

LNYC Loft, LLC v Perelman
2016 NY Slip Op 31647(U)
August 24, 2016
Supreme Court, New York County
Docket Number: 650969/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 650969/2011
LNYC LOFT, LLC, INDIVIDUALLY
vs
STANLEY PERELMAN, JANI
Sequence Number : 011
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

In this action for, *inter alia*, breach of fiduciary duty, plaintiffs move for leave to reargue the the motion brought by defendants Stanley Perelman (“Perelman”) and Jani Development II, LLC (“Jani”) for summary judgment dismissing plaintiff’s tortious interference with contract claim, and upon reargument, denying the motion and reinstating the claim.

Factual Background

This action involves a condominium development building in New York City located at One York Street, which is owned by One York Properties, LLC, which is wholly owned by defendant One York Street Associates LLC (“One York”). Plaintiff LNYC commenced this action against, *inter alia*, Perelman and Jani for tortious interference with contract, *to wit*: the Limited Liability Company Operating Agreement of HRC-NYC Development LLC (the “HRC Operating Agreement”), to which plaintiff LNYC and defendant Hudson Opportunity Fund (“Hudson”) were parties.

On the date of the alleged breach, May 5, 2010, HRC-NYC Development (“HRC Development”) owned 75% of One York, and Jani (Perelman’s company) owned 25% of One York. Under the One York Operating Agreement, HRC Development was to receive 75% of the revenue and Jani was to receive 25%. Further, plaintiff LNYC owned 44% of HRC Development and defendant Hudson owned 56% of HRC Development. Thus, plaintiff LNYC was to receive 44% of HRC Development’s 75% interest in One York (or 33% of One York), while Hudson was to receive 56% of HRC Development’s 75% interest in One York (or 42% of One York).

Dated: _____, 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

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

However, Hudson (which was 56% owner of HRC Development and HRC Development's managing member) amended, on behalf of HRC Development, One York's Operating Agreement (the "amendment"), from the 75% -25% split between HRC Development (of which plaintiff LNYC was 44% owner) and Jani, to a 50% - 50% split. Not only did this increase revenue to Jani from 25% to 50%, but also, this resulted in a reduction of plaintiff LNYC's revenue from 44% of 75% of HRC Development (or 33% of HRC Development) to 44% of 50% (or 22% of HRC Development). According to plaintiff, Hudson failed to obtain plaintiff's consent to the amendment, as required under the HRC Operating Agreement, and Perelman induced Hudson to breach this Agreement.

By Order and Decision dated February 9, 2016 (the "Decision"), the Court dismissed plaintiffs' cause of action for tortious interference with contract based on the defense of economic interest.

In support of reargument, plaintiffs argue that the Court erred by failing to take into account whether Perelman and Jani took any steps to protect their economic interest, even if it existed. Perelman and Jani did not act to protect any legal or financial interest in the business of Hudson, the breaching party, and therefore, no economic interest defense can exist here.

The breaching party is Hudson, and at the time of the breach of (and the tortious interference with) the HRC Operating Agreement on May 5, 2010, Perelman and Jani really had no legal or financial stake in Hudson, and never had any such stake before or after that date. Nor did they have any legal or financial stake in HRC. Therefore, the economic interest defense, which applies where the defendant-interfering party acted to protect its own legal or financial stake in the breaching party's business, does not apply to Perelman and Jani.

And, even if an economic interest existed by virtue of a shared investment in One York's project, as the Court stated, Hudson's amendment to One York's Operating Agreement did not protect that shared investment. There was no interfering act undertaken to protect the interfering party's stake in the business, to either protect a creditor's rights or protect a shareholder or member. The interfering acts consisted of misrepresentations to Hudson, and its executives, as to plaintiff LNYC's consent, to induce Hudson to amend One York's Operating Agreement in contravention of the HRC Operating Agreement. The interfering acts also included the forged/fabricated e-mails by which Perelman and Jani claimed that the 'written consent' to the amendment had been obtained from LNYC. Revenues were not increased or saved, but only redistributed among members. The viability of the One York Project was not affected. The only effect of the action taken was to enhance the revenues to Perelman and Jani at the expense of LNYC and even HRC. Perelman and Jani failed to show that any existing stake or interest in Hudson's business was protected by the interfering acts of Perelman and Jani. The defense of economic interest therefore cannot stand.

Additionally, the defense cannot stand because the means of Perelman and Jani's interference were illegal and involved fraud, including forgery and fabrication of purportedly e-mailed documents and a payment to induce Hudson to breach the HRC Operating Agreement. Perelman and Jani did not act lawfully. There is an issue as to whether the conduct of Perelman and Jani was lawful.

In opposition, Perelman and Jani and One York argue that the motion is procedurally defective for submission only of an affirmation of counsel with no knowledge of the facts and

inclusive of legal matter in violation of 22 NYCRR 208.11(b)(1), and for failure to submit a memorandum of law. The Court correctly determined that Perelman and Jani acted to protect a legal and financial interest they had in HCR Development's "business," *i.e.*, the One York Project, and by entering into the amendment, they were protecting their right to the additional compensation they have been orally promised by Hudson for remaining in the Project. Further, plaintiff made no claim that defendants' alleged interference involved malice, fraud or illegality, which plaintiffs failed to show in any event.

In reply, plaintiffs argue that they set forth sufficient arguments for reargument and for reinstatement of the claim.

Discussion

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]). 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]). 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 [1st Dept 1984]) 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).

Although 22 NYCRR 208.11, regarding motions and procedures, provides in part that "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law," there is no authority cited by defendant that precludes this Court from overlooking such procedural defect or deems a violation of this rule as fatal to the motion. Defendants' reliance on *Armendariz v Tiramisu Rest.* (170 A.D.2d 334, 566 N.Y.S.2d 41 [1st Dept) and *ZVUE v Bauman* (23 Misc.3d 1111(A), 885 N.Y.S.2d 714 [Supreme Court, New York County]) is misplaced. The First Department in *Armendariz* vacated the Appellate Term's decision affirming an assessment of costs for violation of such rule. Further, although the Supreme Court disregarded two affidavits of an attorney consisting of legal arguments, legal opinions, and contract interpretation, said attorney did "not appear to be admitted to practice law in New York and has not been admitted pro hac vice in this action." Importantly, the Court expressly declined to "strike the other improperly-filed legal arguments in affidavits and affirmations on this occasion," and "admonished" counsel to not "repeat this error."

Contrary to defendants' contention, to the extent that plaintiffs argue that the Court misapplied the law as to the requirements of the economic interest defense to a tortious interference with contract claim, reargument is granted.

However, upon reargument, the Court adheres to its determination that, "the Perelman defendants [Perelman and Jani] had an economic interest in Hudson [which breached the HRC Development Operating Agreement]," as "the Perelman defendants were sibling entities" and "were charged with managing the shared investment under One York Associates operating

agreement” (Decision, p. 7). The Decision also indicated that Hudson amended the Operating Agreement “because it was pressured to do so by Perelman in order to incentivize his continued work on the project” (Decision, p. 6). Thus, plaintiff failed to establish that Perelman and Jani did not act to protect any legal or financial interest in the business of Hudson, the breaching party to warrant change in this Court’s previous determination in this regard.

Upon review of plaintiff’s previously submitted opposition papers, the Court finds that plaintiff did not raise the argument that the economic defense did not apply by virtue of Perelman and Jani’s illegal and fraudulent acts (pp. 25-27). Nor in reply does plaintiff point to any section in its previously submitted opposition papers or affidavit of Darkish to show that such an argument was previously made. Reargument is not designed to afford the unsuccessful party successive opportunities 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). In any event, the emails prior to the alleged breach on May 10, 2010 and deposition testimony fail to support any claim of fraudulent or illegal undertaken in order to induce Hudson to breach the HRC Operating Agreement.

Conclusion

Based on the foregoing, it is hereby

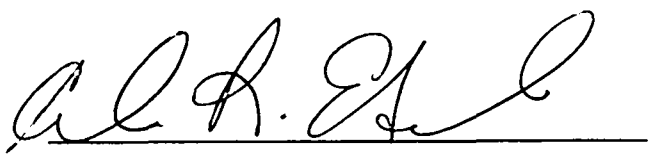
ORDERED that plaintiffs’ motion for leave to reargue the the motion brought by defendants Stanley Perelman and Jani Development II, LLC for summary judgment dismissing plaintiff’s tortious interference with contract claim, and upon reargument, denying the motion and reinstating the claim is granted solely to the extent that reargument is granted; and it is further

ORDERED that upon reargument, the Court adheres to its earlier determination in granting the motion for summary judgment dismissing the tortious interference with contract claim; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 8/27/16



J.S.C.

HON. CAROL R. EDMOND
J.S.C.

1. CHECK ONE :

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DO NOT POST

CASE DISPOSED

MOTION IS: GRANTED DENIED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

REFERENCE