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

PART 56

Index Number : 113633/2007
ZUCKERMAN, MYRON
vs
GOLDSTEIN, SYDELL
Sequence Number : 018
RENEWAL

INDEX NO.

MOTION DATE 8.4.10

MOTION SEQ. NO. 018

MOTION CAL. NO.

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CAROL EDMEAD
J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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MYRON ZUCKERMAN,

Plaintiff,

-against-

SYDELL GOLDSTEIN, AUDREY SILLER, BARBARA ZUCKERMAN, LANCE LANDERS, and SAM-FAY REALTY CORP.,

Defendants.

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Index No. 113633/07

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Sydell Goldstein ("Sydell"), Audrey Siller ("Audrey"), and Barbara Zuckerman ("Barbara") and Lance Landers ("Landers") (collectively, "defendants") move pursuant to CPLR 2221(e)(2) for leave to renew argument on plaintiff's motion for indemnification of attorneys' fees resulting from this Court's September 30, 2009 Order and Memorandum Decision upon the ground of a change of law, *to wit*: the March 25, 2010 Appellate Division decision on appeal of such order, and pursuant to CPLR 2221(e)(2) and (e)(3) upon a showing of new facts not offered on the prior motion.

Factual Background

In early 2009, plaintiff moved for, *inter alia*, partial summary judgment for his *pro-rata* share of the proceeds of the sale of Sam-Fay Realty Corp. ("Sam-Fay"), a family-owned business. By order dated June 29, 2009, this Court addressed the merits of defendants' counterclaims against plaintiff, and except as to the claim of mismanagement of fees and actions he undertook regarding unions welfare payments, held that none of the remaining counterclaims

served as a basis for defendants to continue withholding plaintiff's *pro rata* share of the proceeds of Sam-Fay.

In September 2009, Plaintiff, Myron Zuckerman ("plaintiff") moved pursuant to New York Business Corporation Law ("BCL") 724 (a) and (c) for indemnification for his legal expenses incurred in connection with his defense of defendants' claims asserted against him as a former officer of defendant Sam-Fay Realty Corp. ("Sam-Fay").

By Order and Memorandum Decision dated September 30, 2009, the Court held that both BCL 723(a) (as raised by the parties) and 724(a) permit a person to obtain indemnification for attorneys' fees in an action or proceeding provided such action or proceeding falls within the scope of BCL 722. And, based on a plain reading of BCL 722, plaintiff was required to show that he "acted in good faith, and for a purpose he believed to be in the best interests of Sam-Fay." The Court then stated that the good faith requirement was related to the duty of loyalty a director or officer owes to the corporation. Thus, plaintiff's pursuit of his *pro-rata* share of the proceeds was not undertaken for the benefit of Sam-Fay. Further, the Court held, although plaintiff successfully defeated defendants' counterclaims of breach of fiduciary duty and corporate waste and mismanagement, the *merits* of defendants' counterclaims for breach of fiduciary duty and corporate waste and mismanagement were not addressed, and thus, not decided. Therefore, the Court's decision in favor of plaintiff did not necessarily result in a finding that the plaintiff's handling of the affairs of Sam-Fay were done in good faith and in the best interest of Sam-Fay. The Court then held that plaintiff failed to meet his burden of establishing that the costs he incurred in defending the counterclaims at that juncture of the litigation pertained to actions he undertook in good faith for the best interests of Sam-Fay. However, plaintiff was entitled to

attorneys' fees incurred to defend against the counterclaims up to this juncture (June 23, 2008), to the extent he establishes, at a hearing, that his challenged actions were undertaken in good faith and for a purpose he reasonably believed to be in the best interests of Sam-Fay.

The Court then noted that when plaintiff later moved again for partial summary judgment and defeated the defendants' counterclaims entirely, the Court addressed the counterclaims "that arose after October 17, 2002 that pertain solely to Myron" (June 29, 2009 Decision, p. 5). In that Decision, the Court found that defendants' counterclaims were insufficient to establish any basis to continue withholding plaintiff's *pro-rata* share of the proceeds of the sale of the 29th Street property. According to the Court, "Such finding includes a finding that plaintiff did not commit corporate waste or mismanagement, and thus, did not breach his fiduciary duty to Sam-Fay." Thus, plaintiff was entitled to indemnification for the reasonable expenses, including attorneys' fees plaintiff actually and necessarily incurred from June 23, 2008 in connection with his defense against the counterclaims resulting in the June 29, 2009 Order. Consequently, the Court granted plaintiff's motion for indemnification for his legal expenses incurred in connection with his defense of defendants' claims asserted against him as a former officer of defendant Sam-Fay Realty Corp. to the extent that

> the plaintiff is entitled to a hearing as to the issues of (1) whether the challenged actions subject to and up through the June 23, 2008 Order were undertaken by plaintiff in good faith and under a reasonable belief that they were in the best interests of Sam-Fay, and if so, the amount so incurred; and (2) as to the amount of attorneys' fees plaintiff actually and necessarily incurred from June 23, 2008 in connection with his defense against those counterclaims resulting in the June 29, 2009 Order.
> (See Order dated September 30, 2009, entered on October 2, 2009).

Plaintiff then sought to reargue the Court's decision. By decision dated November 23, 2009, and entered on December 7, 2009, this Court granted reargument, but adhered to its

decision.

Plaintiff then appealed the decision entered on October 2, 2009, and on March 25, 2010. Yet, the Appellate Division affirmed this Court's decision, and held that a hearing was warranted. The Appellate Division stated:

> As the Court of Appeals has noted, a prerequisite to an officer's or director's right to indemnification is a showing of good faith in dealing with the corporation. A judgment on the merits is not necessarily dispositive of whether the director or officer acted in good faith (citation omitted).

Thereafter, on June 23, 2010, at a conference on discovery and evidence to be introduced at the hearing, the Court limited the hearing to the issue raised in paragraph (2) above. The Court found that plaintiff conceded that he cannot establish that he was acting in good faith and under reasonable belief that his actions were in the best interest of Sam-Fay. Thus, the Court ruled that this issue (raised in paragraph (1) above) had been conceded.[1]

On renewal, defendants now argue that the court should dismiss plaintiff's claims for indemnification of legal expenses, or alternatively, order the deposition of plaintiff. CPLR 2221 (e) (2) provides for a motion to renew upon a showing that there has been a "change in the law that would change the prior determination. Defendants point out that this Court, in the Order and Decision entered October 2, 2009, essentially held that no proof that the plaintiff had acted in good faith in the best interests of the corporation was necessary with respect to attorneys' fees plaintiff actually and reasonably incurred from June 23, 2008 in connection with his defense against those counterclaims resulting in the June 29, 2009 Order because plaintiff had prevailed

[1] Plaintiff attested that "With respect to the subject matter of the Counterclaims by and relating to Sam-Fay Realty Corp. ("Sam-Fay") and my application for indemnification of attorneys' fees relating thereto, I cannot prove that I acted in good faith and for the benefit of Sam-Fay."

on the merits. However, the Appellate Division clearly held that "a judgment on the merits is not necessarily dispositive of whether the director or officer acted in good faith", and that "a prerequisite to an officer's or director's right to indemnification is a showing of good faith in dealing with the corporation."

Defendants argue that if this Court had the benefit of the clear statement of the law subsequently set forth by the Appellate Division that (a) a judgment on the merits is not necessarily dispositive of whether the director or officer acted in good faith, and (b) that a prerequisite to an officer or director's right to indemnification is a showing of good faith in dealing with the corporation, this Court would change its prior determination - plaintiff has never shown, nor can he show, that he acted in good faith for the benefit of Sam-Fay with respect to the matters in dispute. In plaintiff's affidavit, dated May 7, 2010, plaintiff admits that he cannot prove that he acted in good faith and for the benefit of Sam-Fay with respect to the subject matter of the Counterclaims by and relating to Sam-Fay.

Defendants further argue that CPLR 2221 (e) (2) and (e) (3) provide for renewal upon a showing of new facts not offered on the prior motion that would change the prior determination and reasonable justification for the failure to present such facts on the prior motion. Plaintiff's admission would change the prior determination and was not available until he swore to it on May 7, 2010. Further, to date, defendants have not had the opportunity to take plaintiff's deposition, and pursuant to Court Order, said admission by plaintiff was *in lieu* of plaintiff's deposition.

Defendants point out that in this Court's Order and Memorandum Decision dated June 29, 2009, the Court did not rule in favor of plaintiff with respect to the contested management fees

and the union welfare payments; thus, this Court did not rule that plaintiff acted in good faith and in the best interest of Sam-Fay with respect thereto.

With respect to the Spreading Machine Promissory Note, this Court ruled that the same was covered by the Release from Sam-Fay-and plaintiff did not act in good faith in the best interest of Sam-Fay in demanding that the Release be executed. The Court further ruled that the same may be immaterial because Myron owned less of an interest in Spreading Machine than he did in Sam-Fay- but such begs the issue as to whether, when Myron should have repaid the debt when in control of Spreading Machine, he did not instead loot that company by diverting the assets thereof to himself and his immediate family members, and whether, regardless of his ownership interest, it was in the best interests of Sam-Fay that the note be repaid to Sam-Fay. As the Note was part and parcel of the diversion of Sam-Fay assets accomplished with the placing of the Mortgage, when none of the other individual defendant/shareholders were shareholders, officers or directors of Sam-Fay, the issue is whether the same was in the best interests of Sam-Fay - plaintiff has already admitted in affidavit that the same was for the benefit of his brother, not Sam-Fay. Finally, the promissory note was to ensure the repayment of the mortgage placed against the Sam-Fay property which, according to the affidavit of plaintiff, was to purchase the IMSA property, which obligation plaintiff had assumed through his own corporation through the sublease for the IMSA property - so his failure to pay on the sublease directly resulted in the promissory note not being repaid which as a matter of law was not in the interest of Sam-Fay.

With regard to the mortgage, the Court held that: "The mortgage represents a pre-existing legal obligation, and paying that obligation after the date of the Release does not subject him to

any liability." The issue therefore is whether, when Myron placed the mortgage against the property, when the other individual defendants/shareholders were not shareholders, officers or directors of Sam-Fay, he acted in the best interests of Sam-Fay (which by affidavit he admitted he did not), and whether Myron was acting in the best interests of Sam-Fay by requiring Sam-Fay to release him, which as a matter of law he could not have been.

The issue regarding the Thales Litigation was whether plaintiff acted in the best interests of Sam-Fay in his failure to assist Sam-Fay in defending against said litigation, despite multiple requests that he do so, as he was the sole operating officer when the events giving rise to the dispute occurred - the other shareholders had all fully cooperated with management in defending the action which is why no monies were held back to ensure their cooperation - and through their cooperation it could be determined that they had no liability - the same could not be said about plaintiff.

Therefore, as the Appellate Division has held that a "prerequisite to an officer's or director's right to indemnification is a showing of good faith in dealing with the corporation", and as the Court has not yet so found with respect to plaintiff's remaining claims for indemnification, and as plaintiff has either admitted that he can not make such a showing, or as is shown above such showing can not be made by plaintiff, plaintiff's remaining claims for indemnification should be dismissed.

Defendants further argue, in the alternative, that if plaintiff contends he acted in good faith for the benefit of Sam-Fay with respect to his remaining claims for indemnification, the deposition of the plaintiff should be ordered, and the trial date adjourned to accommodate same.

In opposition, plaintiff argues that defendants' motion is not one to renew, but rather is an

untimely motion to reargue as no new facts or law have been shown. Since Notice of Entry of this Court's September 30, 2009 Order was served on October 2, 2009, and defendants did not seek reargument within 30 days thereafter, defendants are now precluded from so doing. Plaintiff filed a Notice of Appeal from the portion of the Order which required plaintiff to prove that his actions through June 23, 2008 were undertaken in good faith and under a reasonable belief that they were in the best interests of Sam-Fay Realty Corp. and no cross-appeal from item no. 2 in the said Order was made. The Appellate Division affirmed the Order but did not address item 2 in this Court's September 30, 2009 Order, as only item 1, relating to Defendants' Counterclaims which were barred by a release of claims, was in issue.

The statement by the Appellate Division that a judgment on the merits is not necessarily dispositive of whether the director or officer acted in good faith does not represent a change in the law. The Appellate Division cited for that proposition the ten-year old decision by the New York Court of Appeals (*Biondi v Beekman Hill House Apt. Corp.*.), which had also been in cited by this Court in its September 30,2009 Order. Plaintiff's affidavit to the effect that he could not prove that he acted in good faith and for the benefit of Sam-Fay is not a new fact, and is rrelevant to the issues here. Such affidavit relates to the Counterclaims asserted by defendants in their Answers to the Complaint - concerning the transfers of funds by Sam-Fay to other family corporations (item (1) in this Court's September 30, 2009 Order) and not to the matters which are the subject of item (2).

After the Counterclaims were dismissed based on an October 17, 2002 release of claims, plaintiff served Combined Discovery Requests seeking information on any claims Sam-Fay might have based on plaintiff's activities subsequent to October 17, 2002. Defendants served a

Reply to those Discovery Requests. The matters asserted in the Reply are the subject matter of item (2) in this Court's September 30, 2009 Order.

Plaintiff moved for partial summary judgment on the ground that none of the claims in the Reply were valid, as plaintiff was accused of things he did not do or which were done by defendants. The June 29, 2009 Order granted that motion in all material respects.

As appears from the Reply, defendants complained of four matters: (A) a complaint by Thales Management, (B) the alleged failure of Plaintiff to collect on a Note Receivable from a family corporation named Spreading Machine Exchange, Inc. ("Spreading Machine"), (C) payments made after October 17, 2002 on a mortgage on property owned by Sam-Fay, and (D) various amounts complained of in a Petition for Dissolution in a related proceeding. These claims were outlandish and made in bad faith and plaintiff requested sanctions and costs, which this Court held was premature. Plaintiff argues that the Court should have, and can now grant plaintiff's request for sanctions, as Landers has been encouraged to now reargue the very same matters. Since no new facts or change in the law has been shown, defendants' motion should be denied.

With respect to defendants' request to take plaintiff's deposition, this Court already ruled that plaintiff need not appear for a deposition if he submitted an affidavit as described in this Court's April 27,2010 Order.

Discussion

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D.

Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529 NYS2d 277).

A motion for leave to reargue, on the other hand, under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Under the circumstances in this case, and in the interest of justice, this court will exercise that discretion, and grant the plaintiff's motion for leave to renew and reargue. However, upon renewal and reargument, the Court adheres to its determination.

This Court's Order and Memorandum Decision dated September 30, 2009, entered on October 2, 2009 was twofold: (1) granting plaintiff indemnification to the extent plaintiff could

prove that the challenged actions subject to and up through the June 23, 2008 order were undertaken by him in good faith and under his reasonable belief that they were in the best interests of Sam-Fay and (2) granting a hearing on attorneys' fees actually and necessarily incurred from June 23, 2008 relating to his defense against those counterclaims resulting in the June 29, 2009 order. The second part of the Court's determination directed an attorneys' fees hearing, based on the Court's finding, essentially that plaintiff did not commit corporate waste or mismanagement, since defendants' counterclaims of corporate waste and mismanagement were insufficient. In other words, since defendants' counterclaims for corporate waste and mismanagement were insufficiently stated, plaintiff could not be found liable for corporate waste and mismanagement. In this Court's opinion, there was no basis for defendants to continue withholding plaintiff's share of the proceeds of the sale of Sam-Fay, and this finding "include[d]" a finding that he did not breach his fiduciary duty to Sam-Fay.

