

**Zuckerman v Goldstein**

2008 NY Slip Op 32945(U)

October 27, 2008

Supreme Court, New York County

Docket Number: 113633-2007

Judge: Carol R. Edmead

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

PRESENT: ~~5~~ **CAROL EDMEAD**  
~~J.S.C.~~ **J.S.C.**  
*Justice*

PART 35

Index Number : 113633/2007  
**ZUCKERMAN, MYRON**  
VS.  
**GOLDSTEIN, SYDELL**  
SEQUENCE NUMBER : 003  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE 8/19/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
OCT 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants pursuant to CPLR 2221 for leave to reargue this Court's Order and Memorandum Decision, dated June 23, 2008, is granted, and upon reconsideration, the Court adheres to its determination; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/27/08

  
**CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
MYRON ZUCKERMAN,

Plaintiff,

Index No. 113633-2007

-against-

SYDELL GOLDSTEIN, AUDREY SILLER, BARBARA  
ZUCKERMAN, LANCE LANDERS, AND SAM-FAY  
REALTY, CORP.,

Defendants.

-----  
HON. CAROL ROBINSON EDMEAD, J.S.C.

**FILED**  
OCT 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

MEMORANDUM DECISION

Defendants Sydell Goldstein (“Sydell”), Audrey Siller (“Audrey”), Barbara Zuckerman (“Barbara”), Lance Landers (“Lance”),<sup>1</sup> and Sam-Fay Realty, Corp. (“Sam-Fay”) (collectively, “defendants”) move pursuant to CPLR 2221 for leave to reargue this Court’s Order and Memorandum Decision, dated June 23, 2008, and upon reargument, granting the relief originally requested by defendants in their underlying cross-motion. Defendants argue that, (1) the Court misinterpreted Article 10 of the 1989 Shareholders Agreement (the “1989 Agreement”), (2) in upholding the agreement dated October 17, 2002 (the “2002 Agreement”), the Court failed to recognize that certain claims treated as “derivative” by the Court were, in said agreement, explicitly made personal to the defendants, as individuals, and therefore, should not have been dismissed, and (3) in finding that the defendants, as beneficiaries of a trust had released plaintiff, as trustee, the Court determined an issue not briefed by the parties and to which defendants have not had an opportunity to be heard, and in so doing overlooked and misapplied the relevant law.

\_\_\_\_\_  
<sup>1</sup> Lance is Sydell and Audrey’s attorney (Decision p. 2). Lance’s counterclaim for abuse of process was severed and dismissed without opposition.

### *Factual Background*<sup>2</sup>

Sam-Fay is a corporation which owned the building located at 515 West 29<sup>th</sup> Street (the “West 29<sup>th</sup> Street property”). Sam-Fay was formed by the parents of Myron, Ira,<sup>3</sup> Sydell and Audrey. Upon his father’s death, Myron and his mother became trustees of a trust (the “Trust”) which held Sam-Fay for the benefit of Myron’s mother and Myron, Ira, Sydell and Audrey.<sup>4</sup>

Three other corporations are also involved in the parties’ dispute: (1) Sewing Machine (which was primarily Myron’s business), (2) Spreading Machine (which was primarily Ira’s business), and (3) IMSA, which was formed to purchase property for Spreading Machine.

In 1988, a mortgage was placed against the West 29<sup>th</sup> Street Property in order to raise the down payment for the purchase of a property in Maspeth (the “Maspeth Property”). A loan to acquire the Maspeth Property was obtained from New York City Industrial Development Agency (“IDA”), and the Maspeth Property was purchased in the name of IDA, with IMSA being given a lease and right to purchase the Maspeth Property for \$1.00.

In 1989, Ira, Myron, Sydell and Audrey, executed the 1989 Agreement, wherein they agreed that “income derived by Sam-Fay Realty Corp. from the MANHATTAN PREMISES [] be used first to pay or contribute toward the payment of the mortgage encumbering the Building and premises . . . located at 48-85 Maspeth Avenue . . . .” Defendants and Myron dispute as to

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<sup>2</sup> These facts are taken from the Court’s decision which is the subject of this reargument motion.

<sup>3</sup> Myron, Barbara (Ira’s widow), Sydell and Audrey each have a 25% interest in Sam-Fay.

