SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

HOWARD J. KAPLAN and MICHELLE A. RICE,

Plaintiffs,

-against-

Index No.: 656188/2016

Mot. Seq. No. 005

LADENBURG THALMANN & CO., INC., HOWARD M. LORBER, RICHARD J. LAMPEN, and SIGNATURE BANK,

Defendants.

MASLEY, J.:

Plaintiffs Howard J. Kaplan and Michelle A. Rice (Kaplan and Rice) move, pursuant to CPLR 2221(d), to reargue this court's October 19, 2017 decision (the Decision) granting the motion of defendants Ladenburg Thalmann & Co., Inc., Howard Lorber, and Richard J. Lampen (collectively, the Landlord) to dismiss the complaint.[1] The Landlord opposes the motion and renews their request for sanctions.

The tortured history of these five related actions[2] is set forth in various decisions and will not be repeated here.

In this motion currently before the court, Kaplan and Rice argue for reinstatement of their first cause of action for breach of contract. In the complaint, Kaplan and Rice allege that the Landlord breached the sublease when it accepted funds held at Signature Bank in an account under the name of Arkin Kaplan Rice LLP (AKR) to pay

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[1]Defendant Signature Bank did not participate in this motion and the action continues against it. All references to "defendants" mean the moving defendants, not Signature.

[2]The index numbers are: 652316/12 (Arkin against Kaplan and Rice regarding, *inter alia*, rent payments); 653835/12 (accounting); 651982/13 (Ladenburg against Signature Bank seeking to drawdown on the Letter of Credit); 151984/15 (L&T action for unpaid rent); and 656188/16 (Kaplan and Rice against the landlord and bank for drawdown on letter of credit).

outstanding rent after Kaplan and Rice withdrew from that firm. Section 24(b) of the sublease provides that when a partner withdraws from partnership with Arkin, that partner is released from all rights and obligations under the sublease. Kaplan and Rice withdrew on May 17, 2012. This court dismissed that claim because

> "the Sublease does not bar Landlord's actions, and the prior decisions recounted above affirm that Landlord had a legal right to act as it did. While Landlord's exercise of its rights to seek rent and to drawdown the letter of credit may have injured Kaplan and Rice to the extent that they have a claim on funds in the Arkin Kaplan Firm's account, they cannot claim damages against Landlord based on Landlord's exercise of its legal right."

(*Kaplan v Ladenburg Thalmann & Co., Inc.*, 2017 NY Slip Op 32281[U], *25-26 [Sup Ct, NY County 2017] [emphasis added]). Kaplan and Rice insist that this court overlooked two First Department decisions and prior rulings by Justices Oing and Sherwood.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to 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 [1st Dept 1979].)

The court denies leave to renew. The court clearly credited section 24(b) of the sublease, pursuant to which Kaplan and Rice are not personally liable to the Landlord for the rent after May 17, 2012, when they withdrew from the partnership. While there is a conflict in the various court decisions in writing, and on the record, as to whether law firm assets belonging to Kaplan and Rice may be used to pay rent after May 2012, the court resolved that conflict by relying on the most recent First Department decisions. First, *Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 422, 426 (1st Dept 2014) provides:

> The motion court correctly found that the sublease at issue is a contract subject to general principles of contract interpretation; the plain language of section 24 (B) of the sublease releases any withdrawing partner, other

than Arkin, from any further rights or obligations under the sublease upon the date of withdrawal. Indeed, the language in section 24 (B) is "reasonably susceptible" to only one interpretation. The motion court therefore properly rejected plaintiffs' argument that section 24 (B) referred only to Kaplan and Rice's personal liability, and therefore, that Kaplan and Rice's share of the partnership assets should be used to pay rent or other obligations to the sublandlord under the sublease after they withdrew from the firm. On the contrary, section 24 (B) does not contain any limitations or qualifications, and there is no basis to interpret the parties' agreement as impliedly stating something that they did not specifically include. Accordingly, defendants Howard Kaplan and Michelle Rice, as withdrawing partners, were released from any further obligations, including the requirement to pay rent, under the sublease as of the date of their withdrawal.

Similarly, plaintiffs argue that Partnership Law § 71 mandates the payment of creditors from partnership assets before partners are individually required to make contributions to satisfy the partnership's debts and liabilities, and thus, section 24 (B) of the sublease does not release Kaplan and Rice from liability under the sublease. We reject this argument. While New York Partnership Law sets forth the rules for distribution of partnership assets and liabilities in "settling accounts between the partners after dissolution," section 71 expressly provides that those rules are "subject to any agreement to the contrary." Here, the parties had a contrary agreement—namely, the sublease. (citations omitted).

Second, *Arkin Kaplan Rice LLP v Kaplan,* 138 AD3d 415, 415 (1st Dept 2016) provides:

> "defendants Kaplan and Rice were partners of AKR pursuant to section 71 of the Partnership Law, but that they were not liable for any post-dissolution liabilities, including as partners of AKR, under the specific language of the sublease at issue."

It was apparent at argument on this motion that the Landlord insists on relying on the prior inconsistent statements that AKR is responsible for the rent until the sublease expired in June 2015. Kaplan and Rice cannot charge the court with Landlord's obstinance. Likewise, Kaplan and Rice refuse to recognize that, while the court in *Ladenburg Thalmann & Co, Inc. v Signature Bank*, 128 AD3d 36 (1st Dept 2015), authorized the Landlord's drawdown, the purpose of the accounting is to reconcile these very claims. These are issues to be resolved among the former partners in an accounting, not the Landlord and not the bank. Therefore, the court did not overlook or

misapprehend the prior decisions and orders.

The Landlord's request to renew its motion for sanctions, which is not properly before the court as a cross-motion, is denied. Kaplan and Rice's motion to reargue cannot be deemed frivolous as they had a legal basis to rely on.

Accordingly, it is

ORDERED that the motion of plaintiffs Howard J. Kaplan and Michelle A. Rice to renew is denied; and it is further

ORDERED that the cross motion of defendants Ladenburg Thalmann & Co., Inc., Howard Lorber, and Richard J. Lampen for sanctions is denied.

Dated: 3/20/18

ENTER:

HON. ANDREA MASLEY