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| <b>FYM Millbrook LLC v Weinberg</b>                                                                                                                                                                                            |
| 2018 NY Slip Op 33327(U)                                                                                                                                                                                                       |
| December 18, 2018                                                                                                                                                                                                              |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 850003/2016                                                                                                                                                                                                     |
| Judge: Kathryn E. Freed                                                                                                                                                                                                        |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED**

**PART**

*Justice*

-----X

FYM MILLBROOK LLC,

Plaintiff,

- v -

SARAH WEINBERG, TRACY KENNEDY, PUBLIC SERVICE  
MUTUAL INSURANCE CO., NEW YORK STATE DEPARTMENT  
OF TAXATION, and NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD,

Defendants.

INDEX NO. 850003/2016

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 102, 103, 104, 105, 106, 117, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for

REARGUMENT

Upon the foregoing documents, it is ordered that the motion and cross-motion are **decided as follows.**

In this foreclosure action, plaintiff FYM Millbrook LLC ("FYM Millbrook") moves, pursuant to CPLR 2221(d), to reargue this Court's prior decision and order dated August 28, 2017 ("the prior decision"). The prior decision denied plaintiff's motion for summary judgment against defendant Sarah Weinberg ("Weinberg") and denied the striking of Weinberg's first, second, fifth, and sixth affirmative defenses, as well as her counterclaim for a declaratory judgment in her favor. FYM Millbrook now seeks to reargue those portions of the prior decision. Defendant Weinberg opposes plaintiff's motion and cross-moves, pursuant to CPLR 2221(d), to reargue the portions of the prior decision that dismissed her tenth and fifteenth affirmative defenses, which challenge plaintiff's standing to litigate the instant action. After oral argument,

and after a review of the parties' papers and the relevant statutes and case law, the motion and cross-motion are **decided as follows**.

### **FACTUAL AND PROCEDURAL BACKGROUND:**

The facts of this matter are set forth in detail in the order of this Court dated August 28, 2017 (Doc. 74), which denied FYM Millbrook's motion for summary judgment against defendant Weinberg and denied the striking of her first, second, fifth, and sixth affirmative defenses, as well as her counterclaim for a declaratory judgment in her favor. FYM Millbrook moves, pursuant to CPLR 2221(d), to reargue those portions of the prior decision. Weinberg opposes plaintiff's motion and cross-moves, pursuant to CPLR 2221(d), to reargue the portions of the prior decision that dismissed her tenth and fifteenth affirmative defenses, which challenge plaintiff's standing to litigate the instant action.

### **POSITIONS OF THE PARTIES:**

In support of its motion for reargument, FYM Millbrook argues that this Court misapplied the law in rendering its prior decision because there is no dispute that Weinberg signed the note in her individual capacity, there was a default under the loan documents, and FYM Millbrook is the holder of the note and mortgage. (Doc. 78 at 2.) Although the note is purportedly between 35-28 Realty and Capital One, FYM Millbrook asserts that the notation of "35-28 Realty" is "merely a typographical error in the [n]ote." (*Id.*) FYM Millbrook argues:

While a covenant to pay the obligation secured by a mortgage may be contained in the note, if the covenant to pay the obligation is inserted in the mortgage, it is valid and binding. (citations omitted.) A covenant to pay in the mortgage is enough to obligate the mortgagor, whether or not a note has been given. (citations omitted.)

(*Id.* at 4–5.) In other words, FYM Millbrook asserts that Weinberg may be held liable for the debts regardless of whether she signed the note in her individual or corporate capacity because she signed the mortgage in her individual capacity. (*Id.*) Further, because Weinberg mortgaged the premises in the mortgage as security for the loans, FYM Millbrook argues that it may foreclose on the premises. (*Id.* at 5–6.)

In addition, FYM Millbrook, citing Real Property Law § 249 (*id.* at 6), maintains that Weinberg’s personal liability is not essential to a valid mortgage and that, even if Weinberg had not covenanted to pay the mortgage debt, it would still have a remedy by foreclosing on the premises. Because there is no issue of fact as to Weinberg’s liability under the note’s and mortgage’s obligations, FYM Millbrook argues that its motion for reargument must be granted. (*Id.* at 6–7.)

In opposition to FYM Millbrook’s motion, Weinberg contends that FYM Millbrook’s reliance on Real Property Law § 249 is misplaced. Under that provision, a mortgagor is not liable for the payment of a debt unless the mortgagor had expressly covenanted to pay the debt.<sup>1</sup> In the absence of such a covenant, the mortgagee’s remedies are confined to the property encumbered by the mortgage.<sup>2</sup> Weinberg thus maintains that the issue in this action is not whether FYM Millbrook satisfied its prima facie case for foreclosure, but whether she is the responsible party under the note and mortgage. (Doc. 103 at 3.) “The issue of fact existed . . . because the loan documents—the note and mortgage—when read together are not clear as to who is liable under

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<sup>1</sup> New York Real Property Law § 249 provides: “A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.”

<sup>2</sup> See *id.*

the note. The note defines [35-28 Realty] as the ‘maker’ and the mortgage suggests Weinberg is obligated.” (*Id.* at 4.)

Additionally, Weinberg asserts that FYM Millbrook cannot rely on § 249 as a basis for reargument—which may not be obtained upon a new theory of liability not previously advanced—because FYM Millbrook did not reference that provision in its complaint or in its motion for summary judgment. (*Id.* at 6–7.) She maintains that FYM Millbrook commenced this action based only on her purported default under the note. (*Id.*) Weinberg further argues that there is a question of fact pertaining to the enforceability of the mortgage because it is unclear whether any consideration was exchanged for the same.

Weinberg also cross-moves, pursuant to CPLR 2221(d), to reargue the portions of this Court’s prior decision that dismissed her tenth and fifteenth affirmative defenses, which challenge FYM Millbrook’s standing to litigate the instant action. (*Id.* at 9.) As a preliminary matter, Weinberg acknowledges that her cross-motion is untimely pursuant to the statutory 30-day period under CPLR 2221. (*Id.*) Nevertheless, she contends that this Court should consider her cross-motion because the “motion in chief”—i.e., plaintiff’s motion for reargument—was timely and because the two motions seek identical relief. (*Id.* at 10.) She also claims that her cross-motion should be considered because she was unable to file it timely due to a change in counsel. (*Id.*)

According to Weinberg, when the issue of standing is raised by a defendant, it becomes incumbent upon the plaintiff to prove his or her standing in order to be entitled to the requested relief. (*Id.* at 11.) In support of her argument regarding FYM Millbrook’s standing, Weinberg references the “allonge” to the note (*id.* at 13), which reflects the assignment of the note from Capital One to FYM Millbrook (Doc. 105) and states: “Reference is made to that certain

Restatement of First Mortgage Note (Consolidated Note) dated October 22, 2010 executed by [Weinberg] in favor of [Capital One] . . . .” (*Id.* at 2.) However, because of alleged inconsistencies between the note and allonge—such as, *inter alia*, the two documents bearing different dates—Weinberg contends that this Court should disregard the allonge. (Doc. 103 at 13.)

Even if this Court were to conclude that the allonge constitutes sufficient evidence that FYM Millbrook now has possession of the note, Weinberg argues that there is still an issue pertaining to standing because the note and mortgage sought to be foreclosed upon consist of a series of twelve different notes. (*Id.* at 15.) Since FYM Millbrook has not proved that it possesses all twelve notes, Weinberg asserts that FYM Millbrook has not established its standing to litigate this action. (*Id.* at 15–16.)

In reply, FYM Millbrook reiterates its position that Weinberg is individually liable under the mortgage since she purportedly executed the mortgage in her personal capacity. (Doc. 121 at 5.) With respect to Weinberg’s assertion that the mortgage and note were not supported by adequate consideration, FYM Millbrook argues that Weinberg waived that argument because she never raised it in opposition to its motion for summary judgment. (*Id.* at 9–10.) FYM Millbrook further asserts that there are two possible scenarios in which Weinberg received consideration for the loans: First, if Weinberg in fact executed the note in her personal capacity, then she received consideration in the form of the loan proceeds. (*Id.* at 10.) If 35-28 Realty executed the note, then FYM Millbrook contends that Weinberg still received consideration because the loans benefitted her business, as reflected by the note’s language, which provides that “[i]f the Maker is a limited liability company, this Note is executed by a duly authorized member.” (*Id.* at 11.)

In opposition to Weinberg's cross-motion for reargument, FYM Millbrook argues that this Court should not consider the cross-motion because it is untimely. (*Id.* at 12.) FYM Millbrook further argues that Weinberg failed to contest its standing in opposing the summary judgment motion and has therefore waived that argument. (*Id.* at 15–17.) With respect to Weinberg's contention that the allonge should be disregarded because of its alleged inconsistencies with the note, FYM Millbrook points out that both the note and allonge were executed on the same date and that both documents reference the same loan amount: \$2.88 million. (*Id.* at 17–18.)

In reply, defendant Weinberg states that summary judgment was properly denied in this Court's prior decision because uncertainty still exists as to "which document is incorrect—the note or the mortgage." (Doc. 123 at 3.) Weinberg further argues that Real Property Law § 249 is inapposite because that provision permits a foreclosure based upon only a mortgage instrument. (*Id.* at 4.) However, because the instant action involves not only a mortgage instrument but also a note, Weinberg asserts that plaintiff's argument premised on § 249 is unpersuasive. (*Id.*) And, in response to FYM Millbrook's contention that Weinberg is raising a new argument based on lack of consideration, Weinberg maintains that it is simply being made in response to FYM Millbrook's new theory of liability under § 249. (*Id.* at 5–7.)

In response to FYM Millbrook's argument that Weinberg waived the argument of standing, Weinberg asserts that "the burden never even shifted to [her] to argue this point" because FYM Millbrook never "establish[ed] that it had standing." (*Id.* at 11.) Therefore, because FYM Millbrook's "showing in support of its standing was so deficient" (*id.* at 13), Weinberg maintains that this Court misapplied the law in dismissing her tenth and fifteenth affirmative defenses, which challenge plaintiff's standing (*id.*).

**LEGAL CONCLUSIONS:**

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) “Reargument 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] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

As a preliminary matter, this Court determines that the first six pages of NYSCEF Document 123, submitted by defendant Weinberg’s counsel, should not be considered to the extent that they constitute a sur-reply in opposition to FYM Millbrook’s motion for reargument. The CPLR does not provide for a sur-reply. (*See 430 E. 86th St. Tenants Comm. v State Div. of Hous. & Community Renewal*, 254 AD2d 41, 42 [1st Dept 1998].) In opposing FYM Millbrook’s motion for argument, this Court will only consider the arguments advanced by defendant Weinberg in NYSCEF Document 103, which properly laid out her opposition to plaintiff’s motion. (Doc. 103.)

With respect to FYM Millbrook’s motion, its prayer for reargument in this case rests upon its assertion that defendant Weinberg is liable under the mortgage and note in her individual capacity. (*See Doc. 78 at 4–7.*) It argues that, contrary to this Court’s prior order,

summary judgment should have been granted because Weinberg signed the mortgage in her personal capacity.

Leave to reargue on FYM Millbrook's motion is denied because this Court determines that nothing in the parties' papers changes its conclusion from the prior decision, insofar as there is an issue of fact as to whether the note makes Weinberg or 35-28 Realty liable for the debts owing to FYM Millbrook. While FYM Millbrook characterizes the appearance of "35-28 Realty" on the note as a mere "typographical error" (Doc. 78 at 2), no evidence has been submitted in support of that allegation. It has been held that ambiguities as to the identity of parties bound by a contract can only be resolved by proof. (*See Turner v. Payne*, 7 AD2d 972, 972-73 [1st Dept 1959].) In fact, the First Department has previously held that "officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually . . . ." (*See PNC Capital Recovery v Mech. Parking Sys.*, 283 AD2d 268, 270 [1st Dept 2001].)

With respect to Weinberg's cross-motion for reargument, CPLR 2221(d)(3) provides that motions for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Our courts have determined that "[m]otions for reargument . . . of a contested motion also are required to be made within the same statutory period in which an appeal may be taken." (*Achampong v Weigelt*, 240 AD2d 247, 248 [1st Dept 1997].) Under CPLR 5513, an appeal must be taken within thirty days. (CPLR 5513[a].) Defendant Weinberg acknowledges the tardiness of her cross-motion. (Doc. 103 at 9.) Because the cross-motion was not properly sought within the mandated statutory time period, Weinberg's cross-motion is denied.

In accordance with the foregoing, it is hereby:

**ORDERED** that plaintiff FYM Millbrook LLC's motion for leave for reargument is denied; and it is further

**ORDERED** that defendant Sarah Weinberg's cross-motion for leave for reargument is denied; and it is further

**ORDERED** that plaintiff's counsel shall serve a copy of this order with notice of entry upon all parties within 30 days of entry onto NYSCEF; and it is further

**ORDERED** that the parties are to appear for a conference on May 7, 2019 at 2:15 PM in Room 280 at 80 Centre Street in Manhattan; and it is further

**ORDERED** that this constitutes the decision and order of this Court.

12/18/2018  
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☒

OTHER

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REFERENCE

  
KATHRYN E. FREED, J.S.C.