<sup>4</sup> After their mother’s death in 1993 and the Trust dissolved, Sydell, Audrey, Myron and Ira became shareholders and Myron became president of Sam-Fay until he was replaced in 2006 by Audrey.

whether defendants consented to the mortgage being placed on Sam-Fay's West 29<sup>th</sup> Street Property.

Spreading Machine and Sewing Machine became sublessees of the Maspeth Property. Myron, as trustee under the Trust, also entered into a management agreement obligating Sam-Fay to pay not less than \$100,000 per year to enable Spreading Machine to meet its obligations under the sublease. Myron and Sewing Machine allegedly loaned more than \$600,000 to IMSA because it was burdened by monthly payments on the IDA loan. Defendants allegedly objected to the repayments of those loans from IMSA and Sam-Fay.

It was later determined that the Maspeth Property should be sold. Thus, the parties agreed to "move with all due diligence to effectuate the sale of the Maspeth property, all net proceeds of which [are] to be held in escrow pending resolution of all outstanding claims."

In 2002, Myron, Barbara, Audrey, and Sydell executed an Agreement providing for releases and payments of loans that Myron made (the "2002 Agreement"). The 2002 Agreement provided for payment to Sewing Machine, for the distribution to Myron of \$338,644.00, the payment of \$77,018.66 each to Audrey, Sydell and Barbara, and the balance to be distributed equally among the shareholders. The parties also waived any right to the monies distributed to Sewing Machine and acknowledged that the distributions were in full settlement of the disputes among the shareholders of the four corporations, and among each other.

In 2007, Sam-Fay's West 29<sup>th</sup> Street property was sold, and at a meeting of the shareholders in August 2007, Audrey, Sydell and Barbara voted to distribute 25% of the available proceeds to each other, except to Myron. (This action by Myron, for *inter alia*, breach of fiduciary duty, ensued).

In the prior motion, Myron sought summary judgment awarding him his *pro-rata* share of the proceeds of the sale of the West 29<sup>th</sup> Street Property and punitive damages. Myron also sought dismissal of defendants' counterclaims on the grounds that they were barred by defendants' release of claims, barred by the statute of limitations, defendants lacked legal capacity, and the counterclaims lacked merit.

The defendants cross moved for partial summary judgment on the issue of liability, finding that Myron was liable for all monies expended on the mortgage he placed against the West 29<sup>th</sup> Street Property, monies paid and/or credited for the management agreement to which Myron committed Sam-Fay, and for all monies taken from Sam-Fay or IMSA for the obligations of Spreading Machine and Sewing Machine.

#### *Court's Prior Decision*

After reciting the salient facts and arguments of the parties, the Court determined the following:

#### Counterclaims

#### Releases and Consents

. . . all of the shareholders were . . . directors of, and control, Sam-Fay. They agreed to waive any claims that Sam-Fay, or any of the other corporations might have. Further, the agreement released all shareholders, regardless of their position within the companies. The only claims reserved were those that were purely personal and did not arise out of the businesses. These counterclaims . . . arise out of the operation of the businesses, and were released by the 2002 Agreement. . . . Thus, defendants are bound by the 2002 Agreement, and are, thereby, precluded from seeking any compensation from Myron for any business activities that occurred prior to the signing of the 2002 Agreement.

The Court also notes that the 1989 agreement to the mortgage on the West 29<sup>th</sup> Street Property specifically states that income derived by Sam-Fay would be used first to pay or contribute toward the payment of the mortgage on the Maspeth property. Ex. 12, Art. 10. It was signed by all four shareholders; therefore, any contention that Audrey, Sydell and Barbara neither knew nor consented to such an arrangement is specious.

\* \* \*

Standing

Myron contends that any alleged injury was to the corporations, not to the individual shareholders. . . .

\* \* \*

Contrary to defendants' implied argument . . . the individual defendants have no standing to bring the counterclaims in their individual capacities. . . .

. . . even with respect to those claims that Sam-Fay has standing to raise, it is precluded by the 2002 Agreement from raising any claims with respect to any actions by Myron prior to October 17, 2002. Thus, the only claims that can be addressed by this court are the Sam-Fay's claims that date from after October 17, 2002 . . . .

Statute of Limitations

\* \* \*

In view of the fact that the 2002 Agreement waived all claims by the defendants that arose before or at that time, this issue is moot. Only claims that arose after October 2002 can be addressed. Since any such claims are within the statute of limitations period, there is no need to determine whether the statute of limitations would be applicable to the counterclaims.

