To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

----------x

ANTONINO MOTTA,

Plaintiff

-against-

SALVATORE VENTURA,

Defendant.

----------x

DECISION AND ORDER
Index No. 60251/2016
Motion Sequence 6

The following papers were considered on the the defendant's motion to reargue:

Order to Show Cause/Affidavit/Affirmation/Exhibits a-h	1-11
Affidavit & Affirmation in Opposition/Exhibits 1-9	12-22
Memorandum of Law in Opposition	23
Reply Affidavit/Exhibits A-C	24-27
Reply Memorandum of Law	28

Upon the foregoing papers, it is ordered that the motion is denied.

The plaintiff, Antonino Motta ("Motta"), commenced this action against the defendant, Salvatore Ventura ("Ventura"), the co-owner of a residential property located at 426 East 73rd Street, New York, New York, alleging ongoing abuse of his position as manager of the property and alleging, *inter alia*, that Ventura failed and refused to provide Motta with financial information to account for monies received, or to remit 50% of the monthly balances to Motta, as required and seeking monetary damages, an accounting, an injunction, attorney's fees, costs and expenses.

Ventura failed to respond to the complaint and the plaintiff moved for a default judgment. By Decision and Order dated February 16, 2017, the Court (Lubell, J.) denied that motion, then granted the plaintiff's unopposed re-application by Decision and Order, dated April 26, 2017, ordering, *inter alia*, that Ventura provide Motta with a full and

proper accounting as to the financial condition of the property and all moneys due and owing to the plaintiff, pursuant to the underlying Management Agreement.

Motta subsequently moved to hold Ventura in contempt for allegedly deliberately flouting the Court's Order. The Court (Lubell, J.) set the matter down for a hearing to determine the issue, which hearing was assigned to this Court. The parties began negotiations with the assistance of the Court (Lubell, J.) and agreed that the firm of Imowitz Koenig & Co., LLP ("Imowitz") would conduct the accounting that the Court ordered.

Prior to commencing the hearing, the parties advised this Court that they had settled the case and on April 16, 2018, placed such settlement on the record. As part of the settlement, Ventura agreed to pay Motta $100,000.00 within 60 days and an additional $30,000.00 for attorney's fees; the parties agreed that the management agreement would be assigned to Rosa Maria Ventura a/k//a Rosa Maria Mangiafridda ("Mangiafridda"); the agreement would be amended to reflect that a third-party management company would continue to manage the property through 2019; all tenant checks would be made payable to the management agent; the bank account would be changed to reflect the managing agent as the signatory; the parties would work together on a schedule E; Motta would withdraw his request for contempt and the settlement would not have any effect on the accounting that was in the process of being performed.

Imowitz continued with the accounting and completed such in September 2018, determining that $146,747.57 is due and owing to Motta for the period 2011 through 2017.

Motta filed a motion seeking to confirm the accounting and direct that judgment be entered on it and Ventura filed a cross-motion seeking an order pursuant to CPLR 2221 to renew the April 26, 2017 Order of the Court or alternatively, modify such Order to the extent of the stay imposed as to management responsibilities and declaring that the stay does not apply to the management agreement as assigned to Mangiafridda, based upon the terms of settlement reached in April 2018; and also seeking an order pursuant to CPLR 3217, directing the discontinuance of the action in light of the April

2018 settlement. Ventura subsequently withdrew that portion of the cross-motion referring to CPLR 2221.

This Court determined that the April 26, 2017 Decision and Order (Lubell, J), entered judgment in favor of Motta as to liability and ordered Ventura to provide Motta a full and proper accounting as to the financial condition of the property and all monies due and owing to Motta pursuant to the underlying management agreement. That order was not superceded or replaced, the parties agreed with the assistance of the Court (Lubell, J) to the accounting firm, and in fact, in the settlement placed on the record before this Court, both parties agreed that the accounting would continue. The Court found no merit in Ventura's contention that he consented to the accounting, but not to its effect and that the accounting was simply for Motta's benefit, since such would place no liability on Ventura after the judgment on liability was entered and the accounting ordered by Justice Lubell.

The settlement placed on the record was for a contractual payment of $100,000.00 and $30,000.00 in attorneys' fees. Those amounts were not in leu of the accounting and the settlement placed on the record specifically stated that the accounting would continue. Further, pursuant to Justice Lubell's Decision and Order Ventura was to pay Motta all monies due and owing pursuant to the underlying management agreement. Nevertheless, this Court found that Ventura raised substantive issues with the findings of the accounting firm and scheduled the matter for a framed issue hearing on the accuracy of the accounting performed by Imowitz and to determine an equitable result.

The Court also denied Ventura's motion to modify the April 26th Decision and Order, finding that at the time Ventura placed his settlement on the record, he was aware of the April 26th Order and did not move at that time to modify it in anyway and was well aware of the rights and obligations he would be transferring. The parties specifically noted that Mangiafridda would not take on the responsibility of the management.

Mangiafridda now files a motion seeking leave to renew and reargue and upon the granting of such leave, an order directing that effective January 1, 2020, Mangiafridda assume management duties for the year.

Mangiafridda seeks to reargue that portion of the Court's Decision and Order, which misstated the representations made on the record at the April 16, 2018 settlement of the action regarding the responsibility Mangiafridda would take for the management of the subject real property located at 426 Each 73rd Street, New York, New York. Alternatively, Mangiafridda seeks leave to renew that portion of the Decision for the purpose of determining that Mangiafridda shall assume responsibility for management of the property, in place of Eric Goodman Realty, which management ends on December 31, 2019, as per the terms of the settlement.

Discussion

A motion for reargument must 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," (CPLR 2221[d][2]). Such motions are addressed to the sound discretion of the Supreme Court, (*see Deutsche Bank Nat. Trust Co. v Ramirez,* 117 AD3d 674 [2d Dept 2014]). Therefore, the Court has jurisdiction to reconsider the prior order "[r]egardless of statutory time limits concerning motions to reargue" (*see Itzkowitz v King Kullen Grocery co., Inc.*, 22 AD3d 636 [2d Dept 2005]) and the Court does not have to deny a motion to reargue merely because it was made beyond the 30-day limit defined in CPLR 2221[d][3] (*Id.*).

"A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal, and, therefore, were not known to the court" *Morrison v. Rosenberg*, 278 A.D.2d 392, 717 N.Y.S.2d 354 (2d Dept. 2000). The motion "must set forth a reasonable justification for the failure to present such facts on the prior motion" *Sobin v. Tylutki*, 59 A.D.3d 701, 873 N.Y.S.2d 743 (2d Dept. 2009). '[A] motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation"' *Renna v. Gullo*, 19 A.D.3d 472, 797 N.Y.S.2d 115 (2d Dept. 2005). However, "[t]he requirement that a motion for renewal be

based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion" (*see Gonzalez v Vigo Const. Corp.*, 69 AD3d 565, citing *Matter of Surdo v Levittown Pub. School Dist.*, 41 AD3d 486 [2007]; *see also Heaven v McGowan*, 40 AD3d 583, 586 [2007]).

Upon a review of the arguments made and the evidence submitted on the order to show cause, the Court now denies the application. The attorney asserts that the Court did not fully address the injunction in the April 2017 Order and inaccurately stated that "[a]t the time Ventura placed his settlement on the record, he was aware of the rights and obligations he would be transferring. The parties specifically noted that Mangiafridda would not take on the responsibility of management" (*See* Decision and Order dated June 28, 2019).

The Court has reviewed the record and has determined that it was not inaccurate in its statement. The parties replied "no" when specifically asked by the Court if Mangiafridda would take on the responsibility of the management. Further, even if the Court was mistaken in its statement, this does not change the analysis and the determination of the Court that as Ventura's assignee, Mangiafridda is barred from exercising any management rights that Ventura could not exercise..

With regard to the motion to renew, the Court also denies such motion. This matter was already settled and a settlement placed on the record before this Court. The motion that was decided by this Court was with regard to the accounting and a cross-motion to modify the prior order with regard to have Mangiafridda manage the property at the end of 2019. Mangiafridda, who is not even a party to the action and technically cannot reargue or renew a motion that was not brought by her in the first place, cannot now make a motion contesting testimony and documentation submitted during the pendency of the matter. Further, any disputes with regard to the accounting and documentation provided was to be addressed at a hearing scheduled by this Court.

Accordingly, based on the foregoing, it is

ORDERED that the order to show cause to renew and/.or reargue is denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2019

HON. SAM D. WALKER, J.S.C.