

**Griffon V., LLC v 11 E. 36th LLC**

2010 NY Slip Op 33189(U)

November 4, 2010

Supreme Court, Nassau County

Docket Number: 022614-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**GRIFFON V., LLC, assignee of the rights of  
CHINATRUST BANK (U.S.A.),**

**Plaintiff,**

**-against-**

**11 EAST 36<sup>TH</sup> LLC, MORGAN LOFTS LLC,  
MADISON CONDOS LLC, BLUEBELL ASSETS LLC,  
ELI MORDECHAI BOBKER and  
BEN BARUCH BOBKER,**

**Defendants.**

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**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No: 022614-09  
Motion Seq. No: 2  
Submission Date: 9/17/10**

**The following papers have been read on this motion:**

- Notice of Motion, Affirmation in Support, Memorandum of Law and Exhibits...x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**
- Defendants' Memorandum of Law in Opposition.....x**
- Reply Affirmation in Support, Reply Memorandum of Law in Support  
and Exhibits.....x**

This matter is before the Court for decision on the motion for reargument filed by Plaintiff Griffin V LLC, assignee of the rights of ChinaTrust Bank (U.S.A.) ("Griffon" or Plaintiff") on July 13, 2010 and submitted on September 17, 2010. For the reasons set forth below, the Court denies Plaintiff's motion.

## BACKGROUND

### A. Relief Sought

Plaintiffs moves, pursuant to CPLR § 2221, for an Order granting reargument of the Plaintiff's motion for summary judgment in lieu of a complaint, which this Court denied by decision dated June 2, 2010 ("Prior Decision") and, upon reargument, granting Plaintiff's motion in its entirety.

Defendants oppose Plaintiff's motion.

### B. The Parties' History

The parties' history is set forth in detail in the Prior Decision. In the Prior Decision, the Court outlined 1) the Affidavits in Support of Kin-Keung Foo a/k/a Kenneth Foo ("Foo") and Michael Shah ("Shah") which a) provided details regarding the execution and terms of the relevant commercial instruments and other agreements in this matter, including the Amended and Restated Promissory Note ("Note"), Revolving Line of Credit Agreement ("Credit Agreement"), letter agreement dated May 6, 2009 extending the maturity of the Credit Agreement until June 14, 2009, Borrower's Estoppel Affidavit, General and Continuing Guaranties and Assignment Documents; and b) outlined the sums allegedly owed by Defendants to Plaintiff, Plaintiff's demand for those payments and Defendants' failure to make those payments, 2) the Affirmation of Plaintiff's counsel in support of Plaintiff's request for counsel fees, and 3) the Supplemental Affidavit in Support of Shah which discussed real estate taxes due on the relevant property and provided a revised statement of the sums due to Plaintiff by Defendants.

In the Prior Decision, the Court also outlined the Affidavit in Opposition of Joe Bobker ("J. Bobker") which contained averments in support of Defendants' contentions that 1) the Court should deny Plaintiff's motion because Plaintiff has prior, detailed knowledge of Morgan's defenses; 2) the Note represents only a portion of the Line of Credit loan facility ("Loan Facility"), which the parties closed in April 2008, and Griffon should not be permitted to enforce the Note summarily; and 3) Griffon should not be permitted to enforce the Note because Chinatrust a) breached its prior agreement to sell the Note to Morgan which would have resulted in new financing for the Morgan Lofts project; and b) hindered the release of the appraisal required for refinancing which prevented the sale from closing.

The Court outlined the relevant law and, noting that Defendant-Borrower asserted that it has a counterclaim against Chinatrust based on its purported misconduct during 2006 and 2007, resulting in Defendant-Borrower overpaying for the Note, concluded that the Court's decision on the motion involved a determination of whether Borrower's allegations are counterclaims that arise out of the same transaction at issue in the Note, or instead constitute actual defenses to Plaintiff's claim. Pursuant to *Harris v. Miller*, 136 A.D.2d 603 (2d Dept. 1988), summary judgment in lieu of a complaint would be required in the former instance, but should be denied in the latter. The Court denied Plaintiff's motion based on its determination that:

Borrower's allegations appear to be defenses that are inextricably intertwined with Plaintiff's right to recover under the Note. Indeed, these allegations somewhat resemble the defendant's allegations in *Fine v. DiStanti*, 79 A.D.2d 673 (2d Dept. 1980), in which the Second Department held that judgment as a matter of law on a promissory note was inappropriate when the defendant alleged fraud in the parties' financial dealings, and the defendant's allegations regarding the parties' business dealings were "intimately interrelated" to the plaintiff's claim.

(Prior Decision at p.11)

The Court deemed the moving and answering papers the complaint and answer, respectively and denied, as moot, the application for counsel fees.

#### B. The Parties' Positions

Plaintiff now moves for reargument of the Prior Decision submitting, *inter alia*, that 1) even if the Note cannot be enforced against the Defendant-Borrower, Plaintiff may enforce the "absolute and unconditional" Guarantees and obtain judgment on those Guarantees; 2) by failing to dispute that the Defendant-Borrower received the money at issue and that they are liable to Plaintiff under the Guarantees, Defendant-Guarantors admitted their liability under the Guarantees for the amount Plaintiff claims is owed; and 3) the Defendant-Guarantors failed to come forward with proof sufficient to raise an issue as to any defense.

Plaintiff contends that the Court erroneously denied Plaintiff's motion based on the Defendant-Borrower's claim of fraud by Chinatrust because 1) given the language in the Guarantees stating that Guarantees are absolute and unconditional, the Guarantors may not rely on a fraud defense against enforcement of the Guarantees; 2) any potential fraud claim fails in light of the documentary evidence, including the Estoppel Affidavit in which Defendant Ben

Bobker swore that there was no fraud affecting the indebtedness evidenced by the loan documents; and 3) Defendants failed to submit any evidence of fraud.

Defendants oppose Plaintiff's motion submitting, *inter alia*, that 1) contrary to Plaintiff's assertion that the Guarantors failed to come forward with proof, the Affidavit of J. Bobker was submitted on behalf of all Defendants; 2) the defenses raised by Defendants in opposition to Plaintiff's original motion relate not merely to the underlying debt but rather to the enforceability of the entire alleged indebtedness; 3) Plaintiff's motion to reargue fails to respond to Defendants' showing that Plaintiff had knowledge of Defendants' claims and defenses and, therefore, is not a holder in due course with respect to the Note; 4) Plaintiff's motion to reargue "proceeds with what amounts to tunnel vision" (Ds' Memorandum of Law in Opp. at p. 8) by asserting that, regardless of Plaintiff's prior conduct and the relationship between Defendants' submissions and Plaintiff's claims, the Court should enforce the Guaranties because the Guarantors made no separate submission in opposition to Plaintiff's initial motion; 5) Plaintiff's motion to reargue oversimplifies the Defendants' submissions in opposition to the original motion, and the Court's analysis in denying that motion; and 6) Plaintiff has failed to demonstrate that the Court misunderstood any of the facts, or misapplied the law, in reaching the Original Decision.

Defendants also provide cases in support of their contention that the Guarantors may assert defenses that are available to the principal to the Note. *See, e.g., H. H. & F. E. Bean, Inc. v. Travelers Indem. Co.*, 67 A.D.2d 1102 (4<sup>th</sup> Dept. 1979) in which the Fourth Department affirmed the trial court's denial of plaintiff's motion for partial summary judgment against the defendant-indemnity company which asserted as a defense to plaintiff's action to recover on the payment bond that the plaintiff failed to perform its contract with the defendant-principal in several respects. *Id.* at 1102-1103. In concluding that the trial court had correctly denied the motion for partial summary judgment, the Fourth Department held:

When a guarantor is sued alone, it may not urge as a defense an independent cause of action in favor of its principal against the plaintiff. However, this does not preclude a defense with respect to the transactions in suit between the plaintiff and the defendant's principal as to the amount due thereon [citation omitted]. A guarantor should be liable for no more than his principal where there is a partial failure of consideration.

*Id.* at 1103.

In its Reply Affirmation, Plaintiff, with the Court's permission, provides a copy of Defendants' Counterclaims and Third-Party Complaint dated July 15, 2010. In that pleading, Defendants makes numerous factual assertions in support of their claims, *inter alia*, that 1) Chinatrust made certain misrepresentations to Joe Bobker and Morgan regarding the loans at issue, on which they relied to their detriment; and 2) Chinatrust deliberately hindered and prevented Morgan from completing its purchase of the Note. Plaintiff, in its Reply Affirmation, makes reference to many of the allegations in Defendants' Counterclaims and Third-Party Complaint, and reasserts its arguments that Plaintiff has demonstrated its right to judgment as a matter of law on the Guaranties, and that the Guarantors' defenses fail as a matter of law.

#### RULING OF THE COURT

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992).

The Court has considered Plaintiff's arguments, including its arguments in the instant motion that Chinatrust's purported misconduct does not affect the liability of the Guarantors. The Court concludes that Plaintiff has not demonstrated that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. In light of the Court's conclusion that Borrower's allegations appear to be defenses that are inextricably intertwined with Plaintiff's right to recover under the Note, and case law suggesting that those defenses may be relevant to Guarantors' obligation to Plaintiff, the Court concludes that Plaintiff has not established its right to summary judgment in lieu of a complaint against either the Borrower or Guarantors. Accordingly, the Court denies Plaintiff's motion.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on November 16, 2010 at 9:30 a.m.

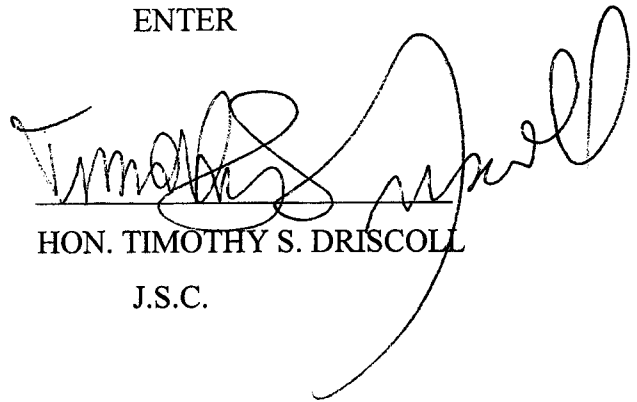
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

November 4, 2010



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE