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

PRESENT: Jane S. Solomon PART 55
Justice

Index Number : 100422/2006

CARBONE, JAMES

VS.

243 W.118TH ST., LLC

SEQUENCE NUMBER : 008

REARGUMENT/RECONSIDERATION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for reargue and/or renew.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-8

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion is denied in accompanying decision & order.

FILED
JUN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/18/09

J.S.C.
JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

JAMES CARBONE, GIROLAMO CUCINELLA AND MICHAEL BETTIGOLE, Plaintiffs,	Index No. 1[illegible]22/2006
-against-	
243 E. 118TH ST., LLC, Defendant,	
243 E. 118th ST., LLC, Third-Party Plaintiff,	Third-Party Index No. 590274/2006
-against-	**Decision and Order**
STEWART TITLE INSURANCE COMPANY, et al., Third-Party Defendants.	Motion Sequence No. 008

JANE S. SOLOMON, J.S.C.:

In a prior decision in this case, filed on December 23, 2008, the Court denied the motion of 243 E. 118th St., LLC ("243 LLC") for summary judgment on its claims against third-party defendant Stewart Title Insurance Company ("Stewart"). The Court also, upon searching the record, granted summary judgment in Stewart's favor. 243 LLC now moves for leave to reargue and/or for leave to renew.

The motion to reargue is denied because 243 LLC fails to identify any matter misapprehended or overlooked in the prior motion. CPLR 2221(d)(2). Renewal also is not warranted because 243 LLC does not offer a reasonable justification for its failure to offer its purported new evidence in the earlier motion. CPLR 2221(e)(2) and (3).

The facts are set forth in detail in the prior decision. As relevant here, 243 LLC, the owner of the Manhattan property referenced by its name (the "Property"), was insured under a title policy issued by Stewart (the "Policy"). In April 2004, 243 LLC transferred the Property to its sole members, Gerold Migdol and Sheri Migdol, in connection with the procurement of a mortgage. The Property was later transferred back to 243 LLC. In November 2004, the company was sued in a mortgage foreclosure action for a previously recorded mortgage that was not disclosed on earlier title reports. After being served with process in the foreclosure action, 243 LLC contracted to sell the Property to plaintiffs. A problem also surfaced with regard to a bankruptcy proceeding relating to the Property.

When 243 LLC requested Stewart's assistance in resolving the bankruptcy issue, Stewart disclaimed coverage under the Policy because coverage was terminated when the Property was transferred from 243 LLC to the Migdols as individuals. When plaintiffs commenced this action for specific performance of the contract of sale, 243 LLC commenced a third-party action against Stewart and others. The third-party complaint sought a declaration that Stewart was obligated to provide coverage and alleged that Stewart's denial was made in bad faith.

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243 LLC moved for summary judgment, and Stewart opposed the motion, defending its denial based on the termination of coverage. It also claimed that 243 LLC did not give prompt written notice to Stewart. The Court credited the first argument, rendering Stewart's second contention moot.

The Court based its holding on the clear and unambiguous terms of the Policy, which, *inter alia*, states that coverage was only to continue after a conveyance of title if the insured retained an "estate or interest" *in the land*. According to this provision, coverage terminated upon the transfer because 243 LLC lost its "estate or interest" in the Property when it was transferred to the Migdols.

A holding to the contrary would be, in the Court's view, "inconsistent with the very nature of a limited liability company and the notion that a limited liability company owns property as a separate and distinct legal entity." (Decision and Order, filed December 23, 2008, p. 7.) In support of its determination, the Court cited *Gebhardt Family Inv., L.L.C. v. Nations Title Ins. of New York, Inc.*, 132 Md. App. 457 (Md. App. 2000), which interpreted language that is virtually identical to the policy provisions at issue here.

The Court considered and rejected 243 LLC's principal argument in support of its motion, which was that the 2007 and

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not the 2001 TIRSA[1] Rate Manual was applicable to the 2004 transfer of the Property. The Court reasoned that it was abundantly clear that the 2001 TIRSA Rate Manual was in effect when the Property was transferred in 2004. The key distinction between the two versions is that the 2001 Rate Manual does not include nominee/principal transfers among the kinds of transfers that would permit coverage to continue, while the 2007 version does include such transfers.

In this motion, 243 LLC largely abandons its earlier argument that the 2007 version applied and focuses on another one. The new notion is that the 2001 version actually permitted coverage to continue after nominee/principal transfers, even though it does not say so. 243 LLC's attorney bases this argument on his own experience and his description of a telephone conversation that he had with an attorney who was involved with the 2007 amendments to the TIRSA Rate Manual.

