

<b>Foremost Contr., LLC v New 118, LLC</b>
2009 NY Slip Op 30664(U)
March 24, 2009
Supreme Court, New York County
Docket Number: 107819/07
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT: J.S.C.  
*Justica*

PART 1

Index Number : 107819/2007  
FOREMOST CONTRACTING, LLC

vs  
NEW 118TH LLC  
Sequence Number : 005  
SUMMARY JUDGMENT

INDEX NO. 107819/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

his motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A+B  
Answering Affidavits — Exhibits A  
Replying Affidavits Exhibits 1-4


PAPERS NUMBERED	
1	_____
2	_____
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.

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

Dated: March, 2009

  
MARTIN SHULMAN  
J.S.C. *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 1

-----X  
 FOREMOST CONTRACTING, LLC,

Plaintiff,

- against-

Index No.: 107819/07

**Decision and Order**

NEW 118, LLC, MICHAEL HERSHKOWITZ and  
 MICHAEL DAVIS

Defendants.  
 -----X

**Martin Shulman, J.:**

Co-defendant, Michael Davis ("Davis" or "co-defendant"), seeks reargument of this court's October 6, 2008 Decision and Order ("Oct. 6<sup>th</sup> Decision"<sup>1</sup>) which denied Davis' motion for summary judgment dismissing Foremost's third cause of action as against this co-defendant and alternatively reiterates his request for a CPLR 2201 stay of this action as well as other related relief ("Reargument Motion or "Stay Request", where applicable).

After co-defendant's Reargument Motion became *sub judice*, Davis moved by order to show cause *inter alia* to compel Foremost to provide supplemental responses to Davis' discovery requests and produce documents necessary for his defense of the third cause of action ("Discovery OSC"). Foremost opposes both the Reargument Motion and Discovery OSC, both of which are being consolidated here for disposition.

**Relevant Background**

Foremost commenced this breach of contract action against the LLC, co-

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<sup>1</sup> The balance of this decision and order will utilize the defined terms set forth in the Oct. 6<sup>th</sup> Decision.

defendant, Hershkowitz and Davis arising from a condominium project known as "The Ivy", viz., its construction of an East Harlem residential apartment building located at 2303 Second Avenue and 249 East 118<sup>th</sup> Street, New York, New York. Hershkowitz and Davis are members of the LLC which owned The Ivy at all times relevant to this dispute. On August 2, 2005, the LLC executed a construction contract with Foremost to complete the construction of The Ivy to create condominium units (Exhibit 1 to Esses Reply Aff. in Further Support of Reargument Motion and Stay Request). At the same time, Hershkowitz and Davis also signed a letter agreement to pay Foremost \$282,046.00 as additional consideration beyond the \$6,631,618.00 that was otherwise required to be paid under the construction contract ("Additional Sum") (*Id.*).

In its third cause of action, plaintiff alleges co-defendants, Hershkowitz<sup>2</sup> and Davis, are personally obligated to pay Foremost the Additional Sum as an additional undertaking which plaintiff claims remains due and owing (see Exhibit B annexed as Exhibit 3 to Esses Reply Aff. in Further Support of Reargument Motion). In defense of this claim, Davis contends the letter agreement was merely an amendment to the construction contract and is an LLC debt for which he should not be personally responsible.

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<sup>2</sup> As noted in the Oct. 6<sup>th</sup> Decision, Hershkowitz has been federally indicted for alleged fraud in connection with various construction projects including The Ivy. During the pendency of this action, attorneys for the named defendants withdrew as Hershkowitz's counsel and the LLC went into involuntary bankruptcy. And during the underlying round of summary judgment/discovery motion practice, Hershkowitz refused to appear pro se to either defend against any of Foremost's claims or prosecute its own counterclaims against plaintiff *inter alia* for the negligent construction of The Ivy (pervasive, building-wide leaks due to inadequate exterior waterproofing and unworkmanlike installation of plumbing, etc.). Thus, the Oct. 6<sup>th</sup> Decision awarded plaintiff a default judgment as to liability against Hershkowitz on the third cause of action and set the matter down for an inquest to assess Foremost's damages thereunder.

