, 2009


STEPHEN L. UKELEY, J.D.C.

New Court Date:

Jan 14, 2010
@ 3:00 P.M.

DATE MAILED

DEC 09 2009