[* 1]

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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56m

Mr. Hye Kim

INDEX NO. 600827/08

MOTION DATE 7/18/08

- v -

MOTION SEQ. NO. 002

Chi Soon Um et al

MOTION CAL. NO. _____

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

FILED

JAN 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11/18/08

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

•

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----------x

MI HYE KIM,

Plaintiffs **Index No. 600827/08**

-against- **DECISION AND ORDER**

CHIN SOOK UM, HAE YONG KIM and DE PARIS CORP.

Defendants

----------x

RICHARD B. LOWE III, J:

The defendants move pursuant to CPLR 2217 *et seq.*, for an order granting reargument on and/or renewal of the plaintiff's motion for summary judgment in lieu of complaint and upon such reargument and/or renewal either; (a) staying all proceeding herein and compelling the parties to proceed herein via the American Arbitration Association as further set forth in the "Stock Purchase Agreement," and/or (b) denying the plaintiff's motion for summary judgment in lieu of complaint.

Background

The plaintiff, Mi Hye Kim ("Kim"), sued the defendants, Chin Sook Um ("Um"), Hae Yong Kim and De Paris Corp. (collectively "defendants"), for default on a promissory note. The promissory note was for the amount of $135,000 plus interest in exchange for Kim's shares of De Paris Corp. Kim moved for summary judgment in lieu of complaint. In an order dated June 9, 2008, this Court granted Kim's motion.

The defendants' attorney, Louis M. Diluzio, Esq. ("Diluzio"), in his affirmation, claims

that sometime between April 22, 2008, when the motion for summary judgment in lieu of complaint was submitted, and May 9, 2008, the oral argument date, he received from his client, Um, a copy of a stock purchase agreement ("agreement") in connection to the promissory note at issue. Diluzio claims that the delay for receiving the agreement was due to Um's lack of English. This agreement, however, was not annexed along with the defendants' other documents for the motion for summary judgment in lieu of complaint. It is unclear from the defendants' present memorandum in support of the motion to reargue/renew as to when Diluzio attempted to submit this agreement to the court. The plaintiff contends that Diluzio attempted to submit the agreement after the oral argument when this Court had requested the transcript to be ordered.

The significance of this agreement is that it contains an arbitration clause, and Diluzio claims that this proceeding should have been sent to arbitration. Since this Court did not receive or consider this agreement, Diluzio argues the motion for summary judgment in lieu of complaint was decided without consideration given to the arbitration clause. The other argument Diluzio set forth is that the promissory note that the defendants gave to Kim in exchange for Kim's shares to De Paris Corp. lacks consideration. The defendants alleges that Kim had already previously issued all authorized shares of stock in De Paris Corp., hence, the stock secured by the promissory note is illusory. The defendants do not annex any evidence to support this claim.

Kim denies the defendants' claim that the stocks are illusory. Also, Kim argues that there was no reason for the defendants' failure to submit the agreement in opposition to the motion for summary judgment in lieu of complaint. Kim argues that Um had the agreement in her possession the whole time, that the defense in fact made mention of the agreement prior to the motion being filed, and that Um's defense of lack of English is an insufficient excuse since

Um is a sophisticated businesswoman. Furthermore, Kim argues that this agreement would not have changed the outcome of the motion.

DISCUSSION

A motion for leave to renew and reargue is governed by Civil Practice Law and Rules § 2221. Civil Practice Law and Rules § 2221 (f) states:

> A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made.

(CPLR 2221 [f])

Therefore, pursuant to Civil Practice Law and Rules § 2221 (f), Um's motion for leave to renew and reargue shall be discussed and determined separately.

Motion for leave to Reargue

Civil Practice Law and Rules § 2221 (d)(2) states the 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*; and

(CPLR 2221 [d] [2]) (emphasis added)

Furthermore, a motion for leave to reargue based on a new legal theory is disfavored. In *DeSoignies v Cornasesk House Tenants' Corp*, 21 A.D.3d 715 (1st Dept 2005), the plaintiff unsuccessfully moved for leave to reargue based on a new legal theory. The court there held that "[r]eargument is not available where the movant seeks only to argue a new theory of liability not previously advanced" (*id.* at 718).

In the present case, the defendants failed to submit the agreement in the prior motion for summary judgment in lieu of complaint. A motion to reargue is not to be granted to consider

"facts not offered in the prior motion." (CPLR 2221 [d] [2]) Since this agreement was not offered in the prior motion, a motion to reargue will not be granted based on this new fact.

Concerning the defendants' argument that the promissory note lacks consideration. This argument lacks merit. The claim that the note lacks consideration because of fraud is based on the defendants' suspicions that are unsubstantiated by any evidence. More importantly, the court has already considered the allegations of fraud in the previous motion. This is not a new fact or law that the court overlooked. The defendants cannot circumvent the statutory requirements by reinventing an old argument. Hence, the defendants' motion for leave to reargue is denied.

Motion for leave to Renew

Civil Practice Law and Rules § 2221 (e) (2) and (3) states:

> 2. shall be based upon *new facts not offered on the prior motion that would change the prior determination* or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. *shall contain reasonable justification for the failure to present such facts on the prior motion.*

(CPLR 2221 [e] [2] [3]) (emphasis added)

To prevail on a motion for leave to renew, the movant must demonstrate: (1) the new facts not offered on a prior motion would change the prior determination; and (2) a reasonable justification for the failure to present such facts on the prior motion. (*Swedish v Beizer*, 51 AD3d 1008, 1010 [2d Dept 2008]); (*see also Lardo v Rivlab Transp Corp*, 46 AD3d 759, 760 [2d Dept 2007]) (holding that a new affidavit supported the movant's version of the facts, however movant's justification for failing to present the affidavit in the prior motion was not a reasonable one); (*see also Siegel v Monsey New Square Trails Corp*, 836 NYS2d 678, 680 [2d Dept 2007]) (denying the movant's motion for leave to renew because movant failed to exercise due diligence to discover the evidence earlier and evidence was merely cumulative, and would

not have changed the outcome of previous motion); (*see also Williams v Nassau County Medical Center*, 829 NYS2d 645, 646 [2d Dept 2007]) (denying the movant's motion for leave to renew based on movant's evidence would not have change the outcome of previous motion).

a. Different outcome of prior determination based on the arbitration clause

In the present case, the agreement would not have changed the outcome of the previous motion for summary judgment in lieu of complaint. The defendants allege that the agreement contains an arbitration clause, and therefore, this proceeding should have been directed to arbitration. However, this argument fails to address the court's reasons for granting the summary judgment in lieu of complaint. The prior decision held that the plaintiff established a prima facie case by submitting proof of an instrument for the payment of money and of the default, and the defendants failed to raise a triable issue of fact and did not dispute that they have defaulted. The Arbitration clause in the agreement has no bearing on this Court's reasoning for granting summary judgment.

i) *arbitration is not mandatory in this case*

In arguendo, even if the defendants were successful in submitting the agreement for the prior motion, the defendants' right to arbitration is not absolute.

Paragraph 16 of the agreement states that, ". . . in the event that there is a dispute arising out of or relating to this [a]greement, then at the *request of any party* hereto made to the other parties in writing, such disagreement shall be resolved by arbitration . . . ." In the plain meaning of the arbitration clause, arbitration is not mandatory and is by request. In this case, neither party alleged that they requested arbitration.

ii) *the right to arbitration has been waived by the defendant*

Where a litigant has a right to compel arbitration, this right is waived when he or she make use of the judicial system. (*see Digitronics Inventioneering Corp v Jameson*, 52 A.D.3d 1099, 1100 [3rd Dept 2008]) (holding that the defendant waived his right to arbitration by participating in the judicial process); (*see also Accessory Corp v Capco Wai Shing, LLC*, 39 A.D.3d 344, 345 [1st Dept 2007]) (holding that the defendant waived his right to arbitration by participating in discovery); (*see also Spataro v Hirschhorn*, 40 A.D.3d 1070, 1071 [2d Dept 2007]) (holding that the defendant waived his right to arbitration by filing a counter-claim) The defendants in this case waived their right to arbitration by their participation in this litigation when defending against the previous motion.

b. Different outcome of prior determination based on lack of consideration

The defendants' argument that the promissory note lacks consideration also fails to demonstrate that the outcome of the previous motion would have been different. The defendants merely allege that the plaintiff already issued all legal shares of De Paris Corp.'s stocks, and therefore, the stock in exchange for the promissory note was illusory. The defendants fail to offer any proof in support of this allegation and thus, fail to raise an issue of triable fact with this argument. The evidence and argument set forth by the defendants would not have change the prior determination.

c. Due diligence on the defendants' part

Finally, the defendants did not exercise due diligence in discovering or presenting the agreement to this Court. Um had in her possession the agreement and did not give it to her attorney until after the motion was fully submitted. The only excuse the defendants gave was Um's lack of English. However, this explanation lacks credibility, since Um is a businesswoman. According to defendants' own memo, Um has owned other business. It is safe

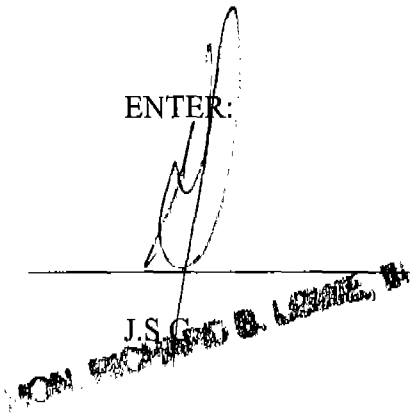
to assume that Um possesses a sufficient level of English to understand the importance of the agreement. Conclusively, the defendants failed give a reasonable justification for not presenting the agreement earlier, and failed to show that the agreement would have changed the outcome of the prior motion.

Conclusion

Therefore, based on the foregoing, the motion is denied.

Dated: December 18, 2008

ENTER:



J.S.C.