\* \* \*

Breach of Fiduciary Duty

\* \* \*

With respect to any issues prior to the 2002 Agreement, there is no basis for defendants to [withhold] Myron's share of the proceeds from the sale of the West 29<sup>th</sup> Street Property. Defendants have not offered any evidence as to the amount at issue; however, any amount in excess of such amounts must be distributed to Myron.

The Court concluded by dismissing "any portions of Sam-Fay Realty Corp.'s counterclaims based upon actions occurring prior to October 17, 2002" as well as the counterclaims of Sydell, Audrey, and Barbara.

*Defendants' Instant Motion*

Defendants argue that the Agreement referred to by the Court as Exh. 12 was not a "1989 agreement to the mortgage on the West 29<sup>th</sup> Street Property" as the Court stated, but expressly pertained to the "mortgage" encumbering the Maspeth Avenue Property, and had nothing to do

with the mortgage on the West 29<sup>th</sup> Street Property. Therefore, the Court misapprehended the 1989 Agreement in reaching its conclusion that Audrey, Sydell and Barbara knew and consented to the complained of mortgage on West 29<sup>th</sup> Street. At the time the complained of mortgage was executed in 1988 encumbering the West 29<sup>th</sup> Street Property, Sydell, Audrey, and Barbara were not shareholders, officers or directors of Sam-Fay, but were beneficiaries under the Trust controlled by Myron. The complained of mortgage transferred the right of the beneficiaries to receive the income from the property to another, which transfer is expressly forbidden by EPTL § 7-1.5. Paragraphs “seventeenth” and “twenty-second” of the trust at issue expressly forbids the beneficiaries from transferring their right to the income generated by the trust or to encumber the principal of the trust. There is no proof that plaintiff consented in writing to or ratified the complained of mortgage.

Next, defendants argue that paragraph 4 of the 2002 Agreement on which the Court relied to deny Sydell, Audrey, and Barbara standing to bring the counterclaims in their individual capacities, expressly provides that the remaining assets of *Spreading Machine* be distributed equally to Sydell, Audrey, and Barbara. Thus, by virtue by said Agreement, the causes of action that may have been derivative, became personal to the defendants. Once the distribution was made, the percentages due to the defendants were no longer causes of action of the corporation, but a personal cause of action to Sydell, Audrey, and Barbara for the amount converted by Myron that he now owes Sydell, Audrey, and Barbara. Also, tax returns show that the distribution was made between August 2002 and July 2003. Therefore, Myron must show that this distribution was made prior to October 17, 2002. Upon his failure to do so, Sydell, Audrey, and Barbara are entitled to 50% of the amount taken.

Finally, the Court's apparent holding that Sydell, Audrey, and Barbara have settled all their claims as beneficiaries against Myron as trustee, misapprehends that the Trust is a separate legal entity, and that Myron, as Trustee of that legal entity, owes the individual beneficiaries certain fiduciary duties. Any causes of action arising therefrom are personal to the beneficiaries. Thus, the counterclaims of Sydell, Audrey, and Barbara do not arise from the business of the corporations, but arise from the operation of the Trust. Defendants point out that the Court stated that the "only claims reserved were those that were purely personal and did not arise out of the businesses. These counterclaims, even if they date from when Myron was trustee, arise out of the operation of the businesses, and were released by the 2002 Agreement." Thus, the Court acknowledged that 2002 Agreement did not release Myron from the personal claims of Sydell, Audrey, and Barbara, and overlooked the fact that beneficiaries of a trust cannot release the trustee without a full accounting. The 2002 Agreement was not executed by Sydell, Audrey, and Barbara as beneficiaries of the Trust, and Myron acted, as Trustee, in a manner completely at odds with the specific Trust language by failing to pay the income generated by the Trust to the beneficiaries and failing to collect on loans made with Trust assets. It is also uncontested that Myron never gave any accounting.

Should the Court allow reargument, the Court should note that defendants are seeking an accounting, restitution and damages, and the time limitation for maintain an action to pay a disposition or distributive share against a personal representative does not accrue until the account of the personal representative is judicially settled.

### *Opposition*

The mortgage on the West 29<sup>th</sup> Street Property and 1988 Management Agreement with Spreading Machine involving Sam-Fay did not constitute a breach of fiduciary duty by plaintiff because Myron derived no personal benefit from them at the expense of the other beneficiaries of the trust. Each beneficiary had a 25% interest in Sam-Fay and received a 25% interest in IMSA. As a result of these transactions, Sydell, Audrey, and Barbara owned two buildings instead of one, and subsequently profited when the Maspeth Property was sold. The loan by IDA and the mortgage by Sam-Fay were part of the same financial package, designed to achieve the common purpose of purchasing the Maspeth Property. None of the beneficiaries assigned their interest in the Trust, but consented to the loan by Sam-Fay for the purchase of a new building, and the borrowing of funds by Sam-Fay to make that loan. Moreover, Article Nineteenth of the Will of Sam Zuckerman expressly authorized the trustees to borrow money upon the security of the West 29<sup>th</sup> Street Property and to execute a mortgage as security therefor.

Sydell, Audrey, and Barbara consented to the purchase of the Maspeth Property. They signed a Letter of Representation with IDA. Sydell, Audrey, and Barbara were defined as "Individual Guarantors" and represented that they knew of no proceedings wherein an unfavorable decision would adversely affect the Guarantee Agreement or Subordination Agreement from them and Sam-Fay as creditors. Ira signed the Promissory Note on behalf of Spreading Machine to repay the loan from Sam-Fay.

The incorrect reference by the Court to the 1989 Agreement as an agreement to the Sam-Fay mortgage had no bearing on the Court's decision. The Court made no finding whether or not all parties consented to the transaction, and such consents were not the basis of the Court's

decision. The relevance of the 1989 Agreement and the 2002 Agreement is that all parties consented to the use of Sam-Fay's funds for the benefit of the IMSA.

Further, the counterclaims are barred by the Release, wherein each shareholder released any and all claims that he or she had against each other, and each family corporation released any and all claims that it had against each other family corporation and each shareholder. The counterclaims allege that plaintiff breached his fiduciary duty to the corporation and defendants, but do not allege that he breached his duty to the trust beneficiaries. Although defendants characterize this as a new, beneficiary/trustee claim, the claim relates to the business of Sam-Fay and IMSA, and the status of Sydell, Audrey, and Barbara as beneficial owners of Sam-Fay and as shareholders of IMSA. Paragraph 8 of the 2002 Agreement settled all disputes among the individuals and family corporations "regarding prior personal and/or business transactions" involving the corporations.

Defendants' argument that a release of a trustee should only rarely be effective in the absence of an accounting and that there was no accounting is not supported by the record and not previously made to the Court. Nor was defendants' argument that they have personal claims against Myron for failing to make payments to them as required by the 2002 Agreement previously made. In any event, in paragraph 4(d) of the 2002 Agreement, Sydell, Audrey, and Barbara agreed to the final distribution from Sewing Machine and waived any right to participate therein. Therefore, such arguments cannot be offered on this motion for reargument.

Plaintiff also maintains that defendants lack legal capacity to assert the counterclaims. Any injury was to the corporations. Sydell, Audrey, and Barbara were injured only to the extent that they were entitled to share in the profits of the respective corporations. Their alleged injuries

were therefore derivative, not direct. In any event, none of the corporations are parties to this action except Sam-Fay. Any alleged claims by or on behalf of the other corporations may not be asserted in this action. Defendants also point out that Barbara lacks legal capacity to sue, as she was not a beneficiary of the trust and did not become a shareholder in any of the corporation until 1996 after Ira's death.

Finally, the counterclaims are barred by the statute of limitations. As the counterclaims do not arise from the transaction alleged in the Complaint (distribution of proceeds of sale of West 29<sup>th</sup> Street except to Myron), they are barred to the extent they allege matters predating October 10, 2001. The limitations period regarding any claim by Sam-Fay against Myron expired six years after the 1988 transaction. The distribution of shares of Sam-Fay was made when the trust was terminated in 1993, and the limitations period for any action against a trustee by a beneficiary for breach of fiduciary duty begins to run when the trust is terminated. Thus, any claim by the beneficiaries against Myron as co-trustee expired in 1996 with respect to money damages, and in 1999 with respect to equitable relief.

### *Reply*

Defendants insist that the Court overlooked the relationship between the parties and the fiduciary obligations owed from Myron to defendants, and failed to apply controlling fiduciary law. Defendants detail the manner in which Myron, as trustee, breached his fiduciary duties to the beneficiaries of the Trust and the fiduciary duties he owed to his corporation. The 1988 mortgage was placed for the benefit of Ira, and this mortgage was a waste of corporate assets for the benefit of one beneficiary, Ira, at the expense of the others. The Management Agreement was also a waste of corporate assets.

Furthermore, Myron cannot demonstrate that Audrey, Sydell and Barbara were fully informed in 1988 that Spreading Machine could not pay its bills. To pay the bills to finance the Maspeth Property, Spreading Machine had already borrowed more than \$231,000, and although Myron knew this at the time of the 1989 Agreement, defendants did not. As to Sam-Fay, where at least one of the subtenants, *i.e.*, Myron, never intended to pay rent, and where the loan made by Sam-Fay was immediately subordinated so that it could never be collected upon, violated the prudent investor standard Myron was bound to follow.

Defendants argue that Myron's acts as President and trustee of the Trust, in 1988, in mortgaging the Sam-Fay asset for a non-corporate purpose, in executing a management agreement to the detriment of Sam-Fay for the benefit of his brother, in making a loan to his brother for less than the face amount of the mortgage, in entering into these agreements when he knew that his brother could not make the Maspeth Property payments due under the sublease, *inter alia*, do not arise out of the operations of Sam-Fay and are therefore not included in the Release. Here, there was no full disclosure to the defendants.

Further, to the extent there is any deficiency in the pleading, defendants' pleading may be amended to conform to the facts, and breaches of duties are amply pleaded. The Release, which expressly excludes claims that are purely personal in nature and do not arise from the operations and business of the four corporations, never mentions the Trust, was not signed by Audrey, Sydell and Barbara as beneficiaries of the Trust, and was not signed by Myron as trustee of the Trust. The breach by Myron were simply not an issue at the time the Release was executed.

Finally, defendants' argument, that certain claims are not derivative in nature and thus should not be dismissed, is not a new argument. And, the counterclaims are not barred by the

statute of limitations. Myron never openly repudiated his obligation to administer the Trust, which is required before the statute of limitations period begins to run.

### *Analysis*

The motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, “is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Mucklowe v Browning School*, 80 AD2d 790, 437).

Here, defendants point to several instances in which the Court, arguably, misconstrued facts and law and thus, reargument is granted. However, upon reargument, the Court adheres to its earlier decision.

Upon review of the 1989 Agreement, Article 10 thereof indicates that the Agreement pertained to the mortgage encumbering the *Maspeth* Property. As defendants point out, Article

10 does not make reference to any mortgage upon the West 29<sup>th</sup> Street Property, but states that the rental or other income from Sam-Fay from the “Manhattan Premises” (i.e., the West 29<sup>th</sup> Street Property) would be used toward the payment of the mortgage on the Maspeth Property. However, the Court’s incorrect reference to the mortgage as one upon the West 29<sup>th</sup> Street Property, does not obviate the Court’s conclusion reached in the paragraphs immediately preceding this statement, that “defendants are bound by the 2002 Agreement, and are, thereby, precluded from seeking any compensation from Myron for any business activities that occurred prior to the signing of the 2002 Agreement.”

In this regard, the 2002 Agreement, which is between Myron, Barbara, Sydell and Audrey, contained a “release” of “any and all claims” that:

- (I) any Shareholder has or had against any other Shareholder;
- (ii) any Shareholder has or had against IMSA, SME, and/or MZS, excluding however, the rights of the Shareholders to receive the payments set forth in this agreement. . . .”
- (iii) IMSA, Sam-Fay, SME and/or MZS have against each other or against any Shareholder.

The 2002 Agreement continues:

Subject to all defenses including the statute of limitations, this release is not intended to cover claims, if any, that are purely personal in nature and do not arise from the operations and business of the four corporations and do not arise from an individual’s status as a shareholder of any one of the four corporations listed above.

It is undisputed that defendants’ counterclaims allege that Myron breached his fiduciary duty to the corporation and defendants, but do *not* allege that he breached an independent duty as a trustee to Audrey, Sydell and Barbara in their capacities as the Trust beneficiaries. Further, the Court may permit an amendment to the pleading to conform to the proof presented before it (*see*

*Carnival Co. v. Metro-Goldwyn-Mayer, Inc.*, 23 AD2d 75, 258 NYS2d 110 [1<sup>st</sup> Dept 1965]), any claim in the proposed pleading must have merit (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]). However, the 1989 Agreement herein plainly excludes only those claims which (1) are purely personal, (2) “do not arise from the operations and business of the four corporations” and (3) do not arise from an individual’s status as a shareholder of any one of the four corporations. Defendants cannot establish that their counterclaims “do not arise from the operations and business of the four corporations” so as to survive the release contained in the 1989 Agreement. Indeed, all of defendants’ allegations against Myron pertain to the manner in which Sam-Fay, IMSA, and Sewing Machine (“his own company”) and Spreading Machine (Ira’s business) were operated. That the 1989 Agreement does not mention “trust” or is signed by Barbara, Sydell and Audrey in their capacities as “beneficiaries” does not obviate the fact that they each released each other (and Myron) and the four corporations from “any and all claims” against each other. Thus, for Barbara, Sydell and Audrey’s “personal” claims as beneficiaries of the Trust to survive the release of any and all claims, such claims must fall within the exception carved out in the 1989 Agreement, and the exception applies to purely personal claims that do not arise from the operations and business of the four corporations. The Court notes that the 2002 Agreement indicates that Barbara, Sydell and Audrey further agreed to “execute such further instruments . . . as may be necessary or required to effectuate the . . . fulfillment of the obligations of IMSA, SME, and MZS under the IDA Loan Documents.” And, they agreed that the “Payments . . . are in full settlement of the disputes that existed among the Shareholders, SME, IMSA, MZS, and Sam-Fay regarding prior personal and/or business transactions that affected the assets, liabilities and business of IMSA, Sam-Fay . . .” Therefore, since defendants’

counterclaims, as alleged and as proposed, arise out of the operations and business of the four corporations, such claims are barred by the comprehensive release contained in the 1989 Agreement.

The Court notes that defendants' reliance on *In re Capone* (258 AD2d 581, 685 NYS2d 466 [2d Dept 1999]) is misplaced. In *In re Capone*, the Second Department upheld the grant of a petition to invalidate a release and direct a judicial accounting. A release executed in the absence of bad faith, fraud, or duress, and with full knowledge of the estate's status, will generally be upheld as valid. The two interim accountings petitioner received before signing the release were "only brief summaries, failed to provide a complete picture of the estate, and significantly understated the estate's tax liability." Given that the record failed to indicate that petitioner executed the release with full knowledge of the estate's status, the release was properly invalidated.

Here, it is uncontested that Sydell, Audrey, and Barbara engaged in extensive discussions and negotiations over a two-year period, in which all parties were represented by counsel. Prior to their execution of the 1989 Agreement containing the release, Barbara, Sydell and Audrey had signed a "Letter of Representation" where they represented that they knew of no proceedings wherein an unfavorable decision would adversely affect the Guarantee Agreement or *Subordination Agreement from them and Sam-Fay as creditors*. The submissions therefore support Myron's contention that defendants were aware of financing arrangements in connection with the purchase of the Maspeth Property.

Furthermore, whether paragraph 4 of the 2002 Agreement, which provides that the

remaining assets of Spreading Machine be distributed equally to Sydell, Audrey, and Barbara, renders defendants' claims otherwise derivative claims, personal to the defendants, is inconsequential. Any such "purely personal" claims of Barbara, Sydell and Audrey for the amount converted by Myron that he now allegedly owes them are barred by the release for the reasons noted above.

**Conclusion**

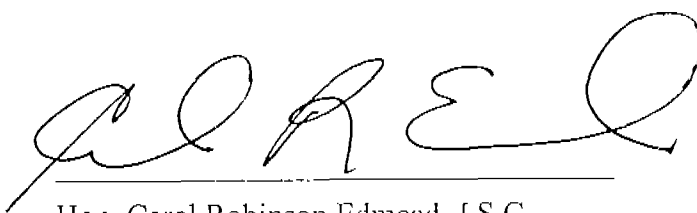
Therefore, based on the foregoing, it is hereby

ORDERED that the motion by defendants pursuant to CPLR 2221 for leave to reargue this Court's Order and Memorandum Decision, dated June 23, 2008, is granted, and upon reconsideration, the Court adheres to its determination; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 27, 2008



Hon. Carol Robinson Edmead, J.S.C.

**CAROL EDMEAD  
J.S.C.**

**FILED**  
OCT 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK