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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Scarpulla Justice PART 19

Index Number : 603423/2006
ORR, KENNETH
vs.
YUN DANIEL
SEQUENCE NUMBER : 014
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

motion and cross-motion are decided in accordance with accompanying memorandum decision.

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

Dated: 12/14/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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KENNETH ORR,

Plaintiff,

-against-

DANIEL YUN and BELSTAR GROUP, LLC,

Defendants.

----------X

Index No.: 603423/06
Submission Date: 10/10/12

DECISION AND ORDER

For Plaintiff:
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036

Schindler Hockman & Cohen LLP
100 Wall Street, 15th Floor
New York, NY 10005

For Defendants:
Heller, Horowitz & Feit, P.C.
292 Madison Avenue
New York, New York 10017

Papers considered in review of this motion to reargue:

Noting of Motion	1
Aff in Support	2
Aff in Opp	3
Mem of Law	4
Reply Mem of Law	5

HON. SALIANN SCARPULLA, J.:

In a case involving a falling out between investment bankers at a fledgling hedge fund, defendants Daniel Yun ("Yun") and Belstar Group, LLC ("Belstar") (together, "defendants") move for an order pursuant to CPLR 2221 granting them leave to reargue that portion of this Court's October 21, 2011 decision and order which dismissed defendants' counterclaim against plaintiff Kenneth Orr ("Orr"), and upon reargument, to reverse that decision.

In the October 21, 2011 decision and order, I granted defendants' motion for summary judgment dismissing Orr's claims, and I dismissed defendants' counterclaim for fraud.

Orr appealed the decision and order granting defendants' motion for summary judgment; defendants did not move to reargue nor did they appeal the dismissal of their counterclaim. Defendants explain that they did not appeal the dismissal of their counterclaim "because they were content to end the litigation after this Court's decision dismissing Orr's claims, without pursuing their counterclaim, in order to avoid the further burden and expense of this 6 year old litigation. Unfortunately, defendants did not anticipate that the Appellate Division would reverse the dismissal of Orr's claims, thereby requiring a trial." On appeal, in a decision dated May 22, 2012, the Appellate Division, First Department, modified the decision and order, denying defendant's motion as to the first, third and fourth causes of action.

Defendants now move for leave to reargue the dismissal of their counterclaim.

Background[1]

In February 2006, Orr entered into an agreement (the "February 2006 Agreement") with Belstar, a fledgling multi-advisor hedge fund. On June 15, 2006, Yun and Belstar

[1] For a more complete recitation of the background, see the October 21, 2011 decision and order.

jointly executed a $40,000 promissory note for Orr (the "Note"). The Note was payable on June 15, 2009.

On June 27, 2006, Orr sent an e-mail to Yun, a principal at Belstar, indicating that he wished to begin working as Belstar's president. Yun responded, on behalf of Belstar, by denying any obligation to pay under the February 2006 Agreement.

In September 2006, Orr filed a verified complaint alleging various damages arising from Belstar's unwillingness to honor the February 2006 Agreement, and in 2008, Orr served an amended complaint. In his first cause of action Orr alleges that defendants' are liable to him for lost compensation arising from defendants alleged breach. In the third cause of action Orr claims that defendants are liable for depriving him of the benefit of the February 2006 Agreement through Yun's alleged failure to attend meetings set up by Orr. Finally, in the fourth cause of action Orr alleges that he is owed the amount the ownership interest that he never acquired would be worth if Yun had not, allegedly, sabotaged relationships with potential clients and failed to solicit various investors.

On July 14, 2009, approximately one month after the Note was payable, Orr moved for partial summary judgment on the Note. This Court (Justice E. Lehner) denied the motion on the ground that liability under the Note was not expressly alleged in the complaint. On November 6, 2009, Orr moved, under separate Index No. 115741/09, for summary judgment in lieu of complaint for payment on the Note. The motion was

assigned to Justice Joan Madden, who granted it by a decision and order dated July 19, 2010.

While defendants argued that Orr fraudulently induced them into executing the Note, alleging that Orr misrepresented his educational and professional qualifications, Justice Madden found that, "Orr's misrepresentations did not induce defendants to make the Note. Yun concedes that he executed the Note in order to terminate his business relationship with Orr because he was dissatisfied with Orr's results. Defendants were not relying on Orr's credentials when contemplating the Note, but were eager to sever the relationship with Orr despite his qualifications. As such, defendants were not fraudulently induced into making the Note."

The First Department affirmed Justice Madden's decision on appeal, and echoed her reasoning. "There is no evidence that when executing the note defendants actually relied on any misrepresentations by plaintiff as to his qualifications. Rather, it is undisputed that they executed the note in exchange for rescinding their pre-existing agreement because they were dissatisfied with the results of their business venture with plaintiff." *Orr v. Yun*, 83 A.D.3d 525, 525 (1st Dep't 2011).

In the October 21, 2011 decision and order, I granted summary judgment dismissing Orr's complaint based on collateral estoppel. As to defendants' counterclaim for fraudulent inducement, I found that Justice Madden held that "defendants were sophisticated businessmen who were able to verify [Orr's] claims about his education and

experience through background checks, calls to former employers and other means. In failing to conduct this due diligence, defendants have failed to satisfy justifiable reliance." As such, any reliance on Orr's alleged misrepresentations was unreasonable and the alleged misrepresentations could not serve as a basis for the affirmative defense of fraudulent inducement. Similarly, the First Department, in affirming Justice Madden's decision, held that there was no evidence that "defendants actually relied on any misrepresentations by plaintiff as to his qualifications." *Orr*, 83 A.D.3d at 525.

I further held that without the element of justifiable reliance, defendants' counterclaim for fraudulent inducement is not viable. As Justice Madden and the First Department held that defendants did not justifiably rely on any misrepresentations by Orr, and defendants failed to show that they did not have a full and fair opportunity to litigate this issue, defendants were collaterally estopped from arguing that they justifiably relied on any misrepresentations by Orr. Therefore, I dismissed defendants' counterclaim for fraudulent inducement.

Defendants now argue that in dismissing their counterclaim based on the collateral estoppel effect of what they characterize as Justice Madden's alternative holding regarding reasonable reliance, I overlooked or misapprehended the holding of the Court of Appeals in *Tydings v. Greenfeld, Stein & Senior, LLP*, 11 N.Y.3d 195 (2008).

Discussion

Pursuant to CPLR 2221(d)(2), a motion to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep't 1992). Absent mistake on the Court's part, the Court must adhere to its original decision. *Pahl Equipment Corp. v Henry Kassis*, 182 A.D.2d 22, 27-28 (1st Dep't 1992). For a number of reasons, defendants' motion to reargue is denied, and I adhere to my original decision dismissing the counterclaims.

First, defendants' motion is untimely under CPLR 2221(d)(3).[2] *See Pearson v. Goord*, 290 A.D.2d 910 (3d Dep't 2002); *Glicksman v. Bd. of Ed./Central School Bd. of Comsewogue Union Free School District*, 278 A.D.2d 364, 365 (2d Dep't 2000) (CPLR 2221(d)(3) "provides that a motion for leave to reargue must be made within 30 days after

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[2] CPLR §2221(d) provides: 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. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

See also Hughes v Pacienza, 35 Misc. 3d 1207A (N.Y. Sup. Ct. 2012).

service of a copy of the prior order with notice of entry"). While there is discretion for a court to consider an untimely motion for leave to reargue, defendants have not established that such discretion should be exercised here. *See Kleinser v. Astarita*, 61 A.D.3d 597, 598 (1st Dep't 2009) ("the court had discretion to reconsider its prior order, sua sponte, and correct it. Such discretion was properly exercised here in view of plaintiff's pro se status"); *Itzkowitz v. King Kullen Grocery Co., Inc.*, 22 A.D.3d 636, 638 (2d Dep't 2005) (the court had jurisdiction to reconsider its prior order, and the appeal taken from the court's prior order was still pending and unperfected when motion for reargument was made).

Here, defendants were represented by experienced counsel, and made an intentional choice as part of their litigation strategy to not pursue a timely motion to reargue or appeal of the October 21, 2011 decision and order. They have therefore not persuaded me to exercise my discretion to entertain their untimely motion.

But even if I were to entertain the late motion, I would deny the motion. Defendants failed to include with this motion the papers which were submitted on the underlying motion for which reargument is sought. "In the absence thereof . . . providing a context for the position advanced, reargument is not available." *Lower Main Street LLC v. Thomas Re & Partners*,233 N.Y.L.J. 64 (Sup. Ct. Nassau Co. 2005) (citing *Gerhardt v. New York city Transit Authority*, 8 A.D.3d 427 (2d Dep't 2004). "Failure to include the underlying motion papers on a motion to renew or reargue can be fatal to such a motion."

Squicciarini v. Oreiro, 2012 NY Slip Op 32745U (Sup Ct. NY Co. 2012) (citing *Sheedy v. Pataki*, 236 A.D.2d 92 (3d Dep't 1997))

Moreover, Orr asserts that defendants are raising the issue of *Tydings* for the first time on this motion. "Reargument is not available where the movant seeks only to argue 'a new theory of law not previously advanced.'" *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005) (quoting *Frisenda v. X Large Enters.*, 280 A.D.2d 514, 515 (2d Dep't 2001)). *See also Board of Directors of the Maidstone Landing Homeowners Assn., Inc. v. Maidstone Landing, LLC*, 2012 N.Y. Misc. LEXIS 4480 (Sup. Ct. N.Y. Co. 2012) ("Having failed to raise this argument in the prior round of motion practice, [movant] cannot raise it for the first time on reargument").

The only portion of the underlying motion papers submitted by defendants is an unsigned attorney reply affidavit dated June 23, 2011. While there is no mention of *Tydings* in the affidavit, it does argue that in order for collateral estoppel to apply, the issue must have been essential to the decision, and must have necessarily been decided. Defendants' counsel further asserts, without citation to any case law, that "[b]ecasue Justice Madden's decision regarding reliance was only an alterative holding in the first place, and was ignored by the Appellate Court, the reliance issue was not 'essential' to, or 'necessarily' decided, in the other action, and the defendants are therefore not barred from asserting the fraud defense in this action.

Accordingly, plaintiff's argument that this issue is being raised for the first time on this motion to reargue is called into question. While it is possible that Orr may be right that *Tydings* was not specifically raised on the underlying motion, the issue addressed in *Tydings* was raised in this reply affidavit.

Therefore, even assuming for purposes of this motion that this issue was raised in the underlying motion, defendants fail to establish that I misapprehended the law. Both Justice Madden and the Appellate Division expressly held that there was no evidence that defendants actually relied on any of Orr's purported misrepresentations. Neither Justice Madden or the Appellate Division couch this as an alternative holding. As such, *Tydings* is inapplicable, and I find that I did not misapprehend or overlook the law on the underlying motion.

In accordance with the foregoing, it is

ORDERED that defendants Daniel Yun and Belstar Group, LLC motion for leave to reargue the Court's October 21, 2011 decision and order is denied.

Dated: New York, New York
December 14, 2011

ENTER:

Saliann Scarpulla, J.S.C.