

Omansky v Whitacre

2007 NY Slip Op 33513(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0601897/2004

Judge: Herman Cahn

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

HERMAN CAHN

P Index Number : 601897/2004

PART 49

OMANSKY, LAWRENCE A.

vs
WHITACRE, DRU

DEX NO. _____

Sequence Number : 006

OTION DATE 6/11/07

REARGUMENT/RECONSIDERATION

OTION SEQ. NO. 006

OTION CAL. NO. 12

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/24/07

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
LAWRENCE A. OMANSKY and NICOLENA
OMANSKY a/k/a LINDA OMANSKY,

Plaintiffs,

-against-

Index No. 601897/04

DRU WHITACRE, DRU WHITACRE MEDIA
SERVICES, LTD., and PEPPER ANDROS,

Defendants.

-----X
DRU WHITACRE, DRU WHITACRE MEDIA
SERVICES, LTD.,

Third-Party Plaintiffs,

-against-

64 NORTH MOORE ASSOCIATES, a New York
State partnership, 64 NO MOORE LLC, a New
York State Limited Liability Company, ROBERT
GURLAND, MARK OUDINE, BOMARK
ASSOCIATES, LLC, a New York State Limited
Liability Company, SUZANNE WINKELMAN
and MARK WINKELMAN

Third-Party Defendants.

-----X
CAHN, J.

Third-party defendants (collectively, 64 North Moore) move to reargue the court's decision dated March 19, 2007 which granted third-party plaintiffs' (collectively, Whitacre) motion for partial summary judgment and ordered 64 North Moore to defend and indemnify Whitacre in the main action. Whitacre has cross-moved to renew and reargue that portion of an

[*3]
order dated May 8, 2006 which disqualified Whitacre's attorney from representing it at trial.

With respect to 64 North Moore's motion for reargument, in the prior decision it was held that the plain language of an indemnity agreement required 64 North Moore to indemnify Whitacre in "any litigation," except for a specific, separate action that was pending at the time the agreement was entered into.

64 North Moore now argues that since the decision, non-party John Mark Oudine (Oudine), a partner in 64 North Moore, has been deposed. At his deposition, Oudine offered parol evidence regarding the purpose of the limited carve-out in the indemnity agreement.

CPLR 2221 (d) (2) provides that "[a] motion for leave to reargue: . . . (2) 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."

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.

Foley v Roche, 68 AD2d 558 (1st Dept 1979).

In reply papers, movant characterizes its motion as one for renewal, pursuant to CPLR 2221 (e), as well as for reargument.

Movant cites *Blue Chip Emerald LLC v Allied Partners* (299 AD2d 278 [1st Dept 2002]) as authority for setting aside the earlier decision, based on a fiduciary duty to disclose "special facts" known only to Whitacre, when the indemnity agreement was being negotiated, and

Whitacre's breach of that duty. According to 64 North Moore, Oudine stated, in substance, that the parties to the agreement had agreed to defend themselves against any litigation which might arise as a result of the sale of the premises, and that the one litigation that had been carved out was the only exception known to defendants at that time.

Neither the deposition testimony of Oudine, nor the holding in *Blue Chip* require the granting of the motion. Oudine's deposition testimony constitutes additional extrinsic evidence, with which 64 North Moore once again seeks to impeach an agreement already found to be unambiguous as a matter of law. The fact that Whitacre's attorneys knew that a similar action had been commenced by Omansky against Whitacre before the agreement was signed was known to the court at the time the original motion for partial summary judgment in this third-party action was argued before the court. Whitacre's counsel was disqualified from representing it at the trial of this action as a result of that information. 64 North Moore has failed to establish that the court misunderstood the facts or misapplied the law, or that new evidence requires a different result in this case.

The holding in *Blue Chip* turned on the fact that the co-venturer who was alleged to have defrauded plaintiff was the manager of the joint venture at issue. The Court found that this relationship created a fiduciary duty on the part of the co-venturer to disclose its negotiations with a third party for the immediate resale of the venture's principal asset at more than twice the price plaintiff had sold its interest for. Here, there is no allegation that Whitacre was a manager of the sale of units at the premises, as was the case in *Blue Chip*. The third party's commencement of additional litigation during the negotiation of the parties' agreement was a

[*5]

matter of public record “which defendant could have discovered through the exercise of ordinary diligence had [it] made inquiry at the appropriate time.” *Auchincloss v Allen*, 211 AD2d 417 (1st Dept 1995). 64 North Moore has failed to raise a material question of fact on the breach of fiduciary duty claim. *See Dubbs v Stribling & Assocs.*, 96 NY2d 337 (2001).

Whitacre’s cross motion to renew and reargue the disqualification of counsel from representing it at trial is denied. It is possible that this cross motion to reargue an order that was entered more than a one year ago is untimely. However, assuming the timeliness of the cross motion, in the May 8, 2006 order, counsel was permitted to continue representing Whitacre up until trial, and in the time leading up to trial, to handle discovery and pretrial matters and negotiations towards settlement. The order was issued based on counsel’s own representation, at oral argument, that he had been privy to information relevant to the indemnity agreement which he did not disclose to 64 North Moore during negotiation of that agreement. Counsel’s disqualification to represent Whitacre at trial continues, despite the grant of summary judgment to Whitacre on the issue of indemnity and defense, since it is likely that counsel will be called as a witness in the trial of the main action. Whitacre has not argued that the court misunderstood the relevant facts or law when it disqualified counsel, nor does the granting of partial summary judgment require that counsel’s disqualification be lifted.

Accordingly, it is

ORDERED that the motion of the third-party defendants to renew and reargue is denied; and it is further

ORDERED that the cross motion of the third-party plaintiffs to renew and reargue is denied.

Dated: October 24, 2007

ENTER:



J.S.C.

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