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| Spectrum Origination LLC v Hess |
| 2014 NY Slip Op 32840(U) |
| October 28, 2014 |
| Supreme Court, New York County |
| Docket Number: 653171/13 |
| Judge: Melvin L. Schweitzer |
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and improperly considered extrinsic evidence of Spectrum's \$4,000,000 credit bid. He also contends that Real Property Actions and Proceedings Law (RPAPL) § 1371 (2) required the court to hold a hearing to determine the Mine's "fair and reasonable market value." RPAPL § 1371 (2). In addition, Mr. Hess argues that the motion should be renewed based on developments in the chapter 11 bankruptcy proceeding of Alliance Consulting Group, LLC, one of the Borrowers for the loan guaranteed by Mr. Hess, pending in the United States Bankruptcy Court for the Southern District of Mississippi (Mississippi Bankruptcy Action). Mr. Hess's motion to renew is based upon: (1) two new expert reports valuing the Mine; (2) twenty potential bidders who have expressed an interest in the Mine in connection with the bankruptcy trustee's motion to conduct a "do-over" auction; and (3) the bankruptcy trustee's application requesting the employment of a specialized brokerage firm to assist in the marketing and re-auctioning of the Mine. Defendant's brief at 20. Mr. Hess contends that this evidence raises an issue of fact as to the Mine's reasonable market value.

"A motion for leave to reargue . . . 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." CPLR 2221 (d) (2). "A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (2), (3).

Here, Mr. Hess fails to identify any facts or law that the "court overlooked or misapprehended . . . in determining the prior motion." CPLR 2221 (d) (2). Instead, he seeks to introduce new grounds for denying the underlying motion. However, "[r]e-argument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously

decided or to present arguments different from those originally asserted.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992) (internal citations omitted). Therefore, the motion to reargue is denied.

With respect to the motion to renew, Mr. Hess fails to identify any new evidence. The valuation reports prepared in connection with the Mississippi Bankruptcy Action, each valuing the Mine in excess of Spectrum’s \$4,000,000 credit bid, do not present new facts that were not known to Mr. Hess at the time of the prior motion as, on that motion, Mr. Hess submitted two valuations, which also valued the Mine in excess of \$4,000,000. *See William P. Pahl Equip. Corp.*, 182 AD2d at 27 (finding that documents obtained during discovery in a separate lawsuit did not constitute new evidence as their content was known to the movant at the time of the prior motion). Moreover, “[t]he subsequent retention of an expert is not proper grounds for renewal.” *Sullivan v Harnisch*, 100 AD3d 513, 514 (1st Dept 2012).

Nor do the bankruptcy trustee’s efforts to maximize the value of the bankruptcy estate constitute new evidence “that would change the prior determination.” CPLR 2221 (e) (2). Facts concerning the commercial reasonableness of the foreclosure auction were known to Mr. Hess at the time of the underlying motion, where he argued that Spectrum’s credit bid was suspiciously low but, as stated in the Decision, Mr. Hess “[did] not allege that Spectrum failed to advertise the public auction, or manipulated the public auction, or in any way unilaterally dictated the terms of the sale.” Document number 30 at 10. Moreover, these facts would not change the prior determination. In the underlying Decision, this court explained that “if Mr. Hess does have an issue with how the process was handled in Mississippi . . . he should assert those claims in a court of Mississippi.” *Id.* Mr. Hess has failed to come forward with new evidence or to demonstrate that such evidence “would change the prior determination.” CPLR 2221 (e) (2); *see*

also Mundo v SMS Hasenclever Maschinenfabrik, 224 AD2d 343, 344 (1st Dept 1996)

(“renewal is granted sparingly . . . it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” [internal quotation marks and citations omitted]). Therefore, the motion to renew is denied.

Mr. Hess’s motion is denied for the additional, independent reason that it is procedurally defective. Judgment was entered on May 30, 2014, and Mr. Hess filed the instant motion on June 12, 2014. As judgment had already been entered, Mr. Hess’s recourse was to seek to vacate the Decision and judgment based on “newly-discovered evidence which, if introduced at trial, would probably have produced a different result” (CPLR 5015 [a] [2]), or one of the other grounds specified in CPLR 5015. *See also Fernandez v Moskowitz*, 113 AD3d 574, 575 (1st Dept 2014). In any event, even if the court treated the instant motion as one to vacate judgment pursuant to CPLR 5015, for the reasons discussed above, Mr. Hess fails to make the required showing and the motion is denied.

Mr. Hess also requests, in the alternative, that the court modify the Decision “by limiting the Court’s findings to liability and staying any determination of damages” (document number 47 at 1), so that “the issue of damages [may] be determined among the same parties” in the Mississippi Bankruptcy Action. Defendant’s brief at 22. While the instant motion was pending, the court in the Mississippi Bankruptcy Action issued an order, dated August 22, 2014, which determined that Spectrum’s “Total Claim is valued at \$34,313,520.43 less [Spectrum’s] pre-petition credit for the value of the Mine of \$4,000,000 for a total of \$30,313,520.43.” Document number 76, exhibit C at 14. In addition, the bankruptcy court approved a stipulation among the parties, whereby Mr. Hess withdrew his objections to the Mine’s valuation with prejudice. *Id.* at 18, 22; exhibit A at 4. As the sole issue with respect to damages in the instant action is whether

the Mine's fair market value is higher than Spectrum's \$4,000,000 credit bid, the bankruptcy court's determination renders this issue moot. Therefore, Mr. Hess's alternative request for relief is denied.

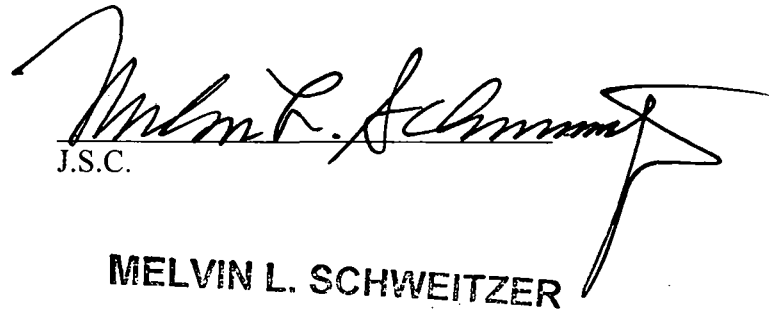
Accordingly, it is hereby

ORDERED that the motion of defendant to reargue and renew plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that defendant's request, in the alternative, to modify this court's April 16, 2014 decision and order by limiting the court's findings to liability and staying any determination of damages until further evidentiary proceedings take place, is denied as moot.

Dated: October 28, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER