Studio A Showroom, LLC v Yoon
2011 NY Slip Op 33970(U)
November 4, 2011
Supreme Court, New York County
Docket Number: 650806/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 49

STUDIO A SHOWROOM, LLC

Plaintiff,

-against-

DAVID YOON, *et al.*,

Defendants.

INDEX NO. 650806/2010

MOTION DATE Nov. 1, 2011

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, plaintiff's motion for leave to reargue is decided in accordance with the accompanying decision and order.

Dated: November 4, 2011

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

----------X

STUDIO A SHOWROOM, LLC

Plaintiff,

-against-

DAVID YOON and YOONY CORP. HOLDINGS, both individually and d/b/a/ THE ADDISON STORY,

Defendants.

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DECISION AND ORDER

Index No. 650806/2010

Hon. O. Peter Sherwood, J.

After oral argument held on May 10, 2011, the court issued a decision on the record which granted summary judgment in defendants' favor dismissing all causes of action alleged in the complaint with the exception of the first cause of action. That cause of action was deemed to be a demand for payment of commissions earned prior to termination of the agreement. The surviving claim was severed and continued. Thereafter, the court issued a written decision and order, dated May 17, 2011 memorializing the decision rendered on the record. Although the court stated that there was an issue of fact as to whether or not a termination/integration clause in the parties' agreement had been stricken at the time defendant, David Yoon, signed the contact on behalf of the manufacturer, corporate defendant, Yoony Corp. Holdings, and whether the manufacturer ever agreed to the change, the court dismissed the fourth and fifth causes of action for breach of contract upon its finding that Yoon had communicated to plaintiff's principal, Aaron Zoref, the manufacturer's desire to terminate the contract pursuant to the 30-day notice clause and Zoref agreed to the termination in an exchange of e-mails. Plaintiff now moves to renew and reargue pursuant to CPLR 2221. For the reasons stated on the record on November 1, 2011, the motion is denied.

In its supporting arguments on the motion, plaintiff does not specifically challenge the court's dismissal of the complaint against the individual defendant, David Yoon, or dismissal of (a) the

second cause of action for quantum meruit, (b) the third cause of action for unjust enrichment, and (c) the fifth cause of action for breach of contract with respect to a confidentiality provision in the party's agreement. Instead, its arguments center on the fourth cause of action for breach of contract.

In support of that branch of the motion as seeks reargument, plaintiff contends that as the non-moving party, the court must accept its pleadings and papers as true. Plaintiff maintains that the court must credit its claim that the contract between the parties was for a specific duration and not terminable and, further, that the silence of plaintiff's principal in response to defendants' letter of termination of the agreement did not constitute an acceptance of the termination.

In support of renewal, plaintiff furnishes e-mails between the parties which were not submitted in opposition to defendants' summary judgment motion and are dated June 9, 2010 and June 11, 2010. Plaintiff contends that the e-mails refute defendants' letter of termination and defendants' ability to terminate the Agreement. Plaintiff avers that it did not previously furnish the e-mails to the court as the central issue was whether the termination/integration clause had been stricken from the agreement, not whether plaintiff had accepted defendants' termination of the agreement. Plaintiff contends that it accepted defendants' termination of the parties' agency relationship, but did not accept defendants' attempt to unilaterally terminate the parties' contract. Defendants contend that the e-mails were available at the time of the earlier motion and may not be considered now.

DISCUSSION

The standard for reargument is well settled. A motion for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221(d); *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group,* 16 AD3d 611 [2d Dept 2005]). Reargument is not a proper vehicle for new issues that could have

been, but were not raised on the prior motion or to conduct a rehash of arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola,* 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.,* 40 AD3d 481, 482 [1st Dept 2007]).

A motion for leave to renew must be based on evidence establishing "new facts not offered on the prior motion that would change the prior determination"(CPLR § 2221 [e] [2]), as well as "reasonable justification" for not offering these facts previously (CPLR § 2221 [e] [3]; *CLP Leasing Co. v Nessen,* 27 AD3d 291, 292 [1st Dept 2006]) "Nevertheless, '[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Allstate Ins. Co. v Liberty Mut. Ins. Co.,* 58 AD3d 727, 728 [2d Dept 2009], quoting *Elder v Elder,* 21 AD3d 1055 [2d Dept 2005]).

The arguments raised on the motion are not new. The new e-mails do not provide support for a change in the court's determination. The issue of whether plaintiff accepted defendants' termination of the parties' agreement was previously argued and rejected by the court.

It is

ORDERED that the motion to renew is denied; and it is further

ORDERED that the motion for leave to reargue is denied.

DATED: November 4, 2011

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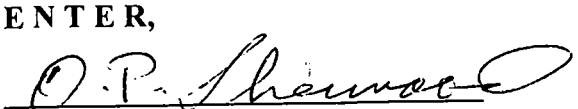

O. PETER SHERWOOD
J.S.C.