SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Lee & Associates NYC LLC INDEX NO. 653686/12

MOTION DATE 2/6/13

-v- MOTION SEQ. NO. 4

The 1998 Alexander Karten Annuity Trust MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on 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

In this action to recover a broker's commission, defendant The 1998 Alexander Karten Annuity Trust ("defendant") moves pursuant to CPLR 2221 and 5015 to renew and/or reargue and vacate this Court's order, dated January 4, 2013 (the "Order") which granted plaintiff's motion for summary judgment on the issue of liability and directed a hearing on damages, and upon reargument and/or renewal, denying summary judgment. Defendant also moves to stay the hearing until this motion is decided and/or the completion of discovery.[1]

In support of its motion, defendant contends that after the Court issued its decision, plaintiff filed the note of issue, despite the absence of any discovery and bill of particulars. Defendant then moved to strike the note of issue and compel discovery (returnable February 11, 2013). However, the Special Referee then issued a notice for the hearing on February 11, 2013.

Defendant argues that the Court overlooked and misapprehended the fact and the law when it found that plaintiff was the procuring cause of the Lease, "despite the [defendant's] claim that plaintiff had abandoned its efforts to secure a lease, not participated in further negotiations and indeed interfered with later negotiations with the Tenant." Defendant argues that discovery is needed to probe the work and effort plaintiff claimed it performed prior to its

[1] The Court denied the request for the stay at an in-court conference on February 6, 2013 when the order to show cause was initially presented to the Court.

Dated: ____

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

abandonment in late May 2012. The issue of plaintiff's demands for the full commission needs to be explored and what alternatives it proposed to raise its commissions based on a change in the rental structure. Plaintiff's abandonment occurred after the defendant refused plaintiff's demand to pay a full commission.

In opposition, plaintiff argues that defendant failed to state a single fact or matter of law that this Court overlooked or misapprehended. Plaintiff merely restates the same arguments previously made, that were belied by the documentary evidence that demonstrated that plaintiff procured the lease agreement in question. Nor does defendant present any newly discovered evidence, and therefore CPLR 5015 is irrelevant.

Defendant had served a Demand for Bill of Particulars and Notice for Discovery and Inspection with its Answer for proof of plaintiff's claim it was the procuring broker. This Court's order granting summary judgment as to liability, however, obviated their relevance. And, defendant's pending discovery motion raises the same arguments made herein. Plaintiff is prepared to proceed before JHO Gammerman with proof of the fair and reasonable value of the commission. Plaintiff is prepared to produce expert witnesses who are available to appear and testify as to such proof, and plaintiff would be prejudiced were it prevented or delayed from doing so.

Discussion

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion to renew, when properly made, posits newly discovered facts that were not previously available *or* a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc.2d at 133, 751 N.Y.S.2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]).

A motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and 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 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*,80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Here, plaintiff's motion is essentially one to reargue, and not one to renew, as he fails to present to the Court any new facts or law for the Court to consider (*Johnson v Ford*, 33 AD3d 529, 823 NYS2d 67 [1st Dept 2006] ("Since plaintiffs did not submit any new or additional facts, the motion court correctly determined that this second motion was really a motion to reargue")).

Thus, CPLR 5015, which permits a court to vacate an order upon the ground of, *inter alia*, newly discovered evidence, does not apply to defendant's motion.[2]

The Court grants reargument on the ground that defendant claims that Court overlooked the fact that plaintiff purportedly abandoned its efforts to secure the Lease, and did not participate in further negotiations, but interfered with subsequent negotiations with the Tenant.

However, upon reargument, the Court adheres to its determination to grant summary judgment on the issue of liability on plaintiff's *quantum meruit* claim.[3]

In order to establish a *quantum meruit* claim, plaintiff must show "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services." (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 926 NYS2d 494 [1st Dept. 2011] *citing Freedman v Pearlman*, 271 AD2d 301, 304 [2000]). And, in "the absence of a special agreement, a real estate broker, to recover a commission, must establish that he was the procuring cause of the sale or transaction" (*Kenneth D. Laub & Co., Inc. v. 101 Park Ave. Associates*, 101 AD2d 744, 475 NYS2d 64 [1st Dept 1984] citing 11 N.Y.Jur.2d, Brokers, § 122).

As previously noted by the Court, the subject July 2012 lease acknowledges that plaintiff was one of two sole brokers "dealt with" by defendant and the tenant Comstock/Skanska JV in connection with the lease. Also, as previously determined by the Court, "the submissions indicate an agreement that plaintiff be paid a commission for brokering the lease, [and] the emails demonstrate that the issue of the amount of plaintiff's commission remained unresolved." Defendant's position that after plaintiff "walked away," defendant had no dealings with defendant and dealt directly with tenant, does not raise an issue of fact as to whether plaintiff performed services in good faith, that defendant accepted plaintiff's services, that plaintiff expected to be compensated for such services, and that the evidence shows that plaintiff was the procuring cause of the subject lease, which identified plaintiff in any event. Thus, that plaintiff allegedly walked away from during negotiations is a factor to be considered on the issue of damages as to the value of plaintiff's services rendered up to that point of the negotiations, if proven as true. As such, the Court rejects defendant's request that the Court, upon reargument, deny summary judgment, and directs the parties to proceed with the hearing on damages before JHO Ira Gammerman as directed in this Court's order dated January 4, 2013. It is also noted that any issue with discovery relative to damages shall be resolved by JHO Ira Gammerman.

Conclusion

Based on the foregoing, it is hereby

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[2] CPLR 5015 permits a court to vacate an order upon the ground of:

"1. excusable default . . .
2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result . . ; or
3. fraud, misrepresentation, or other misconduct of an adverse party; or
4. lack of jurisdiction to render the judgment or order; or
5. reversal, modification or vacatur of a prior judgment or order upon which it is based."

[3] Defendant describes the second cause of action as one for "quantum meruit." (Motion, ¶¶ 5-6).

ORDERED that defendant's motion pursuant to CPLR 2221 and 5015 to renew and/or reargue and vacate this Court's order, dated January 4, 2013 and for a stay of the hearing until this motion is decided and/or the completion of discovery is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 2.14.2013 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**