

Nussdorf v BDO Seidman, LLP
2012 NY Slip Op 33392(U)
March 15, 2012
Sup Ct, New York County
Docket Number: 601359/09
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C.
Justice

PART 48

Index Number : 601359/2009
NUSSDORF, GLENN
vs.
BDO SEIDMAN, LLOP
SEQUENCE NUMBER : 016
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

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 3/15/12


JEFFREY K. OING, J.S.C.
J.S.C.

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 NEW YORK COUNTY

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J.S.C.
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PART 48

Index Number : 601359/2009
NUSSDORF, GLENN
vs.
BDO SEIDMAN, LLOP
SEQUENCE NUMBER : 015
REARGUMENT/RECONSIDERATION

INDEX NO. _____

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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GLENN NUSSDORF, STEPHEN NUSSDORF,
ARLENE NUSSDORF, and RUTH NUSSDORF,

Plaintiffs,

-against-

BDO SEIDMAN, LLP, ERIC HANANEL,
LAWRENCE COHEN, JOSEPH KLAUSNER,
GRAMERCY ADVISORS, LLC, GRAMERCY
ASSET MANAGEMENT LLC, and JAY A.
JOHNSON,

Defendants.

-----x

JEFFREY K. OING, J.:

BACKGROUND

Familiarity with the underlying facts is presumed. Briefly, plaintiffs commenced this action in May 2009 to recover damages allegedly incurred as a result of their investment in three fraudulent tax shelters promoted and marketed to them by the defendants BDO Seidman, LLP ("BDO"), Eric Hananel and Joseph Klausner (the "BDO Seidman defendants") and defendant Lawrence Cohen: (1) the Sentinel Foreign Currency Straddle Transaction, for tax years 1999 and 2000 (the "Sentinel transaction"); (2) the Helios European Style Binary Options Transactions, for tax years 2001 and 2002 (the "Helios transaction"); and (3) the Gramercy Distressed Debt Transaction, for tax years 2003, 2004, 2005 and 2006 (the "Gramercy transaction").

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DECISION AND ORDER

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In their first amended complaint, plaintiffs asserted causes of action for: (1) fraud, (2) conspiracy to commit fraud, (3) aiding and abetting fraud, (4) fraudulent inducement, (5) negligent misrepresentation, and (6) professional malpractice.

In a decision and order, entered July 7, 2010, the Court (J.H.O. Ira Gammerman) granted defendants' motion to compel arbitration of all claims relating to the Helios and the Gramercy transactions based on certain arbitration agreements executed by the parties, and dismissed all claims relating to the Sentinel transaction as time barred. J.H.O. Gammerman, however, granted plaintiffs leave to replead their professional malpractice claim with respect to the Sentinel transaction to provide factual support for their assertion that the applicable statute of limitation was tolled pursuant to the doctrine of continuous representation.

In the second amended complaint, plaintiffs repleaded their professional malpractice claim to include allegations of BDO's continuous representation of them with respect to the Sentinel transaction.

Thereafter, the BDO Seidman defendants, by motion sequence no. 013, and defendant Cohen, by motion sequence no. 014, moved, pursuant to CPLR 7503(a), to compel arbitration of the professional malpractice claim asserted in plaintiffs' second amended complaint, and, in the alternative, to stay litigation of

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that claim, pursuant to CPLR 2201, pending arbitration of the claims asserted in plaintiffs' first amended complaint.

In a decision and order, entered August 4, 2011, this Court determined that "any continuing professional services that the BDO defendants provided at the request of plaintiffs [with respect to the Sentinel transaction] fall outside the scope of the[] agreements" between the parties and, thus, do not require mandatory arbitration (Decision, p. 11). This Court also denied defendants' motion to stay the instant proceeding pending arbitration of the Helios and Gramercy transaction claims because defendants failed to demonstrate that:

Plaintiffs' remaining malpractice claim, which arises out of the 1999 Sentinel transaction, is inextricably interwoven with the arbitrable claims arising out of the later 2001 Helios and 2003 Gramercy transactions. Nor have defendants made clear how the determination of issues pertaining to the 2001 Helios and 2003 Gramercy transactions might dispose of this claim

(Decision, p. 12).

The Instant Motions

The BDO Seidman defendants move to reargue and/or renew the August 4, 2011 decision and order, or, in the alternative, to stay the proceedings pending their appeal of that decision and order. Defendant Lawrence Cohen separately moves for the same relief, and adopts all the arguments set forth by the BDO Seidman defendants.

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DISCUSSION

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court (Rostant v Swersky, 79 AD3d 456, 456 [1st Dept 2010] [citation omitted]. Reargument will 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 Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992] [citing Schneider v Solowey, 141 AD2d 813 [2d Dept 1988]]). The purpose of reargument is not to provide the unsuccessful party with successive opportunities to reargue issues already decided by the court or to present new arguments not originally asserted (Id.).

Contrary to defendants' assertion, the arguments defendants asserted were not overlooked or misapprehended by the Court, but were specifically considered and addressed in the prior decision. The mere fact that the second amended complaint asserts facts regarding the transactions currently in arbitration does not mean that the claims arising from the Sentinel transaction are inextricably interwoven with the claims arising from the Helios and Gramercy transactions. Notably, the Sentinel transaction preceded in time both the Helios and Gramercy transactions. As this Court explained in its prior decision, "[w]hile there may be numerous factual similarities and legal overlap among these three

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transactions, the underlying facts giving rise to their respective claims are sufficiently distinct" (Decision, p. 12).

Similarly, defendants' argument that the arbitration will resolve the issues raised in this litigation is not persuasive as plaintiffs' claims in this action and in the arbitration, although related, arise out of three separate transactions (cf. County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC, 65 AD3d 940 [1st Dept 2009]).

A motion for leave to renew pursuant to CPLR 2221(e)(2) "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 (William P. Paul Equip. Corp., supra, 182 AD2d at 27). Here, because defendants fail to meet burden of demonstrating any new or additional facts warranting renewal, that aspect of their motion is also denied.

In any event, the ability to proffer evidence on a renewal motion readily available at the time of the original motion is limited (see e.g., O'Brien v London Woods Dev. Corp., 280 AD2d 423 [1st Dept 2001]). CPLR 2221(e)(3) specifically requires that the party must provide a "reasonable justification for the failure to present such facts on the prior motion."

Here, the arbitration statement of claim on which defendants now rely was filed with the American Arbitration Association on

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December 10, 2010. Defendants' reply brief on their original motion was filed more than a month later on January 19, 2011. Defendants could have submitted the arbitration statement of claim to this Court at that time. Defendants cannot rely on that statement of claim now, particularly in light of the fact that defendants offer no reasonable excuse for their failure to do so in the first instance (Estate of Brown v Pullman Group, 60 AD3d 481, 482 [1st Dept 2009]). Even if the Court were to ignore the deficiencies of the renewal motion, the statement of claim would not alter this Court's prior determination.

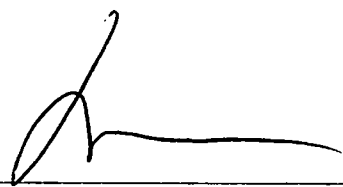
Defendants fail to proffer a sufficient basis for this Court to stay this action pending appeal.

Accordingly, it is

ORDERED that the BDO defendants' (015) and defendant Cohen's (016) motions for leave to reargue and/or renew, or, in the alternative, to stay the proceedings pending arbitration, are denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/15/12


HON. JEFFREY K. OING, J.S.C.