SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF, Justice — PART 8

SOLOW BUILDING COMPANY LLC

-v-

MORGAN GUARANTY TRUST CO. OF N.Y.

INDEX NO. 114972/01

MOTION DATE 1/10/05

MOTION SEQ. NO. 03

MOTION CAL. NO. 10

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	1-5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

Motion is decided in accordance with the accompanying memorandum decision.

2005

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 05 2005

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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Application of

SOLOW BUILDING COMPANY, LLC,

Petitioner,

For an Order Pursuant to Article 75 of the CPLR
Permanently Staying a Demand for Arbitration,

Index No. 114972/01
Mot. Seq. No. 003

-against-

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK,

Respondent.

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DIANE A. LEBEDEFF, J.:

Petitioner Solow Building Company, LLC ("Solow"), moves for an order granting it leave to renew its motion to vacate an arbitration award dated October 29, 2002, based on a purported change in the law (CPLR 2221 [e]), and thereupon vacating the prior order and the judgment (CPLR 5015).

The underlying order confirming the arbitration award, rendered on April 22, 2003, was affirmed by the First Department in a decision dated April 29, 2004; the Court of Appeals thereafter denied leave to appeal, and the Supreme Court denied a petition for certiorari while this motion was pending (*Matter of Solow Bldg. Co. v. Morgan Guar. Trust*, 6 A.D.3d 356 [1st Dept.], *lv. denied*, 3 N.Y.3d 605 [2004], *cert. denied* 125 S.Ct. 1310 [2005]).

CPLR 2221 does not provide a time limit for a motion to renew based on a change in the law, but the motion must be made before judgment is final (*Eagle Ins. Co. v. Persaud*, 1 A.D.3d 356 [2d Dept. 2003]; *Glicksman v. Board of Education/Central School Bd. of Comsewogue Union Free School Dist.*, 278 A.D.2d 364 [2d Dept. 2000]). Here, the direct appeal process had been completed, but the petition for certiorari was pending when the motion was made.

Assuming the motion could be considered timely, Solow has not identified any new law or any change in controlling law that would justify renewal. It contends that the First Department's decision in *Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, 12 A.D.3d 65 (2004), on remand from the United States Supreme Court, 540 U.S. 801, 801 (2003), constitutes a change in the law because it held that the Federal Arbitration Act, including the manifest disregard standard of review, applied broadly to arbitrations that "affect interstate commerce." However, the applicable change occurred in 2003, when the Supreme Court first decided *Citizens Bank v. Alafabco*, 539 U.S. 52 (June 2, 2003), and then granted certiorari in *Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, 540 U.S. 801 (October 6, 2003), vacated the decision and remanded for reconsideration in light of that decision. Those cases were applicable to the direct appeal in the instant matter (*Americorp Securities, Inc. v. Sager*, 239 A.D.2d 115, 116 [1st Dept.], *lv. denied* 90 N.Y.2d 808 [1997], "cases on direct appeal will be decided in accordance with the law as it exists at the time the appeal is decided"). The subsequent decision of the First Department on remand in *Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, is not new law, since it "merely applies previously established principles in a new factual setting or settles a question in a manner

that was clearly foreshadowed" (*id.*, citations omitted).

Moreover, Solow argued both in this court and on direct appeal (motion, exhibit 5, pp. 2-4), that the award should be vacated under the manifest disregard standard, and the argument was addressed on the merits and rejected.[1] In particular, the First Department noted that the arbitrators may have determined that changed circumstances necessitated a different method of calculation than that directed in a prior arbitration award, which Solow had been enjoined to obey.[2] So long as a "barely colorable justification" for an arbitral award may be discerned, the court may not vacate under the manifest disregard standard (*Matter of Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308 [1st Dept. 2004]). Accordingly, the award has already been reviewed and affirmed under the standard which Solow argues applies, and no further review in the guise of renewal is available.

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[1] In contrast, in the first appellate decision in *Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, 300 A.D.2d 32 (2002), the First Department stated that the legal basis for the arbitration award was "questionable," it could not be reviewed under the manifest disregard standard, and, "[g]iven our very limited scope of review," must be affirmed. No such doubts were expressed in connection with the instant matter.

[2] As set forth in this court's prior decision, following the first arbitration, the court granted an injunction precluding Solow from computing the "escalated rents on any basis other than that determined by the arbitrator," unless the "formula may be modified by agreement of the parties or necessitated by changes in the collective bargaining agreement by which Solow is bound" (*Morgan Guaranty Trust Co. of New York v. Solow*, 114 A.D.2d 818, 822-23 [1st Dept. 1985], *aff'd*, 68 N.Y.2d 779 [1986], *"Morgan I"*). This injunctive relief was found to be warranted by Solow's conduct, following arbitration, of continuing to issue wage escalation bills utilizing a method other than the one found by the arbitrators to be the correct one (*id.*, at 822). The injunction did not preclude respondent Morgan Guaranty Trust Company from seeking a change in the method of calculation based on changed circumstances or for any other reason.

Solow's attempt to renew the court's pre-arbitration determination that the dispute could be submitted to a new panel following vacatur of an award rendered by a previous panel, which decision also was affirmed on appeal, is wholly without merit (*In re Solow Building Co., LLC v. Morgan Guaranty Trust Co. of N.Y.*, 294 A.D.2d 224 [1st Dept.], *lv. denied*, 98 N.Y.2d 611 [2002]).

The motion for leave to renew is denied.

This decision constitutes the order of the court.

Dated: April 5, 2005

J.S.C.