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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Trump

- v -

Cheng

INDEX NO. 602877/05

MOTION DATE 12/15/06

MOTION SEQ. NO. 014

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 - 7 2009

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/6/09

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

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DONALD J. TRUMP, individually and derivatively on behalf of HUDSON WATERFRONT ASSOC., L.P., HUDSON WATERFRONT ASSOC., I, L.P., HUDSON WATERFRONT ASSOC. II, L.P., HUDSON WATERFRONT ASSOC. III, L.P., HUDSON WATERFRONT ASSOC. IV, L.P., HUDSON WATERFRONT ASSOC. V, L.P.,

Plaintiff,

-against-

HENRY CHENG, VINCENT LO, CHARLES YEUNG, EDWARD WONG, DAVID CHIU, HUDSON WATERFRONT CORP., HUDSON WATERFRONT I CORP., HUDSON WATERFRONT II CORP., HUDSON WATERFRONT III CORP., HUDSON WATERFRONT IV CORP., HUDSON WATERFRONT V CORP., HUDSON WATERFRONT ASSOC., L.P., HUDSON WATERFRONT ASSOC. I, L.P., HUDSON WATERFRONT ASSOC. II, L.P., HUDSON WATERFRONT ASSOC. III, L.P., HUDSON WATERFRONT ASSOC. IV, L.P., HUDSON WATERFRONT ASSOC. V, L.P., HUDSON WESTSIDE ASSOC., L.P., HUDSON WESTSIDE ASSOC. I, L.P., HUDSON WESTSIDE ASSOC. II, L.P., HUDSON WESTSIDE ASSOC. III, L.P., HUDSON WESTSIDE ASSOC. IV, L.P., HUDSON WESTSIDE ASSOC. V, L.P., JOHN DOE I and JOHN DOE II,

Defendants.

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Index No. 602877/05

RICHARD B. LOWE, III, J:

Motion sequence numbers 014 and 015 are consolidated for disposition.

BACKGROUND

This action involves a dispute over the sale price of, and the use of sale proceeds from, parcels of land that were developed by the parties in this action. The 20-count amended complaint asserted direct and derivative causes of action. Defendants moved to dismiss the amended complaint for lack of jurisdiction, failure to state a cause of action, and based upon documentary evidence. By decision and order dated July 24, 2006, this court granted the motions to dismiss, dismissing all of plaintiffs' claims except the eighteenth cause of action for access to books and records (the "7/24/06 Decision"). Judgment was entered on September 19, 2006.

Plaintiff Donald J. Trump ("Trump") now moves (in motion sequence number 014) to reargue the motions to dismiss pursuant to CPLR 2221 (d), and, upon reargument, for an order denying the motions. Trump also moves to renew his opposition to defendants' motions to dismiss pursuant to CPLR 2221 (e), and, upon renewal, for an order reinstating the causes of action and permitting plaintiffs to serve an amended complaint (motion sequence number 015). Alternatively, Trump sought relief from the judgment, pursuant to CPLR 5015. [1] The facts of this case were stated in detail in this court's decision and order, *Trump v Cheng* (9 Misc 3d 1120[A], 2005 NY Slip Op 51703[U] [Sup Ct, NY County 2005]), the 7/24/06 Decision, and this court's decision and order dated October 1, 2007 (on motion sequence numbers 016, 017 and 018). Therefore, the court presumes familiarity with the facts, and the facts will not be restated

[1] On the parties consent, these motions were held in abeyance while the parties engaged in settlement negotiations, which, it is the court's understanding, did not resolve the parties' dispute. Therefore, the court now addresses these motions.

herein. [2]

DISCUSSION

Motion for Reargument (mot seq 014)

Defendants argue that Trump's reargument motion is untimely, because it was made more than 30 days after Trump's service of a copy of the 7/24/06 Decision. In opposition, Trump argues that, under CPLR 2103, his reargument motion is timely, because he had five days from July 31st (which was August 5th), then another 30 days from August 5th, pursuant to CPLR 2221 (d) (3) (which, Trump claims, was September 5th). In other words, Trump argues that he gets the benefit of an additional five days because he served the order by mail, and that September 5th is 35 days from July 31st.

Under CPLR 2221 (d) (2), reargument "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." Section (d) (3), added to the statute in 1999, states that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

CPLR 2103 (b) (2) provides that "service by mail shall be complete upon mailing," and that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period." In interpreting the interplay between CPLR 2221 and 2103, the Practice Commentary to CPLR 2221 (d) (3) states as follows:

> When the order with notice of entry is served by mail, clearly an

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[2] Unless otherwise indicated in this decision, defined terms in the 7/24/06 Decision shall have the same meaning when used herein.

> extra five days under CPLR 2103 (b) (2) get added to the 30-day period when it is the winner who is serving the loser. But should that extra five days be added when the loser is doing the serving, in effect letting the loser extend its own time for acting by serving the objectionable order by mail?
>
> A 1999 amendment adding a subdivision (d) to CPLR 5513 says yes, specifically, but note that it applies only to the period in which to appeal. The new CPLR 2221 (d) (3) has no counterpart provision, suggesting that the loser who serves the papers should not rely on any extra time from CPLR 2103 (b) (5) for making the motion to reargue

(Siegel, 1999 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C2221:8, 2008 Cumulative Pocket Part, at 126).

In other words, CPLR 5513 explicitly permits the loser to add the extra five days to the 30-day appeal period even when it is the loser who serves the order. No similar amendment was made for the motion to reargue pursuant to CPLR 2221, which was independently codified. Therefore, the statutory gift of the extra five days for the time to appeal does not apply to the time within which a motion for reargument must be made where the losing party serves notice of entry of the underlying order (*Thompson v Cuadrado*, 277 AD2d 151 [1st Dept 2000]). CPLR 2221 (d) (3) was not intended to enlarge Trump's time to move for reargument when he, as the losing party on the underlying motion, had possession of the order and himself mailed notice of entry. Accordingly, Trump had 30 days from July 31st, the date that he mailed a copy of the underlying order, to move for reargument.

Here, Trump entered the 7/24/06 Decision with the Clerk of Court on July 31, 2006. On the same day, he mailed notice of entry to all defendants, which completed service on July 31st. Thus, Trump had until August 30 to move to reargue. Trump moved to reargue on September 5, 2006, six days later. Therefore, Trump's reargument motion was untimely under CPLR 2221 (d)

(3).

Moreover, even assuming for the moment that Trump has the benefit of the five-day extension under CPLR 2103 (b) (2), which he does not, this provision allows five days to be "added to the prescribed period," giving the moving party 35 days from service of notice of entry of the order. Thirty-five days from July 31st is September 4th, not, as Trump argues, September 5th. Thus, even with the benefit of the five-day extension, Trump's reargument motion is untimely.

Furthermore, the supplemental affirmation of Trump's counsel, John Nicholas Iannuzzi, submitted prior to defendants' submission of opposition papers, is dated September 15, 2006 (16 days late) and was received by defendants on September 21, 2006 (22 days late). For the foregoing reasons, Trump's motion for reargument, and his attorney's supplemental submission, are untimely (*Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004] [trial court erred in granting defendant's reargument motion, because motion was untimely made more than 30 days after service of a copy of the order granting underlying motion]).

Under certain circumstances, this court may exercise its discretion to look past the 30-day requirement to hear a technically untimely motion for reargument (*see e.g. Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 165 [1st Dept 2004] [holding that it was not an abuse of discretion for trial court to reconsider prior ruling despite 30 days passing from notice of entry of prior order, because an issue had arisen regarding plaintiff's claims due to the fact that plaintiff testified through a Spanish-speaking interpreter]; *see also Leist v Goldstein*, 305 AD2d 468, 469 [2d Dept 2003] [granting reargument was appropriate exercise of court's discretion where reargument motion "was made at the court's request and after [plaintiff's] filing of a notice of

appeal but prior to the perfection of the appeal"]).