When plaintiff noticed his appeal of this Court's Order and Memorandum Decision dated September 30, 2009, entered on October 2, 2009, plaintiff specifically stated that his appeal was from the first part of the Court's order. Plaintiff appealed "the portion of the Order requiring Plaintiff to prove that his actions through June 23, 2008 which were challenged by Defendants were undertaken in good faith and under a reasonable belief that they were in the best interests of Sam-Fay Realty Corp."

The Appellate Division affirmed the Order but did not address the second part of this Court's September 30, 2009 Order, since only the first part was in issue. In fact, the Appellate Division confirmed that a prerequisite to an officer's right to indemnification is a showing of good faith in dealing with the corporation and confirmed that a judgment on the merits, by

plaintiff, was not dispositive on this issue. These pronouncements by the Appellate Division were the very same pronouncements this Court made in rejecting plaintiff's bid for indemnification of attorneys' fees he incurred in filing his complaint (see September 30, 2009 decision, page 11-12 "the Court's decision in favor of plaintiff did not necessarily result in a finding, nor can a finding be inferred from such decision, that the plaintiff's handling of the affairs of Sam-Fay were done in good faith and in the best interest of Sam-Fay"). Yet, the Court required that plaintiff show "good faith" and "best interests" through June 23, 2008, when counterclaims were dismissed, in order for plaintiff to recover attorneys' fees defending counterclaims that survived up to that date. Indeed, this was not new law then, and does not constitute new law to this Court by virtue of the Appellate Division, because this Court's decision to grant, in the second part of its order, a hearing attorneys' fees, *was predicated on this Court's determination that such a prerequisite had already been shown* as to plaintiff's defense against defendants' counterclaims from June 23, 2008 through the June 29, 2009 order, which dismissed certain counterclaims on the merits. Although meritorious success does not automatically warrant indemnification of legal fees, it is undisputed that no cross-appeal by defendants from the second part of said Order was ever made. The Appellate Division's decision simply does not alter this Court's application of the BCL.

The Court notes that as to defendants' counterclaims of mismanagement of fees and actions plaintiff undertook regarding unions welfare payments, as defendants' point out, the June 29, 2009 Order *did not* make any findings as to these claims. Indeed, the Court stated that there "was no evidence from which the court can, at this time, determine the validity of the $10,000 reclassification" and therefore, that amount "may be withheld from [plaintiff's] distribution." In

addition, since plaintiff did not dispute the other"662.70," such "amount may also be withheld" (Decision, p. 11). The Court also held that since there appeared "to be a question as to whether the union dues were appropriately paid by Sam-Fay, $15,883.00 may be withheld from the distribution to plaintiff" (Decision, p. 14). Therefore, plaintiff did not prevail in having these counterclaims dismissed. Arguably, therefore, the Court's determination for a hearing on attorneys' fees (the second part) could not have included attorneys' fees plaintiff incurred in defending against these counterclaims, since his inability to prevail on these claims necessarily inhibited his ability to prevail on a showing of "good faith" and "best interests." However, this argument by defendant challenges the Court's application in its September 30, 2009 order of the BCL, and are therefore, are untimely so as to warrant a change of this Court's determination (CPLR 2221(d)(3). And again, no cross-appeal was taken from this part of the Court's order. Therefore, reargument based on this claim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants pursuant to CPLR 2221(e)(2) for leave to renew argument on plaintiff's motion for indemnification of attorneys' fees resulting from this Court's September 30, 2009 Order and Memorandum Decision, and pursuant to CPLR 2221(e)(2) and (e)(3) upon a showing of new facts not offered on the prior motion, is granted to the extent that leave to reargue and renew is granted; and it is further

ORDERED that upon renewal and reargument, the motion to dismiss plaintiff's claims for indemnification of legal expenses, or alternatively, order the deposition of plaintiff, is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within three (3) days of entry.

This constitutes the decision and order of the Court.

August 9, 2010

Hon. Carol Robinson Edmead, J.S.C.