

**Gristede's Foods, Inc. v Madison Capital Holdings
LLC**

2018 NY Slip Op 30383(U)

March 1, 2018

Supreme Court, New York County

Docket Number: 651811/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 39

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GRISTEDE'S FOODS, INC.,
Plaintiff,

INDEX NO. 651811/2015

MOTION DATE 9/7/2017

MOTION SEQ. NO. 003

- v -

MADISON CAPITAL HOLDINGS LLC, MC LONG TERM
HOLDINGS LLC, 65and J. JACOBSON,
Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 97, 98, 99, 100, 101, 102, 103, 104, 106

were read on this application to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, it is

In this action for fraudulent and negligent misrepresentation, alter ego liability and breach of contract, plaintiff Gristede's Foods, Inc. ("Gristede's") moves pursuant to CPLR §2221(d), for an Order granting Gristede's leave to reargue this Court's decision and order, dated August 8, 2016 (the "August Order"), to the extent that I granted the motion of defendants Madison Capital Holdings LLC ("Madison"), MC Long Term Holdings LLC ("MC Long Term") and J. Joseph Jacobson ("Jacobson") (collectively, "Defendants") to dismiss the third cause of action in Gristede's Verified Amended Complaint (the "VAC") seeking to pierce the corporate veil.

In the VAC, Gristede's sought to recover more than \$11.5 million in rent arrears, accelerated rent, attorneys' fees and expenses incurred in two nonpayment proceedings, and related charges, allegedly accruing pursuant to the terms of a commercial sub-lease executed by Gristede's and MC Long Term.

Gristede's subleased the premises, located at 2101-2115 Broadway in Manhattan, from nonparty Ansonia Commercial, LLC ("Ansonia") and, pursuant to a sub-sublease dated October 26, 2005, leased the premises to nonparty Loehmann's Operating Co. ("Loehmann's"). Loehmann's filed for Chapter 11 bankruptcy on December 15, 2013, and was permitted to sell the designation rights to the sub-sublease.

Madison Capital then purchased Loehmann's sub-sublease designation rights, with Gristede's knowledge and approval, gaining the exclusive right to designate one or more assignees for the sub-sublease and other unexpired property leases held by Loehmann's. The bankruptcy court approved the assignment of the sub-sublease to MC Long Term, in an order entered June 27, 2014 (the "Assumption Order"), and noted in the order that Gristede's had agreed to the Assumption Order's entry.

MC Long Term paid the amounts necessary to cure Loehmann's default under the sub-sublease, and began paying rent in accordance with the sub-sublease. However, on January 1, 2015, MC Long Term allegedly defaulted in rent payments, causing Gristede's to default in its rent payments to Ansonia.

As a result, Ansonia commenced nonpayment proceedings against Gristede's and Madison Capital on March 6, 2015.¹ Gristede's then commenced this action against Madison Capital and MC Long Term to recover rent arrears and accelerated rent accruing through 2018, the additional security deposit, punitive damages, interest, and attorneys' fees, costs, and disbursements accruing in this action and the Ansonia/Gristede's nonpayment proceedings.

Gristede's also commenced a nonpayment proceeding against MC Long Term on June 1, 2015.² In settlement, MC Long Term relinquished possession of the leased premises to Gristede's, and consented to entry of an approximately \$2.5 million judgment against it for rent arrears accruing through September 2015. In exchange, Gristede's agreed to dismiss all claims against MC Long Term asserted in the Gristede's/MC Long Term nonpayment proceedings.

On January 25, 2016, Gristede's filed the VAC in this action and joined Jacobson, the founder, owner, and executive officer of Madison Capital, as a defendant. The VAC alleged, among other things, that Madison Capital and Jacobson created MC Long Term as a shell corporation to be used as a shield to avoid their financial obligations to Gristede's. Gristede's contended that Madison Capital and Jacobson exercised complete dominion and control over MC Long Term and sought to hold them liable for MC Long

¹ See *Ansonia Commercial LLC v Gristede's Foods, Inc.*, Civil Court, New York County, L&T index No. 57002-NLT-2015 ("Ansonia/Gristede's nonpayment proceedings").

² See *Gristede's Foods, Inc. v MC Long Term Holdings LLC, et al.*, Civil Ct, New York County, L&T Index No. 66198/2015 ("Gristede's/MC Long Term nonpayment proceedings").

Term's contractual obligations, as that company's alter ego. Defendants moved to dismiss the VAC and in the August Order, I granted the motion for the claims against Madison Capital and Jacobson, including the claim for alter ego liability.

Gristede's now moves for leave to reargue the August Order with respect to the third claim to pierce the corporate veil. Gristede's argues that my decision "overlooked and/or misapprehended relevant law holding that alter ego liability for breach of contract may be imposed where a party to a contract is dominated and controlled by an individual or entity to further a scheme resulting in the intentional breach of that contract."

Defendants oppose the motion.

Discussion

Motions to reargue are designed to provide a party with the opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. *See Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dept. 1984). Motions to reargue "shall not include any matters of fact not offered on the prior motion. *See* CPLR Rule 2221(d)(2). And, although the determination of whether to grant a motion for leave to reargue is within the court's discretion, a motion for leave to reargue "is not designed to provide the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992) (internal citation omitted); *Setters v. AI Properties and Developments (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dept. 2016).

Initially, defendants argue that this motion is improper because Gristede's failed to include the papers originally submitted on its motion to dismiss, in violation of CPLR Rule 2214 (c). However, CPLR Rule 2214 (c) states that:

Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system.

Gristede's has complied with Rule 2214(c) by referring to e-filed documents by docket number, thus the motion is not procedurally improper.

Gristede's argues that I erred in holding that Jacobson and Madison's assurances to Gristede's that MC Long Term could perform its obligations under the Sub-Sublease, coupled with their complete domination and control of MC Long Term, and MC Long Term's eventual default, were not sufficiently unfair or unjust, under Delaware law, for the alter ego liability claim to survive Defendants' motion to dismiss. Gristede's cites three new cases in support of its motion to reargue – *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, No. CIV.A. 8578, 1988 WL 5492 (Del. Ch. Jan. 27, 1988); *Corp. Comm'n of Mille Lacs Band of Ojibwe Indians v. Money Centers of Am., Inc.*, No. CIV. 12-1015 RHK/LIB, 2013 WL 5487419 (D. Minn. Sept. 30, 2013); and *McBeth v. Porges*, 171 F. Supp. 3d 216 (S.D.N.Y. 2016). None of the three cases were previously cited in either Gristede's opposition to the motion to dismiss, or its post-oral argument submission (in response to my request) of supplementary case law on the alter ego issue. Moreover,

these cases pre-dated the oral argument and supplementary case law submission. Thus, I will not consider these new cases on this motion to reargue.³

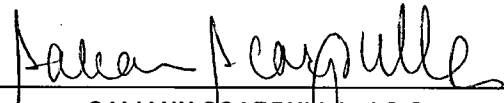
Upon review of the papers submitted, Gristede's has not demonstrated that I overlooked or misapprehended the law in arriving at the decision in the August Order, thus its motion to reargue is denied. See *Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72, 73-74 (1st Dept. 1994).

In accordance with the foregoing, it is hereby

ORDERED that the motion of Gristede's for leave to reargue this Court's decision and order, dated August 8, 2016, is denied in its entirety.

This constitutes the decision and order of this Court.

3/1/2018
DATE


SALIANN SCARPULLA, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | REFERENCE |
| | <input type="checkbox"/> | DO NOT POST | <input type="checkbox"/> | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | |

³ In any event, the new cases cited by Gristede's do not show that I misunderstood or misapplied Delaware law. In each of these cases, veil piercing claims were allowed to proceed because they were premised on something other than a breach of contract claim.