Relevant to the Reargument Motion, the Oct. 6<sup>th</sup> Decision determined that Davis was not entitled to summary judgment dismissing the third cause of action as against him, because "the letter agreement's language does not clearly establish that it was entered into by the LLC and merely signed by . . . Davis in . . . [his] capaci[ty] as [a] member[ ] thereof. Foremost's interpretation [of the letter agreement] is plausible, thus raising an issue of fact which precludes summary judgment . . ." (bracketed matter added)(Exhibit A to Memorandum of Law in Support of Reargument Motion).

### **Reargument Motion**

As articulated in his memorandum of law in support of the Reargument Motion, co-defendant argues that since the letter agreement was executed concomitantly with the construction contract, this circumstance does not demonstrate "direct and explicit evidence of [Davis'] actual intent to be personally liable . . .". Thus, Davis urges the court to reconsider that portion of the Oct. 6<sup>th</sup> Decision and now find that Davis signed the letter agreement as an LLC member warranting summary judgment in co-defendant's favor dismissing the third cause of action.

Alternatively, and relying on his affidavit previously filed with his summary judgment motion (see Exhibit 1 to Esses Reply Aff. and Exhibit B to Memorandum in Support of Reargument Motion), Davis reiterates two reasons for his Stay Request: (1) all of the relevant construction documents, including documentary proof of a substantial number of installment payments Hershkowitz presumably made towards the Additional Sum (see Memorandum in Support of Reargument Motion at p. 3) and of Foremost's negligent construction of The Ivy, were removed when the FBI arrested Hershkowitz and Ivy Woolf-Turk ("Turk"), another LLC member and non-party, all of which Davis is

incapable of gaining access to pending the resolution of the federal criminal action; and (2) because Hershkowitz and Turk have exercised their Fifth Amendment privilege and are refusing to give deposition or trial testimony in this action, Davis cannot obtain necessary (and potentially) exculpatory testimonial evidence to adequately defend against the third cause of action, sustain the LLC's counterclaim alleging plaintiff's negligent construction and, at the very least, justify his right to offset against Foremost's claim for the Additional Sum.

With respect to his Discovery OSC, co-defendant contends that a court order is necessary to compel Foremost to properly respond to Davis' First Set of Interrogatories and Request for Documents because plaintiff's response thereto is wholly inadequate (Esses Aff. in Support of Discovery OSC at ¶¶ 9-13; see also, Exhibits A and B annexed thereto).

In opposition to the Reargument Motion, plaintiff attaches its principal's previously filed affidavit in opposition to Davis' summary judgment motion (Exhibit A to Safran Opp. Aff.) and basically contends that: Davis has not factually or legally demonstrated entitlement to any CPLR §2221(d) relief and the Oct. 6<sup>th</sup> Decision must stand; the court did not misapprehend any fact or relevant law in finding a material issue of fact with respect to personal liability; there is no basis to grant a stay of this action; and in any event, the Reargument Motion and Stay Request must both be denied since plaintiff's papers are defective as Davis failed to include copies of the papers the parties filed in the underlying round of summary judgment/discovery motion

practice.<sup>3</sup>

In opposing the Discovery OSC, plaintiff's counsel contends that Davis' document "requests and interrogatories are massive, lack specificity, and are not material and necessary (or relevant) . . ." (Safran Opp Aff. to Discovery OSC at ¶15) to assist Davis' defense against Foremost's claim against co-defendant, personally, for the Additional Sum as agreed to in the letter agreement, a contract plaintiff's counsel likens to an instrument for the payment of money only. *Id.*

#### Discussion

CPLR 2221(d) states as follows:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. 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
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 AD2d 558 (1<sup>st</sup> Dept. 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously

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<sup>3</sup> In reply, co-defendant's counsel attached a complete set of papers resolving plaintiff's concern that the court lacked the necessary record to properly consider the merits of the Reargument Motion or Stay Request.

decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 (1<sup>st</sup> Dept. 1984); *William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22 (1<sup>st</sup> Dept. 1992).