Here, however, Trump fails to identify any circumstances to justify an extension of time, or any excuse for his untimely motion. Nor does Trump explain the even more untimely supplemental affirmation submitted by his counsel. Accordingly, pursuant to CPLR 2221 (d) (3), Trump's motion to reargue is denied as untimely (*Transport Workers Union v Schwartz*, Sup Ct, NY County, Aug. 31, 2005, Ramos, J., Index No. 600268/03 [reargument motion deemed untimely where made 16 days after 30-day deadline].

In any event, in reviewing the substance of Trump's motion, Trump argues that the court misapplied the applicable standards of review on the underlying motion. Specifically, Trump argues that the court failed to credit as true the pleading and opposition papers, improperly credited documents submitted by defendants, and improperly invoked the business judgment rule. However, Trump fails to identify any law or fact overlooked or misapprehended by the court in determining the prior motion. Moreover, many of Trump's arguments merely repeat arguments already rejected by the court on the underlying motion to dismiss, which is not the proper function of a motion to reargue (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] ["(r)eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (citation omitted) or to present arguments different from those originally asserted"]). Accordingly, Trump's reargument motion (motion sequence number 014) is denied for the additional reason that he fails to identify any law or fact overlooked or misapprehended by the court.

Renewal & Relief from Judgment (mot seq 015)

Trump seeks relief under CPLR 2221 (e) and 5015 (a) (2) based upon material allegedly

discovered after the 7/24/06 Decision. According to Trump, these new documents show that the Cheng Group dominated and controlled the boards of the general partner entities, causing the general partners to abdicate their corporate responsibilities. Trump claims that this evidence supports his argument that the general partners did not seek to obtain the highest price for the Properties. Specifically, Trump claims that his new evidence shows finder's fee "kickback" payments made to Fineview, an entity allegedly owned or controlled by Cheng; loans made in violation of the Agreements; and improper tax payments.

Under CPLR 2221 (e) (2), renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination ... ." Renewal is appropriate "where new information arises which existed at the time the prior motion was made and is relevant to the moving party's claim, but which was unavailable or unknown to that party at the time of the original motion" (*Lee v Ogden Allied Maintenance Corp.*, 226 AD2d 226, 227 [1st Dept 1996]). Under CPLR 5015 (a) (2), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, ... upon the ground of ... newly-discovered evidence which, if introduced ..., would probably have produced a different result and which could not have been discovered in time ... ."

As a preliminary matter, many of Trump's renewal arguments are duplicative of the arguments raised on the underlying motion and on his present motion for reargument. Moreover, for the following reasons, none of the purported newly-discovered evidence would have "change[d] the prior determination" (CPLR 2221 [e] [2]) or "would probably have produced a different result" (CPLR 5015 [a] [2]).

On the renewal motion, Trump submits evidence of a $17.5 million payment made by

Extell (the purchaser of the Properties) to Fineview. In addition, with motion sequence number 019, dated approximately seven months after his renewal motion, Trump submitted additional purportedly newly-discovered evidence concerning Fineview. However, all of Trump's evidence concerning Fineview demonstrates that a payment was made to Fineview by Extell, not by the Hudson Waterfront LPs. Moreover, as discussed in this court's October 1, 2007 decision on Trump's summary judgment motion (motion sequence number 017), the Hudson Waterfront LPs had no agreement with Fineview and paid no fees to Fineview. Additionally, Trump's counsel admitted in court that the Fineview account does *not* name Cheng as the beneficial owner, but rather, names another individual as the owner of that account (6/8/07 Tr., at 22). Thus, Trump's purported new evidence concerning Fineview and finder's fee "kickbacks" is based upon the same speculation as Trump's previous allegations and submissions to the court. Therefore, this evidence would not produce a different result.

Trump argues that his new evidence shows that loans were made between the limited partnerships and entities related to Cheng and Lo at interest rates that violated provisions in the Agreements dealing with loans. Trump also argues that the limited partnerships made improper tax payments. Trump argues that the loans and tax payments show "a pattern, practice and routine" of misconduct that should excuse demand (Trump's 11/22/06 Reply Brief, at 8-9).

As discussed in the 7/24/06 Decision, the demand futility "analysis is fact-intensive and proceeds director-by-director and transaction-by-transaction" (*Khanna v McMinn*, 2006 WL 1388744, *14, 2006 Del Ch LEXIS 86 [Del Ch 2006]). Thus, the inquiry is not whether there is a pattern, practice or routine of misconduct, but whether the particular transaction at issue involves domination or director interest by a majority of the board. For example, in *Goldman v*

Pogo.com, Inc. (2002 WL 1358760, 2002 Del Ch LEXIS 71 [Del Ch 2002]), the board of directors forgave a debt owed to the company by a director, and, immediately thereafter, the company received bridge loan financing. According to the plaintiff, the bridge loan enabled the company to forgive the director's debt, rendering that director interested in the decision to approve the loan. The plaintiff argued that this director was interested in subsequent loans because of the debt forgiveness on the initial bridge loan.

The Delaware Chancery Court refused to excuse demand relating to a subsequent loan, because the plaintiff failed to allege facts raising a reasonable doubt that a majority of the board lacked disinterestedness or independence concerning the later loan. The court stated:

> I have expressed in my analysis ... a fundamental uneasiness with the line of reasoning advanced by Plaintiff that a given board member's disqualifying interest or association in one transaction will *ipso facto* render that board member disqualified in perpetuity for future transactions. Because the Complaint alleges nothing more than [the director's] debt forgiveness prior to the First Bridge Loan, I find as a matter of law that Plaintiff has failed to set forth sufficient facts rebutting the presumption that [the director] acted independently and disinterestedly in approving the Third Bridge Loan

(*Id.* at *6).

Similarly, here, even assuming for the moment that the loan interest rates were not permitted under the Agreements, and that the limited partnerships made improper tax payments, Trump fails to allege that the loans or tax payments had anything to do with defendants forcing the limited partnerships to undersell the Properties, which is the transaction that is the subject of Trump's claims. In other words, none of the purported new evidence indicates that any of the defendants were interested in the sale of the Properties, lacked independence, or dominated the board with respect to the relevant transaction, that is, the sale of the Penn Yards. Therefore, this

evidence would not produce a different result.

Moreover, with respect to the purported improper tax payments, Trump fails to explain why these payments were improper, and the Agreements expressly permit the general partners to pay taxes for the partners and to make tax distributions to meet each partner's tax liabilities (Agreements §§ 9 [e] and 20.9). Indeed, defendants submit documentary evidence showing that the limited partnerships distributed funds to Trump to cover his tax liabilities: $6,851,282 for fiscal year 2001-2002; $5,642,170 for fiscal year 2002-2003; and $12,976,086 for fiscal year 2003-2004 (11/17/06 Gross Aff., Exs. E, F and G). Thus, of the purported $50 million in improper tax distributions, Trump himself was the beneficiary of approximately $25.5 million in tax distributions, which, based upon defendants' documentary evidence, was permitted under the Agreements.

Trump also argues for the first time in his reply papers that the limited partnerships each had one director, Chris Lam (Lam), and one officer, Gross, both of whom were controlled by Cheng. Trump argues that "Lam is the nexus between the General Partner and Cheng" (11/22/06 Goldberg Aff., ¶ 1). However, defendants submit documentary evidence showing six directors and at least two officers, thereby undermining Trump's argument.

CPLR 5015 (a) (3) offers relief upon grounds of "fraud, misrepresentation, or other misconduct of an adverse party ... ." However, Trump fails to show that defendants withheld the purported newly-discovered evidence, or engaged in any fraud or misconduct with respect to this evidence. Trump also fails to show any impropriety in "the means by which the prior order was procured" (*Haber v Nasser*, 289 AD2d 200, 201 [2d Dept 2001]). For the foregoing reasons, Trump's motion (motion sequence number 015) for renewal and relief from judgment is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motions (motion sequence numbers 014 and 015) for reargument, renewal and relief from judgment, are denied.

Dated: January 6, 2008

ENTER:

J.S.C.