

Zhong v Capstone Bus. Credit, LLC

2011 NY Slip Op 32362(U)

August 12, 2011

Sup Ct, NY County

Docket Number: 100429-2009

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 100429/2009
ZHONG, MICHAEL
vs.
CAPSTONE BUSINESS CREDIT
SEQUENCE NUMBER : 006
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

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

FILED

AUG 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

AUG 12 2011

Dated: _____


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Michael Zhong,

Plaintiff (s),

-against-

Capstone Business Credit, LLC, John Rice, III,
Yecheskel Menashe, Esq., and "John Doe,"

Defendant (s).
-----x

DECISION/ORDER

Index No.: 100429-2009
Seq. No.: 006

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

AUG 16 2011

*Recitation, as required by CPLR 2219 [a], of the papers considered ~~NEW YORK~~ ^{NEW YORK} New York of this
(these) motion(s):* COUNTY CLERK'S OFFICE

Papers	Numbered
Pltf n/m [RR] w/ WXZ affirm, MZ affid, exhs	1
CBC, Rice opp w/ SAB affirm, JR affid, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

This lawsuit arises from a failed business transaction involving financing for the purchase of copper. Plaintiff Michael Zhong ("plaintiff") has asserted six causes of action against the defendants, including claims for fraud and unjust enrichment. In connection with a motion by Capstone Business Credit, LLC and John Rice ("Capstone" and "Rice"), the court granted summary judgment severing and dismissing the claims against Capstone and Rice. The case continues as against defendant Yecheskel Menashe, Esq. for reasons fully addressed in the court's prior order dated December 23, 2009 ("prior order"). This motion was initially submitted on default but thereafter opposition papers were filed. The motion is decided without oral argument.

Plaintiff now moves to reargue and/or renew the prior order on the basis of new facts which he contends were available when he opposed the Capstone and Rice motion but that he did not know the information until the discovery process was underway. Capstone and Rice oppose the motion. Yechezkel Menashe, Esq., though served with the motion, takes no position on the relief sought. Plaintiff also seeks permission to serve an amended complaint to add Frank Regina and Narmin Crowe, Inc. as named defendants. Neither Capstone nor Rice take a position on that branch of the motion.

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It 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 A.D.2d 22 [1st Dept 1992]). It is not a vehicle to permit a party to argue again the very questions previously decided (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]; see also Frisenda v. X Large Enterprises Inc., 280 A.D.2d 514 [2nd Dept. 2001] and Rodney v. New York Pyrotechnic Products Co., Inc., 112 A.D.2d 410 [2^d Dept. 1985]) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced (Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 [2nd Dept. 2006]).

Although the court will allow plaintiff to renew his opposition to the motion for summary judgment by Capstone and Rice, permission to reargue is denied because, as will be made clear, there are no "new" facts or newly discovered evidence that would require the court to modify, vacate or in any respect change its prior order. Since the

court addressed the facts of this case and the arguments by the parties in the prior order, the reader is presumed to be familiar with them.

Briefly, plaintiff is an investor and Rice is the President of Capstone and also the Chief Financial Officer of non-party Capstone Feed (Beijing) Company, Inc. ("Capstone/China"). Defendant Menashe is an attorney who represented plaintiff for several years and in connection with the dispute at bar. Plaintiff alleges that Menashe contacted him about a business opportunity allowing him to buy copper in the People's Republic of China. Menashe allegedly told plaintiff that a very wealthy business man named Frank Regina ("Regina") wanted to sell 10,000 metric tons of Russian copper for an initial down payment of "only" \$1,000,000 with the understanding that there would be a limitless supply available to him. None of these promises were made in a written contract and these negotiations took place at or about the same time that Regina entered into a Guaranteed Purchase and Sale Agreement with a non-party, which was guaranteed by Capstone/China, also a non-party.

According to plaintiff, Regina assured him that he did not have to produce certified funds to buy the copper because Capstone (Rice) would guarantee the money for him. Plaintiff was only able to raise \$700,000 and thereafter, in August 2007, Capstone obtained a mortgage on plaintiff's house in the amount of \$350,000. Eventually the mortgage was foreclosed on.