Plaintiff's Reargument Motion must fail. Davis has not shown that the Oct 6th Decision denying the branch of his motion for summary judgment dismissing the third cause of action was wrong, e.g., the court misapprehended any of the critical facts or even misapplied the law. Both parties simply attached copies of the parties' dueling affidavits previously filed in support of, and in opposition to, co-defendant's summary judgment motion. On this record, there is no reason to modify the Oct. 6<sup>th</sup> Decision and a trial is necessary to resolve the issue of whether Davis is or is not personally liable for the Additional Sum. Co-defendant's papers are legally insufficient to warrant CPLR 2221(d) relief. Accordingly, Davis' Reagument Motion must be denied.

Normally, an "assertion of the privilege against self-incrimination is an insufficient basis to preclude discovery . . ." *Fortress Credit Opportunities I LP v. Netschi*, \_\_\_ AD3d \_\_\_, 2009 NY Slip Op 1181, 2009 N.Y. App. Div. LEXIS 1181 [\*\*1](1<sup>st</sup> Dept.). Nor is the court "required to stay a civil action until a pending related criminal prosecution has been terminated so that the party can avoid the difficulty of choosing between presenting evidence in his or her own behalf and asserting his or her Fifth Amendment rights . . ." *Campbell v. New York City Transit Authority*, 32 AD3d 350, 352 (1<sup>st</sup> Dept. 2006). This scenario is not the case here. Davis is not implicated in any criminality involving The Ivy, but rather is confronted with a conundrum imposed not only by Hershkowitz's invocation of the Fifth Amendment privilege, a choice the latter co-defendant exercised at his own peril, but also by the denial of access to LLC

documents the FBI continues to retain, which could shed light on and potentially corroborate Davis' defensive position here.

Notably, plaintiff never cross-moved to: (1) strike any of Davis' affirmative defenses; (2) dismiss any of the counterclaims; and/or (3) seek summary judgment on its third cause of action. Nor does plaintiff quarrel with the court's reasoning for denying that portion of Davis' summary judgment motion seeking dismissal of the third cause of action. In other words, Foremost appears to objectively acknowledge Davis' personal liability for the Additional Sum is not necessarily a foregone conclusion.

In opposition to the Stay Request, Foremost has not categorically denied Davis' assertion that the substantial portion of the Additional Sum has been paid. While co-defendant strenuously contends Foremost negligently performed its construction contract which could arguably mitigate or vitiate its claim to the Additional Sum, plaintiff has not referred the court to any facts of record which counter co-defendant's affirmative defense/counterclaims of negligent construction. In this context and as the Discovery OSC made clear, the paucity of documents plaintiff turned over evidently leaves Davis at an evidentiary disadvantage.

Based on the foregoing, this court has decided to reconsider Davis' Stay Request and grant co-defendant a CPLR 2201 stay of the action and related discovery pending the resolution of the criminal action. It is therefore unnecessary to dispose of the Discovery OSC at this time. Presumably at that future time, any discovery road blocks presently in place will be taken down mooted any need for further discovery orders. Accordingly, it is

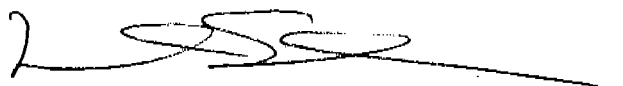
ORDERED that Davis' Reargument motion is granted solely to the extent of

staying this action pending the resolution of the federal criminal action, and is otherwise denied; and it is further

ORDERED that the Discovery OSC is denied without prejudice to renewal upon vacatur of the stay.

The foregoing constitutes this court's Decision and Order. A courtesy copy of this Decision and Order has been sent to counsel for plaintiff and co-defendant.

Dated: New York, New York  
March 24, 2009



Hon. Martin Shulman, J.S.C.

**FILED**  
MAR 27 2009  
NEW YORK  
COUNTY CLERK'S OFFICE