

**Prime Income Asset Mgt., Inc. v American
Real Estate Holdings L.P.**

2008 NY Slip Op 33291(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 603164/05

Judge: Barbara R. Kapnick

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

PRESENT: Hon. **BARBARA R. KAPNICK**

PART 39

Justice

PRIME INCOME ASSET MGMT

INDEX NO. 603164/05

- v -

AMERICAN REAL ESTATE HOLDINGS

MOTION DATE _____

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE J.S.C. DATED: _____

Dated: 12/4/08

FILED
DEC 09 2008
COUNTY CLERK'S OFFICE
NEW YORK


BARBARA R. KAPNICK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

-----X
PRIME INCOME ASSET MANAGEMENT, INC.
and LIBERTY BANKERS LIFE
INSURANCE CO.,

DECISION/ORDER
Index No. 603164/05
Motion Seq. No. 009

Plaintiffs,

- against -

AMERICAN REAL ESTATE HOLDINGS L.P.
and AREH WINDSOR LOCKS, L.L.C.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

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By Decision dated November 30, 2006, on motion sequence numbers 001, 002 and 003, the Hon. Helen E. Freedman dismissed plaintiffs' Complaint. By Decision dated February 23, 2007 on motion sequence number 005 Justice Freedman granted reargument, but adhered to her prior Decision.

Justice Freedman's Decision was subsequently affirmed by the Appellate Division, First Department (41 AD3d 176). A motion for leave to appeal to the Court of Appeals was dismissed "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." (10 NY3d 740).

Plaintiffs thereafter moved, under motion sequence number 007, for leave to amend their Complaint. By Order dated May 22, 2008, Justice Freedman stated as follows:

Upon the foregoing papers, it is ordered that this motion is denied because the Court intended to dismiss the action in its entirety.

Counterclaims are dismissed for failure to pursue and because dismissal of claims resolves issues. Sanctions denied.

Plaintiffs also moved, under motion sequence number 008, for leave to amend their Answer or reply to the counterclaim to assert fraud or fraudulent inducement. By Order dated June 5, 2008, Justice Freedman denied that motion, stating, in relevant part, as follows:

The Complaint, which alleged negligent misrepresentation, breach of contract and numerous related claims has already been dismissed and the dismissal has been affirmed by the Appellate Division. Interposing a fraud cause of action at this time is tantamount to reopening the claims that have already been dismissed. The equitable estoppel claims set forth in the original reply will suffice to defend the counterclaims.

Application for sanctions is denied.

Defendants now move for an order pursuant to CPLR § 2221(a) modifying the May 22, 2008 Order to the extent that the Court *sua sponte* dismissed the counterclaims for want of prosecution even

though the 90-day written demand required by CPLR § 3216(b)(3) as a condition precedent to dismissal for want of prosecution was not made.

Plaintiffs do not oppose the motion, but cross-move for an order:

(1) pursuant to CPLR § 2221(d) granting reargument on plaintiffs' motion to amend and supplement their reply to counterclaims pursuant to CPLR §§ 3025(b) and 1003 and granting plaintiffs leave to amend and supplement their reply to defendants' counterclaims in this action in the form of the proposed First Amended and Supplemental Reply to Counterclaims to assert a cause of action for fraud upon the ground that the Court overlooked and misapprehended law and facts dispositive of the issues raised therein; or, in the alternative,

(2) clarifying (and reconciling) the Court's May 22, 2008 Order, which dismissed the counterclaims, and the June 5, 2008 Order, which seems to contemplate the continued litigation of the counterclaims.

The motion and that portion of the cross-motion seeking clarification of the prior order are granted in accordance with the decision dictated on the record on November 19, 2008 to the extent of deeming the counterclaims active and continued, as was implicit in Justice Freedman's June 5, 2008 Order.

That portion of the cross-motion seeking leave to reargue the June 5, 2008 Order is denied.

Counsel shall appear for a status conference in IA Part 39 on January 28, 2009 at 11:00 a.m.

This constitutes the decision and order of this Court.

Dated: December 7, 2008



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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