

<b>P &amp; HR Solutions, LLC v RAM Capital Funding, LLC</b>
2020 NY Slip Op 33027(U)
September 14, 2020
Supreme Court, New York County
Docket Number: 650238/2019
Judge: Arthur F. Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM**

*Justice*

-----X

P & HR SOLUTIONS, LLC, DEBRA FERGERSON,

Plaintiff,

- v -

RAM CAPITAL FUNDING, LLC, JONATHAN BRAUN, TSVI  
REICH, ROBERT GIARDINA, MICHELLE GREGG, JOE  
BRAZIL

Defendant.

-----X

INDEX NO. 650238/2019

MOTION DATE N/A,  
09/11/2020

MOTION SEQ. NO. 008 011

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 215, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 231, 259, 265, 266, 267, 275, 276, 277, 278, 279, 280, 281, 282, 283, 295, 296, 297, 298, 299

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 285, 286, 287, 288, 289, 290, 291, 292, 293, 294

were read on this motion to/for SUBST/RELIEVE/WITHDRAW COUNSEL.

Upon the foregoing documents, the motion (Sequence No. 008) of defendants Richmond Capital Funding Group, LLC; Michelle Gregg; and Robert Giardina, to reargue or renew their motion to dismiss plaintiffs' complaint is denied for the reasons stated hereinbelow; the cross-motion of plaintiffs, P & HR Solutions, LLC; and Debra Ferguson, for 22 NYCRR § 130-1.1 sanctions, is denied, for the reasons stated hereinbelow. The motion (Sequence No. 011) of Hodgson Russ LLP to withdraw as counsel for defendants Richmond Capital Funding Ground, LLC; Michelle Gregg; and Robert Giardina, is granted, for the reasons stated hereinbelow.

Background to the Instant Action

The instant action arises out of a merchant cash advance agreement executed between plaintiffs P & HR Solutions, LLC ("P & HR"), and Debra Ferguson ("Ferguson"); and co-defendant Ram Capital Funding LLC ("Ram Capital").

On January 14, 2019, by summons with notice, plaintiffs commenced the instant action against defendants Ram Capital; Jonathan Braun ("Braun"); Tsvi Reich a/k/a Steve Reich ("Reich"); Robert Giardina ("Giardina"); Michelle Gregg ("Gregg"); and Joe Brazil a/k/a Yussef Brezel ("Brezel") (NYSCEF Doc. 1). On April 16, 2019, plaintiffs filed their complaint, alleging, inter alia, breach of contract and fraud, and seeking to pierce Ram Capital's corporate veil and, thereby, to hold the individual defendants liable.

This Court's October 22, 2019 Decision and Order on Motion Seq. No. 005, 006, and 007  
On October 22, 2019, this Court issued a Decision and Order on Motion Seq. No. 005, 006, and 007, concluding, in pertinent part:

The motion of defendants [Ram Capital] and [Reich] to dismiss is granted solely to the extent of dismissing the complaint as against [Reich], and is otherwise denied; defendant [Braun's] motion to dismiss is denied; and the motion of defendants Richmond Capital Funding Group, LLC ["Richmond"], [Gregg], and [Giardina] to dismiss is denied, and the Clerk is hereby directed to enter judgment dismissing the case as against Reich only.

(NYSCEF Doc. 188, at 3). This Court found the actions of Gregg's counsel to be "at a minimum, sanctionable conduct" (NYSCEF Doc. 188).

#### Motion Seq. 008

##### Background

In its aforementioned October 22, 2019 Decision and Order, this Court noted that Gregg's June 27, 2019 affidavit (NYSCEF Doc. 123) that Richmond, Gregg, and Giardina submitted in support of their motion to dismiss, contradicted a February 11, 2019 affidavit in Davis v Richmond Capital Group, LLC, Index No. 656346/2018 (NYSCEF Doc. 108). The Court also found that "Gregg has sworn to this Court in a five-month period both that [Gregg] is a director of Finance of Richmond and, also, that [Gregg] has *never* served as a director of Richmond in any capacity" (NYSCEF Doc. 188, at 2).

On November 13, 2019, defendants Richmond, Gregg, and Giardina (the "moving defendants") moved to reargue, pursuant to CPLR 2221(d), or to renew, pursuant to CPLR 2221(e), their motion to dismiss plaintiffs' complaint (NYSCEF Doc. 197). The moving defendants apparently seek to clarify that the aforementioned disparity across affidavits arose from a misunderstanding between Gregg and her attorney (NYSCEF Doc. 206). They assert that said disparity caused the Court not to consider the remainder of Gregg's affidavit in support of the motion to dismiss (NYSCEF Doc. 206, at 5).

