SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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MICHAEL C. TRIMARCO,

Plaintiff,

- v -

CHARLES EDWARDS a/k/a CHARLES E. (CHASE) ERGEN III, and a/k/a M. CHARLES E. (CHASE) ERGEN, and JOHN DOES 1-10,

Defendants.

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INDEX NO. 651977/2018

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52-67, 76-101 were read on this motion to/for Renewal/Reargument.

This action arises out of a loan agreement allegedly executed as part of a settlement terminating a business venture between the parties. Plaintiff Michael C. Trimarco seeks leave to renew and/or reargue the motion of defendant Charles Edwards to dismiss the complaint on the ground, among others, of lack of personal jurisdiction. This motion was granted by this court (Bransten, J.S.C.) in a decision on the record on November 19, 2018, the transcript of which was so-ordered on December 6, 2018 (the Decision).[1] The decision held that this court lacked personal jurisdiction over defendant, a Swiss resident, and that a New York forum selection clause in a 2010 agreement between the parties did not apply to the 2012 loan and settlement agreements, which are the basis of plaintiff's claims in this action. (Decision at 10.) The court further found that the doctrine of forum non conveniens warranted dismissal. (Id. at 11-12.)

In moving for renewal, plaintiff seeks to introduce a 2012 Memorandum of Understanding (MOU) between the parties, which contains a New York forum selection clause that plaintiff contends should apply to the causes of action for breach of the loan and settlement agreements. In support of the request for leave to renew, plaintiff relies on a November 8, 2018

[1] This action was assigned to this Part upon Justice Bransten's recent retirement.

letter submitted to the court, before the scheduled oral argument date of November 19, 2018, requesting leave to "supplement the record" with a new piece of evidence that had assertedly just been located. (Wachtel Missry Letter to Justice Bransten, dated Nov. 8, 2018 [Mundiya Aff., Ex. 16] [NYSCEF Doc. No. 95]; see also Pl.'s Memo. in Supp., at 5.) In the decision on the motion to dismiss, the court noted that plaintiff had requested that the court "consider [this] additional piece of recently discovered evidence," and declined to do so. (Decision at 4.)

On this motion, Plaintiff not only seeks leave to renew in order to submit the 2012 MOU, but also seeks leave to reargue on the grounds that the court "misapprehended the law in refusing to permit Trimarco to supplement the record with the MOU" (Pl.'s Memo. in Supp., at 13) and in "denying Plaintiff's reasonable adjournment request" (Pl.'s Reply Memo., at 12.) Defendant contends that the MOU is not properly considered on a motion for renewal and that plaintiff has failed to articulate an appropriate basis for reargument.

CPLR 2221 (d) (2) provides that 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." It is well settled that the purpose of a reargument motion "is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application." (Foley v Roche, 68 AD2d 558, 567-568 [1st Dept 1979] [internal citations omitted]; accord Matter of Setters [v AI Props. & Devs. (USA) Corp.], 139 AD3d 492, 492 [1st Dept 2016].)

Pursuant to CPLR 2221 (e) (2) and (3), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall

contain reasonable justification for the failure to present such facts on the prior motion." It is well settled that a motion for leave to renew must ordinarily "be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should ordinarily be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." (Foley, 68 AD2d at 568; Nassau County v Metropolitan Transp. Authority, 99 AD3d 617, 618-619 [1st Dept 2012], lv denied in part, dismissed in part 21 NY3d 921 [2013].) A court may, however, "in its discretion . . . grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made." (Nassau County, 99 AD3d at 619, quoting Tishman Constr. Corp. of NY v City of New York, 280 AD2d 374, 376 [1st Dept 2001].)

Like reargument, "[r]enewal should not 'be available where a party has proceeded on one legal theory . . . and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application.'" (Nassau County, 99 AD3d at 619, quoting Foley, 68 AD2d at 568.) "Renewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Nor is it available to argue new legal theories which could have been previously relied upon but were not on the assumption that what was submitted was adequate." (Matter of Weinberg [v Wynyard], 132 AD2d 190, 210 [1st Dept 1987], lv dismissed 71 NY2d 994 [1988]; Estate of Brown v Pullman Group, 60 AD3d 481, 482 [1st Dept 2009], lv dismissed 13 NY3d 789.)

Plaintiff's proffered excuse for failing to submit the 2012 MOU with his opposition to the motion to dismiss is that he "could not locate it at the time" among the "hundreds of thousands of

emails and other documents on various computer hard drives and flash drives." (Trimarco Aff., ¶¶ 17-18.) The court does not find this justification to be reasonable. (See e.g. Abu Dhabi Commercial Bank, P.J.S.C. v. Credit Suisse Secs. (USA) LLC, 114 AD3d 432, 432-33 [1st Dept 2014]; American Audio Serv. Bureau Inc. v. AT & T Corp., 33 AD3d 473, 476 [1st Dept 2006].) Further, this justification is belied by plaintiff's correspondence with the court in seeking an extension of time to respond to the initial motion. Plaintiff's correspondence with the court was silent as to any difficulties in locating crucial documents. Instead, Plaintiff noted that "[t]he issues raised by defendant in the motion are complex, especially in light of his newly filed action in Switzerland[,] which requires Plaintiff to retain Swiss counsel and fully understand the ramifications of that action." (Wachtel Missry Letter to Justice Bransten, dated Aug. 14, 2018 [Kleinhendler Aff., Ex. A] [NYSCEF Doc. No. 55].) Plaintiff also cited the fact that it was "the middle of summer, people are on vacation." (Aug. 15-16, 2018 email chain with Justice Bransten's Clerk [Kleinhendler Aff., Ex. B] [NYSCEF Doc. No. 56].)

Plaintiff's complaint predicated jurisdiction on the New York contacts established by the alleged negotiation and partial execution of the loan and settlement agreements in New York. (Compl., ¶¶ 16-17.) In opposition to the motion to dismiss, plaintiff argued that the 2012 loan and settlement agreements arose out of the 2010 agreement. Plaintiff further argued that the forum selection clause in the 2010 agreement accordingly applied to the 2012 agreements. (Pl.'s Memo. in Opp., at 2-6 [NYSCEF Doc. No. 31].) Plaintiff has failed to make any showing of due diligence in searching for the assertedly critical 2012 MOU that plaintiff himself executed.[2]

[2] Plaintiff first filed suit in federal court in Colorado, where the issue of personal jurisdiction was fully briefed on a motion to dismiss. (See Colorado Action Complaint [NYSCEF Doc. No. 11]; Pl.'s Opp. to Def.'s Motion to Dismiss the Colorado Action [NYSCEF Doc. No. 12].) Plaintiff voluntarily discontinued that action on the same day he filed his opposition to the motion to dismiss in this action. (See Pl.'s Notice of Dismissal of Complaint Without Prejudice [NYSCEF Doc. No. 30].) Despite the reference to both New York and Colorado in the 2012 MOU forum selection clause, and despite apparently ample opportunity to introduce it in either of the two actions, plaintiff did not raise the 2012 MOU until just before oral argument on the motion to dismiss this action.

Under these circumstances, plaintiff both fails to establish a reasonable justification for its failure to offer the 2012 MOU before the prior motion was briefed, and to establish that the interest of justice warrants renewal notwithstanding the absence of a reasonable justification. Plaintiff also has not asserted a valid basis for reargument.

It is accordingly hereby ORDERED that leave to renew and reargue is denied.

July 11, 2019
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE