To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MICHAEL MIKHAILOV,

Plaintiff,

-against-

Index No. 17393/2010
DECISION & ORDER
Motion Sequences 9 & 10

ITZHAK KATAN, RICHARD MARANS, and MARANS, WEISZ & NEWMAN, LLC

Defendant.

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The following papers were received and considered in connection with the above-captioned matter:

PAPERS	**NUMBERED**
Notice of Motion to Renew/Supplemental Affirmation in Support/ Exhibits 1-6	1-8
Memorandum of Law in Support	9
Notice of Motion/Affirmation in Support of Motion for Leave to Renew and Reargue/Exhibits A-E	10-17
Memorandum of Law in Support of Motion for Leave to Renew and Reargue	18
Plaintiff's Opposition Affirmation	19
Reply Affirmation in Support/Exhibits 1-4	20-24
Reply Affirmation in Further Support of Motion to Renew and Reargue/Exhibit A	25-26

FACTUAL & PROCEDURAL BACKGROUND

Defendants, Richard Marans and Marans, Weisz & Newman, LLC (hereinafter "Marans law firm") move this Court to renew/reargue its previous motion for summary judgment. Defendant Itzhak Katan also moves this Court to renew its previous motion for summary judgment. Defendants contend that based upon new evidence - a letter from Africa Israel not in existence prior to this Court's November 2, 2012 decision - Defendants are entitled to judgment as a matter of law and dismissal of Plaintiff's Amended Complaint. In addition, Defendant Katan moves to reargue its previous motion on the grounds that this Court misapprehended certain facts in rendering its November 2, 2012 decision.

In his complaint, Plaintiff alleges that prior to May 15, 2008, Defendant Katan represented that he owned half or all of the membership interest in Gowanus Village IV, LLC (hereinafter Gowanus). Gowanus was a tenant-in-common owner having a 33.33% interest in a parcel of real property known as 420 Carroll Street, Brooklyn, New York. On or about December 19, 2008, Plaintiff entered into an agreement with Defendant Katan pursuant to which Plaintiff purportedly purchased a 49% membership interest in Gowanus. The Agreement was executed by Plaintiff and Defendant Katan, and the Marans law firm was escrow agent.

Pursuant to the agreement, Defendant Katan was to convey the Membership Interest to Plaintiff for $2.2 million ($2,200,000.00) payable as $900,000.00 delivered simultaneously with another $100,000.00 on December 24,2 008; another $600,000.00 delivered on or about 90-days from the execution of the agreement; and $600,000.00 delivered when the New York City Planning Commission certifies that the property has been rezoned fo residential development. The Agreement

made representations of ownership of the shares, and disclosed that Katan had a loan obligation to Africa Israel, Ltd in the amount of approximately $1.4 million.

Plaintiff's complaint says that he paid Defendant Katan the first payment of $900,000.00 on December 19, 2008, and the $100,000.00 on December 22, 2008. The agreement further stated that "[t]he Assignment of Membership Interests shall be held in escrow by law firm of Marans Weisz & Newman, LLC and released upon receipt of the second payment by Katan and shall only be effective upon receipt of the second payment." Plaintiff claims that after the first payment, he discovered Defendants' alleged misrepresentations, fraud, and concealment. Specifically, Plaintiff alleges that he discovered, subsequent to paying $1,000,000.00 for Katan's membership interest, that Defendant Katan had executed a security agreement with AI Holdings (USA) Corp. (hereinafter "AI Holdings").

Plaintiff alleges that about seven months prior to the execution of the agreement, Defendant Katan, while represented by the Marans law firm, executed a promissory note to pay an entity known as AI Holdings the sum of $1,412,039.00. With said note, Defendant Katan also further executed a security agreement with AI Holdings. Plaintiff alleges that Mr. Katan with the collusion of the Marans law firm, concealed the existence of the security agreement. Plaintiff further alleges that Defendants knew Plaintiff would not have entered into the agreement to purchase Mr. Katan's interest if he had known about the security agreement between Mr. Katan and AI Holdings. As such, Plaintiff alleges that the security agreement renders the interest he purchased without residual value. Plaintiff avers that by entering the Agreement [with Plaintiff], Defendant Katan breached most of the material terms of the Security Agreement and was attempting to sell to Plaintiff property which Defendant Katan lacked the right to transfer or sell. Plaintiff's complaint alleges that the Marans law firm represented

Defendant Katan in these transactions and aided and abetted Mr. Katan in said transactions, thereby taking part in defrauding and fraudulently inducing Plaintiff into the agreement with Defendant Katan for Gowanus.

DISCUSSION

Defendants' Motion to Renew

Defendants seek leave to renew their previous summary judgment motions and seek dismissal of Plaintiff's Amended Complaint. A "motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' [CPLR 2221(e)(2)] and 'shall contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3]." *Caraballo v. Kim*, 63 A.D.3d 976 (2nd Dept., 2009), *citing*, *Ramirez v. Khan*, 60 A.D.3d 748 (2nd Dept., 2009) ; *Dinten-Quiros v. Brown*, 49 A.D.3d 588, 852 N.Y.S.2d 793 (2nd Dept., 2001); and *Madison v. Tahir*, 45 A.D.3d 744 (2nd Dept. 2007). "A motion to renew is not a second chance given to a party who failed to exercise due diligence when making their initial factual presentation. *Renna v. Gullo*, 19 A.D.3d 472 (2nd Dept., 2005) *quoting Rubinstein v. Goldman*, 225 A.D.2d 328, 329 (1st Dept., 1996); *see also, Caraballo v. Kim*, *supra; O'Dell v. Caswell*, 12 A.D.3d 492 (2nd Dept., 2004).

Here Defendants offer a letter from Africa Israel that Defendants contend was not available at the time this Court rendered its November 2, 2012 decision. Said letter was forwarded from Africa Israel's Chief Executive Officer and forwarded to Gowanus informing Gowanus that Africa Israel's security interest in the shares of Gowanus were released and that at no time was Africa Israel the owner of the shares of Gowanus. The letter dated November 9, 2012 states:

> Upon the sale of the Property, the security interest held by Africa Israel under the terms of the Pledge and Security Agreement executed between Africa Israel and Itzhak Katan on May 15, 2008, as well as, under the companion Note of the same date executed by yourself have been satisfied by the proceeds of the sale, and as such the Membership Interests in Gowanus Village IV are no longer encumbered.

Defendants argue that said letter extinguishes the remaining causes of action in Plaintiff's complaint as it proves Defendant Katan's ownership of the shares, and proves that there are no longer any encumbrances on said shares.

Defendants contend that the letter clearly establishes that Defendant Katan did in fact own/possess the membership interests in Gowanus. However, Defendants offer no explanation as to why said letter was unavailable at the time this Court rendered its previous Decision & Order. Even in the affidavit from Tamir Kazaz - CEO of AI Holdings Corp and AI Gowanus Village, LLC - Mr. Kazaz offers no explanation of why said letter was not offered nor authored prior to this Court's Decision & Order. Without a showing that Defendants exercised due diligence and were unable to procure a letter or any other evidence proving that Katan did in fact own/possess the membership interests in Gowanus, Defendants are not entitled to the relief they seek.

Defendant the Marans Law Firm's Motion to Reargue

Defendant Marans Law Firm also argues that it is entitled to reargue its previous motion as this Court misapplied the applicable law in denying those portions of the marans law firm's motion for summary judgment. Here, however, the Marans law firm offers no new arguments and simply reiterates its previous arguments on is motion to reargue. A motion to reargue is designed to give a party a chance to convince the court that relevant facts were overlooked or misapprehended or a

controlling principle of law was misapplied and is addressed to the court's reasonable discretion. Its purpose is not to permit a party to reargue once again the very questions the court has already decided. *Foley v. Roche*, 68 A.D.2d 558, 567,(1st Dept., 1979), *citing*, *Fosdick v. Town of Hempstead*, 126 N.Y. 651 (1891); *American Trading v. Fish*, 87 Misc.2d 193 (N.Y. Sup., 1975).

In its previous Decision & Order this Court determined that some of Plaintiff's claims in its complaint were dismissed and that others had merit and that as such, Marans law firm motion for summary judgment was granted in part and denied in part. Plaintiff's causes of action that were not dismissed - and that the Marans law firm seeks to reargue - are Plaintiff's causes of action for breach of contract, fraudulent inducement, negligent misrepresentation, breach of fiduciary duty and breach of Judiciary Law §487.

First, the Marans law firm argues that this Court misconstrued the facts of Plaintiff's breach of contract claim by commingling the relevant facts with those facts used in support of Plaintiff's fraudulent inducement claim. The Court notes that in analyzing Defendant's entitlement to judgment as a matter of law, the facts are not reviewed in isolation. Rather, the moving party has the burden of convincing this Court that no question of fact remains and that as such, the movant is entitled to summary judgment. Marans law firm did not sustain their burden and as such, this Court denied, in part, Defendant's application.

The Marans law firm then proceeds to reiterate facts previously offered in its summary judgment motion in order to supports the present motion. As the Court found in the first motion, there remains a question of fact as to Defendants' claims as said claims are contradicted by Plaintiff's complaint and Plaintiff's allegations that Defendants concealed certain information regarding the transaction. It should be noted that on a motion for summary judgment the role of the Court is "issue

finding" rather than "issue determination" see *Sillman v. Twentieth Century–Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). The record here is rife with questions of fact surrounding the parties' transaction and the representations made to Plaintiff regarding the purchase. Furthermore, a court should not assess credibility on a motion for summary judgment. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 631 (1997). As such, Defendants did not make a *prima facie* showing of their entitlement to judgment as a matter of law.

Accordingly, Defendants' motion to renew their motions for summary judgment and dismissal of Plaintiff's amended complaint is hereby DENIED. Defendant the Marans Law Firm motion to reargue is also DENIED. The parties are directed to appear before the Trial Ready Party on September 23, 2013 at 9:30 am. To the extent any relief requested in Motion Sequences 9 & 10 was not addressed by the Court, it is hereby deemed denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
August 13, 2013

HON. SAM D. WALKER, J.S.C.

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