In support of the instant motion, Gregg asserts that she uses the title "Director of Finance" in her external emails, to "give [herself] more 'credibility' when dealing with merchants" (NYSCEF Doc. 198, at 2-3). She explains that she is not an officer or director of Richmond and that the title "Director of Finance" does not exist within Richmond (NYSCEF Doc. 198, at 2-3). Gregg also emphasizes that (1) on July 8, 2019, her counsel filed an amended affidavit (NYSCEF Doc. 205) which "correctly stated that 'Ms. Gregg is an employee of [Richmond, Ram Capital], and Viceroy Funding,'" and (2) she submitted an affidavit in support of the motion to dismiss, clarifying that she is "not an owner, director, officer or manager of either [Richmond or Ram Capital] and has never served in such capacities" (NYSCEF Doc. 123).

Gregg's counsel asserts that he did not see a contradiction between his knowledge that Gregg was not an owner of Richmond Capital and the fact that Gregg placed the title "Director of Finance" in her emails, because "the title of 'Director of Finance' does not make or imply that

someone is an owner” (NYSCEF Doc. 200, at 4). He clarifies that he did not submit an amended affidavit in James Davis II v Richmond Capital Group, LLC et al., Index No. 656346/2018, as the pertinent motion had already been decided (NYSCEF Doc. 206, at 4). He also claims that in or around the time when he filed Gregg’s affidavit for the motion to dismiss, he had just taken on four active cases in addition to his already-full caseload (NYSCEF Doc. 200, at 3-4).

#### Plaintiffs’ Cross-Motion

On January 8, 2020, plaintiffs cross-moved, pursuant to 22 NYCRR § 130-1.1, for sanctions, attorney’s fees, and costs (NYSCEF Doc. 220). Plaintiffs assert that the moving defendants concede that they, rather than this Court, “mistakenly misapprehended their own set of facts, or at worst, knowingly committed perjury to avoid civil liability” (NYSCEF Doc. 221, at 6). Plaintiffs further assert that the “new evidence,” or clarifications, that the moving defendants interpose existed at the time at which they originally moved to dismiss (NYSCEF Doc. 221, at 6).

In support of their instant cross-motion and in opposition to the instant motion to reargue or renew, plaintiffs emphasize that neither Gregg nor her counsel cites case law to support the motion to renew or reargue, in plaintiffs’ words, “because none exists” (NYSCEF Doc. 221, at 16-17). Plaintiffs also claim that affidavits fail to satisfy the “documentary evidence” requirement of CPLR 3211(a) (NYSCEF Doc. 221, at 5). See Lopes v Bain, 82 Ad3d at 1554 (2009).

According to plaintiffs, the “Form 1099” that Gregg submits to support her non-directorial role at Richmond in fact substantiates her status as holding such a role, because U.S. Tax Code obligates corporate directors to receive a “Form 1099” for any compensation over \$600 (NYSCEF Doc. 221, at 5).

In reply, the moving defendants emphasize that (1) their motion is not frivolous, because this Court overlooked critical information when it did not consider Gregg’s affidavit due to the inconsistencies; and (2) plaintiffs’ request for sanctions is inappropriate. More specifically, the moving defendants assert that this Court failed to consider that (1) plaintiffs failed to serve Richmond with the complaint; (2) “plaintiffs cannot seek restitution or obtain any other affirmative relief under usury laws or the law of unconscionability;” (3) the subject contracts were not usurious or unconscionable; (4) plaintiffs’ breach of contract claim fails as a matter of law, as plaintiffs are not in privity with the moving defendants; (5) “the moving defendants are not alleged to have engaged in any specific torts;” and (6) “the receipts allegedly ‘converted’ by [Richmond] did not belong to P & HR and, notwithstanding, the debits were authorized under P & HR’s merchant cash advance agreements with [Ram Capital] and were thus freely assignable” (NYSCEF Doc. 266, at 7). The moving defendants cite to Hefter v Elderserve Health, Inc., 134 AD3d 673 (2d Dept 2015), asserting that an affidavit may serve as a basis for dismissal under CPLR 3211(a)(1).

#### The Moving Defendants’ Request to Convert Their Motion to Dismiss to a Motion for Summary Judgment

The moving defendants also request that this Court “*sua sponte*” convert their motion to dismiss to a motion for summary judgment (NYSCEF Doc. 266, at 5). They cite to the Appellate Division, Second Department’s ruling in Matter of Knickerbocker Field Club v Site Selection Bd. of City of N.Y., 41 AD2d 539 (2d Dept 1973), which held that a court can treat a motion to dismiss, pursuant to CPLR 3211, as a motion for summary judgment (NYSCEF Doc. 266, at 10-11).

