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

PRESENT: HON. RICHARD B. LATE, Justice PART 56

Fluxo Cane

- v -

Newedge

INDEX NO. 600809/08

MOTION DATE 7/25/08

MOTION SEQ. NO. 002

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
FEB 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/14/09

HON. RICHARD B. LATE, 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

----------X

FLUXO-CANE OVERSEAS LTD. And MANOEL FERNANDO GARCIA,

Petitioners,

Index No. 600809/06

-against-

NEWEDGE USA, LLC (f/k/a FIMAT USA, LLC),

Respondent.

----------X

Hon. Richard B. Lowe, III:

Respondent moves this court pursuant to CPLR 2221(d) for an order granting leave to reargue this Court's ruling that Petitioner Manoel Fernando Garcia ("Garcia") is not required to arbitrate claims under a Personal Guarantee.

Background

The underlying facts in this matter are contained in this court's decision dated June 13, 2008 (the "June Decision"), reference to which is made herein. Generally, however, this dispute arises from trading losses on the New York Board of Trade, which is part of the ICE Futures Exchange (the "Exchange"). There was a Customer Agreement between Fluxo-Cane Overseas Ltd. (Fluxo-Cane) and Newedge USA LLC (Newedge), through which Fluxo Cane, a member of the Exchange, made sugar futures and options trades in an account at Newedge, also a member of the Exchange. Some of the funds used by Fluxo-Cane to margin those trades were loaned to Fluxo-Cane by a Newedge affiliate, pursuant to a Financing Agreement. Garcia personally guaranteed to Newedge all obligations of Fluxo-Cane under the Customer Agreement and Financing Agreement.

In early 2008, Fluxo-Cane incurred losses exceeding $5,000,000 on trades for which Newedge, as Clearing Broker, paid the exchange to cover the losses. Newedge then filed a notice of Arbitration with the Exchange seeking to arbitrate the dispute related to these losses. Newedge's claims were brought under the Customer Agreement, the Financing Agreement, and the Personal Guarantee.

In the underlying motion to stay the arbitration, this Court in the June Decision: (1) denied the stay as to the Customer Agreement and ordered arbitration, but (2) granted a stay of arbitration as to the claims under the Financing Agreement and the Personal Guarantee. The ruling denying arbitration under the Personal Guarantee was based on the court's finding that there was no agreement to arbitrate contained in the guarantee and "Garcia is not a member of ICE and, therefore, did not [ ] agree to submit to arbitration" (Decision p. 6).

The respondent argues that the court's assumption that Garcia is not a member of ICE was mistaken. Therefore respondent argues reargument should be granted and Garcia should be compelled to arbitrate the claims against him under a Personal Guarantee.

Discussion

A motion to reargue must 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" (CPLR 2221[d][2]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v Jeannot*, 18 AD3d 679 [2nd Dept 2005].

Respondent argues the court misapprehended a fact when it found that Garcia was not a member of ICE. Indeed, the court's decision does appear to contradict itself whereby the early

part of the decision finds "Garcia is a conferring member [of ICE]" (June Decision p 2). However, later the decision holds that "Garcia is not a member of ICE" and therefore could not be compelled to arbitrate (June Decision p. 6). Furthermore, Petitioners previously acknowledged at oral argument that they both are members of the Exchange (Nagin Aff., Ex A at 5:8-5:9). Respondants argue Garcia is a conferring member of ICE and Petitioners, in opposition to this instant motion, do not contest this assertion. Therefore, in view of the foregoing, the motion to reargue is granted.

Upon reargument being granted, the respondent argues that Garcia, as a member of ICE, should be compelled to arbitrate the claims brought under the Personal Guarantee. When finding that the claims under the Customer Agreement were arbitrable, this court held that allowable claims also includes any claims arising from trading losses on the Exchange (June Decision p 11). Therefore, Newedge argues this court's rationale for holding that claims under the Customer Agreement are allowable claims applies equally to claims under the Personal Guarantee. In response, Fluxo-Cane argues (1) Newedge's claim against Garcia is based on the Personal Guarantee he signed and not on trades directly or personally placed by Garica and (2) the Guarantee, in part, applies to obligations under the Financing Agreement, which the Court found were not arbitrable.

ICE Rule 20.01(f) provides: "Allowable Claim" shall mean a Claim for losses arising *directly* from (i)any order or Transaction for the purchase, sale, exercise or expiration of an Exchange Futures Contract or Exchange Option . . .(Verified Complaint Ex 6 at 4)(emphasis added). Part of the claims against Garcia under the Personal Guarantee arise from the Customer Agreement. This court has already found that claims arising under the Customer Agreement

arise directly from trading losses and are therefore arbitrable. Therefore, under the Personal Guarantee, Garcia is another party from whom the same trading losses are sought. It has already been determined these claims for losses are subject to arbitration. Furthermore, the Exchange Rules only require that the losses directly arise from transactions on the Exchange. The rules do not require that the individual or entity, from whom losses are sought, *personally* placed the trade.

Lastly, the Personal Guarantee specifically permits Newedge to enforce the Personal Guarantee without first instituting an action against Fluxo Cane. The Personal Guarantee states that Garcia waived "any right to require a proceeding first against [Fluxo Cane] . . ." (Verified Petition Ex 5 ¶ 5). Therefore the forum selection clause in the Financing Agreement has no bearing on the Personal Guarantee. Accordingly, arbitration is not inappropriate where the Personal Guarantee applies to obligations both under the Customer Agreement, which is arbitrable, and the Financing Agreement, which is not.

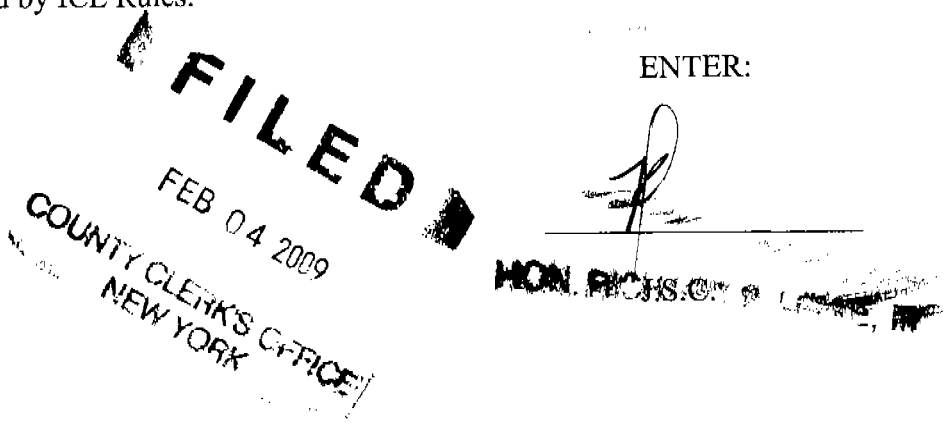
Conclusion

Therefore, the motion to reargue is granted and it is hereby

ORDERED that Petitioner shall arbitrate any "Allowable Claim" under the Personal Guarantee and as defined by ICE Rules.

Dated: January 14, 2009

ENTER:



HON. RICHARD [illegible]