Based on that discussion, he concludes that the addition of nominee/principal transfers to the list of transfers that would permit coverage to continue was merely done to "make clear the then pre-existing custom and practice" of permitting coverage to continue after such transfers. (Affirmation of Stephen B. Meister in Support of Motion to Reargue and/or Renew,

[1] TIRSA is an acronym for the Title Insurance Rate Service Association.

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¶ 4.) According to 243 LLC, before the 2007 revision, coverage was to continue under the provision allowing for the continuation of coverage when the insured retains an "estate or interest" in the property after a transfer. 243 LLC asserts that the revision was only necessary because "disreputable underwriters" like Stewart were refusing to continue coverage under this clause. (Affirmation of Stephen B. Meister in Support of Motion to Reargue and/or Renew, ¶ 5.)

243 LLC's argument is belied by the unequivocal language of the Policy and the 2001 TIRSA Rate Manual. Its speculation about the "custom and practice" of the entire title insurance industry is unpersuasive. Further, its reliance on a description of a phone conversation to show the internal motivations of a single participant in the 2007 revisions to the TIRSA Rate Manual is erroneous. Not only is the description of the phone call inadmissable evidence, but the content, if considered, does not compel the Court to grant this motion.

As noted in the earlier decision, the Migdols apparently needed the Property to be transferred from 243 LLC to themselves, as individuals, so that they could represent to a lender that 243 LLC *no longer* owned the Property and that they owned it *as individuals*. Now after obtaining the loan, and thereby benefitting from the distinction between company ownership and individual ownership, they seek to disregard the

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distinction in the dispute with Stewart.

Significantly, 243 LLC has not cited to a single case which stands for the proposition that coverage was to continue after nominee/principal transfers under a standard title insurance policy, such as the one at issue here, before the 2007 revision to the TIRSA Rate Manual took effect. To the contrary, Stewart has pointed to cases from three states, which are all consistent with the Court's earlier decision. *See Shotmeyer v. New Jersey Realty Title Ins. Co.*, 195 N.J. 72 (2008); *Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co.*, 143 Idaho 411 (2006); *Stevens v. Dakota Title and Escrow Co.*, 2004 WL 2381386 (Neb. Ct. App. 2004).

In *Shotmeyer*, the New Jersey Supreme Court held that coverage terminated when two brothers transferred their property from a general partnership formed by them to a limited partnership for ten dollars consideration. 195 N.J. at 77-78. The limited partnership consisted of the brothers as limited partners with their wholly owned corporation as general partner. Relying on *Gebhardt*, the court reasoned that the transfer to a separate legal entity terminated coverage. *Id.* at 85. The brothers argued that they continued to hold a beneficial interest in the property even though the limited partnership held title. The court expressly rejected the argument, holding that the use of a "beneficial interest" standard to determine coverage under a title insurance policy was problematic. The court reasoned that such a test "may allow a party to 'create' ambiguity" over coverage "in an otherwise clear situation." *Id.* at 86.

In *Stevens,* a title insurance company disclaimed coverage under a policy that was issued to an individual because he transferred the property to a corporation. *Stevens,* 2004 WL 2381386, at *1. The court rejected the insured's argument that coverage continued because he was the sole shareholder of the corporation. *Id.* at *7. Citing *Gebhardt,* the Court reasoned that coverage ended because the insured did not hold an "estate or interest" in *the property* after he conveyed it to his solely owned corporation. *Id.* Here, 243 LLC's "beneficial interest" argument is unpersuasive under the reasoning in *Gebhardt* and its progeny.

243 LLC argues, without citing any authority, that the holding in *Gebhardt* should apply only to transfers from an individual to a company and not, as is the case here, the reverse. However, the crucial point expressed in this line of cases is that coverage ends upon the transfer of a property to another distinct legal owner. If anything, the case for termination of coverage is stronger with a transfer to an individual because the company has no relation to the property from that point. In contrast, when an individual transfers property to a company, the individual might hold an interest in

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the company.

243 LLC claims that the difference lies in the fact that an individual gains a benefit from entity ownership (i.e. limited liability), whereas an individual gains no benefit when it receives a property from a wholly owned entity. However, in this case, the Migdols did benefit from individual ownership because they apparently needed that form of ownership to obtain a loan. 243 LLC also draws a distinction between transfers with and without consideration, ignoring the fact that the transfer to the Migdols was made for consideration, even though the amount was nominal.

Accordingly, it hereby is

ORDERED that the motion of 243 E. 118th St., LLC for leave to reargue and/or for leave to renew is denied.

Dated: June 18, 2009

ENTER:

J.S.C.

FILED
JUN 22 2009
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