#### Plaintiffs’ Request to Submit a Sur-Reply

On February 21, 2020, plaintiffs submitted a letter to this Court requesting an opportunity to file a sur-reply. They present to the Court four affidavits that Gregg submitted in various actions that present contradictory descriptions of Gregg’s job title. Plaintiffs assert that defendants’ reply papers contain additional false information and improperly raise arguments for the first time (NYSCEF Doc. 267). The moving defendants object to this request (NYSCEF Doc. 268). Counsel for the moving defendants claims that he did not intentionally file a false affidavit and that Gregg, an elderly woman, did not understand the legal implications of filing affidavits that listed titles that she used only on her emails (NYSCEF Doc. 268, at 3).

On June 11, 2020, plaintiffs submitted a supplemental affirmation opposing defendants’ motion and supporting plaintiffs’ cross-motion (NYSCEF Doc. 295). Plaintiffs submitted (1) the New York Attorney General’s Office’s June 10, 2020 petition against Richmond, Ram Capital, Braun, Giardina, Reich, and Gregg under New York Executive Law 63(12); and (2) the papers in the Federal Trade Commission’s June 10, 2020 action filed against Richmond, Ram Capital, Braun, Giardina, and Reich, for permanent injunctive relief. On June 15, 2020 the moving defendants then filed a notice of rejection of the subject supplemental affirmation (NYSCEF Doc. 300). They request that, pursuant to CPLR 3024(b), this Court strike said affirmation from the record, asserting that plaintiffs had not received permission from the Court to submit a sur-reply (NYSCEF Doc. 301).

#### Discussion

##### Pertinent Statutes

CPLR 2221(d) states, in pertinent part, 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.”

CPLR 2221(e) states, in pertinent part, that a motion for leave to renew:

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Pursuant to 22 NYCRR § 130-1.1(a):

Conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

#### Discussion of the Instant Motion and Cross-Motion

A motion to reargue “is addressed to the sound discretion of the court.” William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 (1st Dept 1992). “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.” Id. at 27 (citations omitted); accord Foley v Roche, 68 Ad2d 558, 567 (1<sup>st</sup> Dept 1979). In its October 22, 2019 Decision and Order, this Court did not assert that it did not consider the moving defendants’ remaining arguments, as they claim in the instant moving papers. Thus, the moving defendants have failed to establish a ground to reargue arising from this Court’s overlooking or misapprehending facts and/or law.

A motion to renew “should be based on newly discovered facts that could not be offered on the prior motion,” Mejia v Nanni, 307 AD2d, 870, 871 (1st Dept 2003). However, the moving defendants have failed to present to the Court new facts and/or establish a change in the law that would alter the determination set forth in its October 22, 2019 Decision and Order. They cite to affidavits and amended affidavits that were available to this Court and considered at the time at which it issued its October 22, 2019 Decision and Order.

Thus, this Court denies the moving defendants’ motion to reargue or renew their motion to dismiss. The moving defendants’ request that this Court convert, “*sua sponte*,” the moving defendants’ motion to dismiss to a motion for summary judgment is denied as moot and/or in the Court’s discretion.

Although the matter is close, plaintiffs’ request for sanctions is denied in the Court’s discretion.

This Court has reviewed the moving defendants’ other arguments and finds them to be unavailing and/or non-dispositive.

#### Conclusion

Thus, for the reasons stated herein, the motion (Sequence No. 008) of defendants Richmond Capital Funding Group, LLC; Michelle Gregg; and Robert Giardina, to reargue or renew their motion to dismiss plaintiffs’ complaint is hereby denied. The cross-motion of plaintiffs, P & HR Solutions, LLC, and Debra Ferguson, for sanctions, is hereby denied in the Court’s discretion.

Motion Sequence No. 011

Background and Discussion

On May 7, 2020, Hodgson Russ LLP, counsel for defendants Richmond Capital Funding Group; Michelle Gregg; and Robert Giardina, moved, pursuant to CPLR 321(b)(2), to withdraw as counsel for the immediately aforementioned defendants (NYSCEF Doc. 285). As said defendants are not paying movant, and as the attorney who was doing the majority of the work in this case has left the firm, this Court, in its discretion, grants Hodgson Russ LLP's motion to be relieved as counsel. This Court will do its best to ensure that this case is not significantly delayed due to the withdrawal of counsel.

Conclusion

Thus, for the reasons stated herein, Hodgson Russ LLP's motion to withdraw as counsel for defendants Richmond Capital Funding Group; Michelle Gregg, and Robert Giardina, is hereby granted.

20200914120213AENGORONFEB8756A8D242D1B9E4A254AD7C57CA  


9/14/2020  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE