

**13th & 14th Street Realty, LLC v Board of Mgrs. of
the A Bldg. Condominium**

2015 NY Slip Op 30565(U)

April 16, 2015

Sup Ct, New York County

Docket Number: 155269/13

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
13th & 14th STREET REALTY, LLC, *et al.*

Plaintiff,

-against-

THE BOARD OF MANAGERS OF THE
A BUILDING CONDOMINIUM,

Defendant.

-----X

BARBARA JAFFE, JSC:

For plaintiff:
Matthew Hearle, Esq.
Goldberg, Weprin *et al.*
1501 Broadway, 22nd Fl.
New York, NY 10036
212-221-5700

For defendant:
Courtney J. Lerias, Esq.
Adam Leitman Bailey, P.C.
120 Broadway, 17th Fl.
New York, NY 10271
212-825-0365

Index No. 155269/13

Motion seq. no. 002

DECISION & ORDER

By notice of motion, plaintiff moves pursuant to CPLR 2221(d) for an order granting it leave to reargue its prior motion for summary judgment in lieu of complaint, and upon reargument, granting it summary judgment. Defendant opposes.

By order dated May 30, 2014, I denied plaintiff's motion and directed that defendant file an answer to the complaint. At issue is a promissory note signed by the parties, by which defendant agreed to make certain payments; plaintiff signed as sponsor of an offering plan and condominium declaration relating to the condominium conversion of a building located at 425 East 13th Street in Manhattan, and defendant as the unincorporated business association of unit owners (Board) formed pursuant thereto. While it is undisputed that defendant failed to pay the note timely, it argued that the note should not be enforced as it had been procured by fraud. I observed in the decision that "defendant's allegations that the note was procured by fraud are not

controverted by plaintiff,” and thus held that defendant had demonstrated a bona fide defense to the note, and that “as the note is alleged to have been signed fraudulently by a principal of sponsor for the benefit of sponsor, the waiver provision contained therein may not be binding.” (*13th & 14th St. Realty, LLC v Board of Mgrs. of the A Bldg. Condominium*, 2014 NY Slip Op 31429[U] [Sup Ct, New York County]).

Plaintiff argues that I erred in finding that defendant had raised a defense to the note, contending that defendant did not assert that fraud barred enforcement of the note, and that even if it had, that it had waived the defense by making payments for two years on the note until failing to make the final payment on the note’s maturity date. (NYSCEF 45).

Defendant maintains that leave to reargue should not be granted as plaintiff has not shown that I erred or overlooked any material fact and as plaintiff reiterates its prior arguments, and also improperly argues for the first time that defendant waived its fraud defense by making payments on the note. (NYSCEF 55).

In reply, plaintiff denies that it failed to raise the argument previously and references the oral argument. (NYSCEF 57).

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]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not “serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). Nor may the movant advance new arguments not previously presented. (*Kent v 534*

E. 11th St., 80 AD3d 106 [1st Dept 2010]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]).

A review of the initial motion papers reflects that while defendant argued that the note should not be enforced due to sponsor's fraud (NYSCEF 11, 29), plaintiff, in reply, did not address the argument (NYSCEF 30). Plaintiff did not argue that the fraud defense had been waived until oral argument on the motion. (NYSCEF 34).

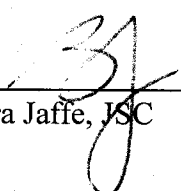
As plaintiff did not raise this issue until oral argument, and only now in this motion cites caselaw in support of that argument, it has improperly advanced a new argument that was not interposed in its original motion. (*See Cohen v Romanoff*, 27 Misc 3d 1208[A], 2010 NY Slip Op 50627[U] [Sup Ct, Kings County 2010] [denying leave to renew and reargue where movant first raised issue during oral argument and then for first time in writing in motion for leave to renew or reargue]; *see also Gonzalez v Sun Moon Enter. Corp.*, 53 AD3d 526 [2d Dept 2008] [evidence submitted for first time in reply papers and at oral argument should have been disregarded as it was not properly before court]; *Peycke v Newport Media Acquisition II, Inc.*, 40 AD3d 722 [2d Dept 2007] [defendant could not, on motion for leave to renew, rely on evidence that it submitted for first time during oral argument]).

Additionally, during oral argument on the prior motion and in opposing plaintiff's argument about payment, defendant stated that the payments were made by the Board when it was controlled by sponsor and that thus, the payments do not constitute a waiver of its fraud defense. This allegation would, in any event, raise a triable issue as to waiver. (*See eg Western N.Y. Geological Servs., Inc. v Mauro*, 135 AD2d 1123 [4th Dept 1987] [plaintiff failed to establish that defendant's payment resulted in waiver of fraud defense as there was factual question as to when defendant learned of alleged fraud]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to reargue its prior motion for summary judgment in lieu of complaint is denied.

ENTER:



Barbara Jaffe, JSC

DATED: April 16, 2015
New York, New York