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

PRESENT: MARTIN SHULMAN J.S.C Justice

PART 1

Index Number : 602614/2007
NIAZI, AMRAN
vs
JPMORGAN CHASE BANK
Sequence Number : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 602614/07

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

s motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1
Answering Affidavits — ~~Exhibits~~	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 5, 2009

MARTIN SHULMAN J.S.C.
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 1

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AMRAN NIAZI, TRANSCORP CONSTRUCTION CORPORATION,

Plaintiffs,

-against-

JP MORGAN CHASE BANK,

Defendant.

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Index No. 602614/07

Decision & Order

MARTIN SHULMAN, J.:

Plaintiffs move to renew and reargue this court's decision and order dated June 2, 2008 which dismissed the complaint in this action for fraud, breach of the covenant of fair dealing, breach of fiduciary duty and breach of contract. Defendant opposes the motion.

The salient facts of the action are summarized in the June 2, 2008 decision and order. All of plaintiffs' causes of action are based upon defendant's alleged improper draw down on a letter of credit procured by plaintiff Transcorp Construction Corporation ("Transcorp") in connection with a construction loan from defendant to non-party Action Housing II, LLC ("Action II"). For the reasons set forth below, the court grants plaintiffs' motion to renew and reargue and upon granting same, adheres to the June 2, 2008 decision and order's determination.

Judicial Estoppel

Plaintiffs contend the court misapprehended the relevant facts and/or misapplied the law regarding the doctrine of judicial estoppel. This court found that plaintiffs' allegations in this action that defendant committed fraud, breached its fiduciary duties

and breached its contractual obligations in drawing down on the letter of credit were contradicted by the allegations in the verified petition in Matter of Harlem Properties Group, LLC, Member of Action Housing II, LLC, for the Judicial Dissolution of Action Housing II, LLC, a Limited Liability Company, pursuant to Section 702 of the New York Limited Liability Company Law v Action Housing II, LLC, Leroy Morrison and Kenneth Morrison, New York County Index No. 602645/07 (the "Dissolution Action").[1]

Plaintiffs argue that judicial estoppel should not apply because: 1) the allegedly inconsistent allegations made in the Dissolution Action were withdrawn when the proceeding was discontinued without prejudice; 2) Harlem Properties Group LLC, the petitioner in the Dissolution Action, is not a party to this action; and 3) the statements made in the Dissolution Action are not inconsistent with those made in this action.

At the outset, the court declines to consider plaintiffs' second and third arguments, which were not raised in opposition to the underlying motion to dismiss. Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. Pro Brokerage, Inc. v. Home Ins. Co., 99 A.D.2d 971 (1st Dept. 1984); William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 (1st Dept. 1992).

As to plaintiffs' claim that the allegations in the verified petition in the Dissolution Action should not be binding in this action, the statements are informal judicial admissions which, in some cases, may constitute documentary evidence within the

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[1] Plaintiff Niazi brought the Dissolution Action in his capacity as a 50% owner and the managing member of Harlem Properties Group LLC.

meaning of CPLR 3211(a)(1). See Morgenthow & Latham v Bank of N.Y. Co., 305 AD2d 74, 79-80 (1st Dept), lv denied 100 NY2d 512 (2003). In opposition to the underlying motion, plaintiff Niazi, the managing member of the petitioner in the Dissolution Action, did not deny that the facts asserted in the Dissolution Action were asserted with his knowledge or under his direction.[2] Id. at 79. In fact, no explanation or rebuttal was ever proffered.

Regardless, even without the inconsistent allegations in the Dissolution Action, the same result would ensue because, as more fully set forth below and in the June 2, 2008 decision and order, the controlling loan documents conclusively establish that defendant was entitled to draw down upon the letter of credit without notice to plaintiffs and the non-party borrower, thus undermining each of plaintiffs' causes of action.

Documentary Evidence

The defaults upon which defendant based its request to draw down on the letter of credit were: 1) Action II's failure to pay the notes in full on the May 25, 2006 maturity date; and 2) plaintiff Transcorp.'s failure to extend the letter of credit in accordance with the terms thereof. Plaintiffs claim that: 1) there was no loan default because the loan never became due since defendant, by its actions,[3] extended the maturity date; 2) in

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[2] Notably, plaintiffs have yet to submit an affidavit of anyone with personal knowledge of their claims in this action. Further, the fact that the petition in the Dissolution Action was verified by counsel is unavailing, and is raised for the first time in this motion. Matter of Liquidation of Union Indem. Ins. Co. of New York, 89 N.Y.2d 94, 103 (1996).

[3] Plaintiffs assert that, as a result of defendant's request that the letter of credit be extended in or about November 2006, Transcorp had every reason to believe that the maturity date of the notes had been extended. In actuality, the notes had already matured on May 25, 2006.

contravention of the building loan agreement's ("BLA") terms, defendant failed to notify Transcorp or Action II that the loan had become due and failed to provide a grace period to cure the default; and 3) defendant was required to notify Transcorp. prior to drawing down on the letter of credit.

Plaintiffs' arguments are based upon their claim that defendant's alleged actions modified the terms of the loan documents. However, each of the relevant loan documents provides, in relevant part, that all modifications thereto must be in writing executed by the parties. Accordingly, defendant's actions could not alter the terms of the loan documents as plaintiffs insist and, by their express terms, the loan documents permitted defendant to draw upon the letter of credit without notice because: 1) the notes initially matured on November 25, 2005 and could be (and were) extended one time only for six months to May 25, 2006; 2) failure to pay the notes on maturity is a default under the BLA permitting defendant to draw down on the letter of credit; 3) as detailed in this court's June 2, 2008 decision and order, no notice of default and opportunity to cure is required under the relevant loan documents; and 4) the terms of the letter of credit do not require notice to Transcorp prior to drawing thereon. Finally, Transcorp defaulted by failing to timely extend the letter of credit.

Plaintiffs' instant motion fails to establish that the court misinterpreted the loan documents. Accordingly, it is

ORDERED that the motion to renew and reargue is granted and, upon granting same, the court adheres to its June 2, 2008 decision and order dismissing the complaint.

The foregoing constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
January 5, 2009

Hon. Martin Shulman, J.S.C.