In connection with the underlying motion Rice established, among other things, that he knew nothing about Regina's dealings or negotiations with plaintiff or that Regina had a "side" agreement" with plaintiff to sell copper to him. He also established that no one from Capstone/China had ever dealt with plaintiff or Menashe in connection

with the contract guaranteed by Capstone/China.

Capstone and Rice also established that although they received a wire transfer on Regina's behalf for which they were paid a commission, they acted only as an depository for the Chinese currency (RMBs). It was also established that although there was a mortgage through Capstone secured by plaintiff's house, that financial arrangement had nothing do with the agreement between plaintiff and Regina. The mortgage was an entirely separate agreement between Capstone and plaintiff because Capstone obtained financing for him. Among the proof submitted was Regina's sworn affidavit that he had an agreement with plaintiff for the purchase of copper in exchange for plaintiff using his influence in the People's Republic of China and that Rice and Capstone were used solely as a depository to receive and covert Chinese currency into U.S. dollars. Regina stated, much as did Rice and Capstone, that he had no relationship with Rice or any of the Capstone companies, and none of the Capstone companies had any relationship with his companies.

Zhong contends that he now has proof Capstone and Rice were more than money transfer agents. He claims the money was not just simply wired to Capstone but that they actually retained it and then refused to turn it over to him. According to plaintiff, the sum of \$4,200,000 RMBs is listed on an "Audited Report" for "Capstone (Beijing) Co., Limited." In a section identified as "top five creditors" there is an entry for "Capstone Asian Trading Limited, Co." The entry states that payments should be made to "Haimao Zhong" (plaintiff's Chinese name) and indicates the sum of "\$4,200,000." Under separate column identified as "remarks" the words "incoming money" appears. According to plaintiff, this shows Capstone and Rice were part of a large scheme to

* 6] .
defraud him.

Where there are unresolved issues of fact, or there is any doubt as to their existence, a motion for summary judgment must be denied so the trier of fact can decide the facts (Cross v. Cross, 112 AD2d 62, 64 [1st Dept. 1985]). Here, however, neither Capstone (Beijing) Co., Limited nor Capstone Asian Trading Limited, Co. are named defendants. Plaintiff's claims are against "Capstone Business Credit, LLC" and Rice. While the name "Capstone" is in each entity's name and they may even be related entities, this is not enough to reopen the court's award of summary judgment defendants.

Although the motion for summary judgment was brought pre-note of issue and plaintiff initially argued that defendants' motion was premature because he had not yet received discovery responses from them, he later withdrew that argument in opposition to their motion (see, prior order). Therefore, any present claim by him that he was prevented from developing his case is without merit. Furthermore, plaintiff claims he just "recently" obtained this evidence but neither elaborates when or how. The evidence is also not in admissible form and, therefore, cannot defeat the defendants' motion for summary judgment. Finally, nothing in the audit raises triable issues of fact that plaintiff was defrauded by Capstone or Rice. There has never been an issue that Capstone/China received and deposited money into its account or that it transferred it to Regina (see, prior order).

Therefore, the "new" facts set forth by plaintiff do not warrant the court reconsidering its prior order and even if the facts are "new," they do not command a different result. The motion to renew is denied. Furthermore, since there are no new

facts to be considered, there is no basis for reargument and, in any event, the motion for reargument is untimely. Therefore, permission to reargue is denied as well.

The other branch of plaintiff's motion is to name Regina and Narmin Crowe, Inc. as named defendants. In connection with the prior motion by Capstone and Rice to dismiss the complaint on the basis that Regina was an unnamed, but necessary, party (CPLR 1001 [a]), plaintiff argued that Regina was not a necessary party because this was not a breach of contract action but an action for fraud. Apparently he has reconsidered his theory of the case and now seeks to assert fraud claims against Regina and Narmin Crowe, Inc. Since the motion is unopposed, it is granted and plaintiff may serve the amended summons and complaint proposed within ten (10) days of this decision and ordered being entered.

Conclusion

Plaintiff's motion to reargue and/or renew the court's prior order of December 23, 2009 is granted and plaintiff is allowed permission to renew. However, upon renewal the court adheres to its prior decision. Since there is no basis for reargument, permission to reargue is denied as well.

Plaintiff's motion to serve an amended complaint is granted.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 12, 2011

FILED

AUG 16 2011

So Ordered:

**NEW YORK
COUNTY CLERK'S OFFICE**



Hon. Judith J. Gische, JSC