SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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HEARST MAGAZINES, A DIVISION OF HEARST COMMUNICATIONS, INC.

Plaintiff,

- v -

FIVE STAR FRAGRANCE COMPANY, INC.,

Defendant.

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INDEX NO. 159620/2017

MOTION DATE 09/08/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 38, 39, 40, 41

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Hearst Magazines, a Division of Hearst Communications, Inc. for order pursuant to CPLR 5015(a)(3) vacating the Decision and Order of this Court dated April 24, 2018, or in the alternative, for an order pursuant to CPLR 221(d) grating leave to reargue its petition (Motion Seq. 002) is denied in its entirety; and it is further

ORDERED that the application of Respondent Five Star Fragrance Company, Inc. for sanctions against Petitioner is denied; and it is further

ORDERED that this proceeding remains disposed in accordance with this Court's Decision and Order dated April 24, 2018 resolving Motion Seq. 001; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this turnover proceeding, Petitioner moves for an order pursuant to CPLR 5015(a)(3) vacating the Decision and Order of this Court dated April 24, 2018 on the ground that Respondent Five Star Fragrance Company, Inc. made misrepresentations of material fact in answering the underlying fraudulent conveyance petition. In the alternative, Petitioner moves for an order pursuant to CPLR 2221(d) grating leave to reargue its petition and upon reargument, granting Petitioner relief setting aside the subject fraudulent conveyance and awarding damages against Respondent.

Respondent opposes the motion in its entirety and moves for sanctions against Petitioner.

BACKGROUND FACTS

This motion stems from a petition alleging that Respondent engaged in a fraudulent conveyance of assets. Petitioner is a judgment creditor seeking to enforce a prior judgment entered in its favor against its judgment debtors, non-parties Cloudbreak Holdings, LLC and Cloudbreak Group, LLC (collectively, "Cloudbreak").

The Prior Judgment Against Cloudbreak

On July 13, 2013, Petitioner commenced an action against Cloudbreak, alleging that Cloudbreak failed to pay for the costs of several print and digital advertisements for Issac Mizrahi fragrances that it purchased in Petitioner's magazines between December 2012 and February 2013, totaling outstanding charges in the amount of $259,450 (*Hearst Magazines v. Cloudbreak Holdings, LLC, et. al.*, Index No. 652567/2013).

On November 17, 2013, Petitioner moved for summary judgment pursuant to CPLR 3212 on its cause of action against Cloudbreak for $259,450, plus interest and costs (*id.*, NYSCEF

Doc No. 4). On June 14, 2014, the Court (Oing, J.) granted Petitioner's motion for summary judgment (NYSCEF doc No. 32, ¶ 14).

On July 10, 2014, a judgment was entered in Petitioner's favor for $295,673.50 (*id.*, ¶ 15). Petitioner seized $53,131.55 from a Cloudbreak bank account but the judgment otherwise remains unsatisfied (*id.*, ¶ 16).

Petitioner alleges that through post-judgment discovery, it learned that while Cloudbreak was defending the prior underlying action, it transferred various assets to Respondent, a company allegedly affiliated with Cloudbreak, for $200,000 (*id.*, ¶ 19). Petitioner alleges that Cloudbreak made the asset transfer to Respondent for less than fair consideration so it could rid itself of assets while defending the prior action (*id.*, ¶ 25). Specifically, Petitioner alleges that the transfer was not arms-length as both Respondent and Cloudbreak were owned and controlled by non-party Glenn Nussdorf and his family at the time of the transfer (*id.*, ¶ 21). Petitioner found that at the time of the transfer, Mr. Nussdorf owned 90% of Cloudbreak Holdings LLC, which in turn owned 100% of Cloudbreak Group, LLC (*id.*, ¶ 22). Petitioner alleged the Nussdorfs also owned approximately 57% of the outstanding common stock of Respondent's parent company, Perfumania Holdings, Inc. (*id.*, ¶ 23). The same lawyer also represented both Cloudbreak and Respondent in the transaction (*id.*, ¶ 24).

The Turnover Petition

On October 27, 2017, Petitioner commenced this special proceeding by filing a petition, together with an application for judgment, seeking to void the allegedly fraudulent asset transfer pursuant to New York Debtor and Creditor Law §§273, 273-a, 274, 275, and 276, and to recover the assets in Respondent's possession pursuant to CPLR §§5225 or 5227 (Motion Seq. 001).

Respondent's Opposition and Cross-Motion to Dismiss

On January 17, 2018, Respondent cross-moved to dismiss the turnover petition. Respondent's Chief Executive Officer submitted an affidavit detailing the background of the subject asset transfer. According to the affidavit, Cloudbreak Group, LLC had previously entered into a licensing agreement with non-party Xcel Brands, Inc. ("Xcel") under which Cloudbreak Group agreed to pay royalties in exchange for the rights to produce and advertise the Issac Mizrahi fragrances that were the subject of the prior action against Cloudbreak (NYSCEF doc No. 39 at 9). Prior to the commencement of the prior action, Cloudbreak Group was forced to shut down, as it was indebted to various creditors, including Xcel. Cloudbreak Group negotiated a termination of its license agreement with Xcel, after which $300,000 remained on the advance that Cloudbreak Group had paid to Xcel (*id.*). Respondent then entered into an agreement with Xcel, under which it was entitled to use the remaining $300,000 advance as a credit toward future royalty obligations (*id.*). Respondent thus paid Cloudbreak Group $200,000 as consideration for Cloudbreak Group's termination of its licensing agreement (*id.*). Cloudbreak Group then surrendered its remaining assets to other various secured creditors. Based on this history, Respondent argued that Cloudbreak Group had no interest in the property Petitioner was trying to reach in the turnover proceeding, as Cloudbreak Group's secured creditors had a blanket lien over all such property, which Cloudbreak Group had either transferred to Respondent or peacefully surrendered (*id.*)

Respondent further contended in opposition that Petitioner, as the judgement creditor, failed to meet its burden pursuant to New York Debtor and Creditor Law (DCL) of establishing a lack of fair consideration in the asset transfer. Respondent averred that the $200,000 it paid Cloudbreak Group constituted valuable consideration for Cloudbreak Group's termination of its

licensing agreement and transfer of the remaining $300,000 balance of its advance to Xcel (*id.* at 10). Respondent also noted that Petitioner failed to plead with particularity the existence of any "badges of fraud" to establish a fraudulent conveyance pursuant to DCL §276, and relied only on self-serving statements that the transfer was not arm's length despite the fact that the transaction involved Xcel, an entity not owned by the Nussdorf family, and was conducted in the ordinary course of business at the behest of Cloudbreak Group's lenders (*id.*).

In reply, Petitioner argued that the burden of proof under DCL should shift to Petitioner given the "overwhelming evidence of collusion, commonality of ownership and strong indicia of bad faith," namely, the Nussdorf family's alleged mutual ownership of Cloudbreak Group and shares of Respondent's parent company (*id.* at 11).

This Court's Dismissal Order

On April 24, 2018, this Court granted Respondent's cross-motion for dismissal of the turnover petition.

This Court found Petitioner's argument that the burden of proof of fair consideration should shift to Respondent to be unpersuasive, noting that cases where courts have shifted the burden typically involve conveyances between family members that were either for no consideration or for a concealed amount (NYSCEF doc No. 36 at 6). Here, by contrast, it was "undisputed that tangible consideration was exchanged as part of the subject transfer," and Petitioner failed to show that evidence concerning the "nature and value of the consideration exchanged in the subject transfer was in the Respondent's control" and "exclusively in [Respondent's possession]." (*id.* at 7). This Court also noted that Petitioner failed to present any evidence that the transaction was intra-family beyond Petitioner's "self-serving claim that the

subject transaction was made between entities controlled by Nussdorf or members of his family" (*id.* at 7-8).

Regarding the merits of the turnover petition, this Court found that Petitioner failed to provide evidence that the subject asset transfer lacked fair consideration or was made in bad faith, and noted that Petitioner's allegations that the Nussdorf family controlled Cloudbreak and Respondent were "insufficient to raise a question of fact to preclude summary judgment" (*id.* at 10). This Court also held that Petitioner failed to meet its *prima facie* burden on its cause of action for avoidance of an actual fraudulent transfer pursuant to DCL §276, finding that Petitioner failed to establish "badges of fraud" such as inadequacy of consideration, and thus failed to establish that a fraudulent conveyance occurred (*id.*).

The Instant Motion for Vacatur and/or Reargument

On May 8, 2020, Petitioner filed the motion now before this Court, seeking vacatur of this Court's April 24, 2018 decision. Petitioner argues that the decision should be vacated pursuant to CPLR 5015(a)(3) as Respondent falsely denied the Nussdorf family's ownership and control of the parties, and this Court thus erred in not shifting the burden of proof of fair consideration to Respondent. Petitioner concludes that "Respondent's misrepresentations misled the Court and tainted the integrity of the proceeding" (NYSCEF doc No. 32, ¶ 5). Alternatively, Petitioner moves for leave pursuant to CPLR 2221(d) to reargue the turnover petition with the burden of proof shifted to Respondent or with the benefit of the proof offered in reply.

In opposition, Respondent argues as a preliminary matter that the instant motion should be denied as untimely, or barred by laches, given that more than two years elapsed between this Court's prior decision and the commencement of the instant motion. Respondent further argues that the motion for vacatur must be dismissed as Petitioner does not identify or present any

evidence establishing a misrepresentation, omission, or other improper conduct by Respondent that would warrant vacatur pursuant to CPLR 5015(a)(3). Respondent also contends Petitioner failed to establish that this Court misapplied the law in determining that the burden of proof of fair consideration should stay with Petitioner. Respondent similarly argues that Petitioner's application for alternate relief of reargument should be denied as it is also untimely, and Petitioner has not established that the Court overlooked or misapprehended any issues of fact in its prior decision.

Respondent additionally contends that sanctions should be imposed against Petitioner as the instant motion is completely meritless (NYSCEF doc No. 39 at 17).

DISCUSSION

Vacatur Pursuant to CPLR 5015

CPLR 5015(a) provides as follows:

"The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or

3. fraud, misrepresentation, or other misconduct of an adverse party; or

4. lack of jurisdiction to render the judgment or order; or

5. reversal, modification or vacatur of a prior judgment or order upon which it is based."

Timeliness of the Motion for Vacatur

There is no limitation of time under which a motion pursuant to CPLR 5015(a) must be made; there is only a requirement that the time within which the motion is made be "reasonable" (*Nash v Port Authority of New York and New Jersey*, 22 NY3d 220, 225 [2013], citing David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5015:3). The determination as to whether such a motion has been made within a reasonable time is within the motion court's discretion (*see* Third Preliminary Rep. of Advisory Comm. on Prac. and Pro., 1959 Legis. Doc. No. 17 at 204-205). However, the court's discretion "must be sparingly exercised lest final judgments be subject to never-ending attack, undermining the sanctity and finality of judgments" (*Nash v Port Auth. of N.Y. & N.J.*, 131 AD3d 164, 166 [1st Dept 2015]).

In support of its argument that the branch of the motion for vacatur is untimely, Respondent cites to several cases where courts denied vacatur motions commenced two or more years after the original order (*A. Resnick Textile Co. v. Ramapo Trading Corp.*, 2003 NY Slip Op 50634[U] 265 [App Term 1st Dept 2003]) [the motion was filed nearly two years after the issuance of the underlying dismissal order and "all of the proof submitted in support of [plaintiff's] motion to vacate .... was available" when the underlying motion to dismiss was submitted] and *Bank of N.Y. v Stradford*, 55 AD3d 765, 765-766, [2d Dept 2008] [holding "appellants' delay of more than two years after entry of the judgment . . . despite their awareness of all relevant facts surrounding the issue, was unreasonable"];). Respondent concludes that this Court should similarly decline to hear the branch of the motion for vacatur as Petitioner has failed to offer a reasonable explanation for commencing this motion after two years of silence.

Petitioner, in opposition, contends that the Court should exercise its discretion to consider the merits of the motion for vacatur, given that there is no proscribed time period under which

relief pursuant to CPLR 5015(a) must be sought. Petitioner also contends Respondent has not demonstrated that Petitioner's delayed filing of this motion has caused Respondent prejudice (NYSCEF doc No. 40 at 3).

The Court finds that the branch of Petitioner's motion for vacatur must be denied as Petitioner has not demonstrated that it was reasonable to seek vacatur under CPLR 5015(a)(3) more than two years after this Court's prior decision. Petitioner acknowledges in its papers that its request for relief pursuant to 5015(a)(3) is "premised on the allegations that Respondent made false denials in its answering papers (paragraphs 7, 8, and 24 of its Answer and paragraph 34 of its Affidavit) that undermined the integrity of the special proceeding and altered the outcome" (NYSCEF doc No. 40 ¶ 13). The "false denials" are in regard to the alleged mutual ownership of Cloudbreak and Respondent's parent company, which, as discussed, formed the basis of Petitioner's claim that the subject asset transfer was fraudulent. Petitioner makes no discrete arguments for why it is entitled to relief under 5015(a)(3) beyond the alleged false denials in Respondents' papers.

Respondent's Answer (NYSCEF doc No. 11) and Affidavit (NYSCEF doc No. 13) were originally filed in opposition to the turnover petition back in January 2018. Petitioner offers no explanation for why it waited until May 2020 to alert the Court to the alleged false representations. The circumstances here are thus applicable to those in *A. Resnick Textile Co.*, *supra*, where all of the proof submitted in petitioner's motion to vacate was fully "available" when the underlying motion was submitted. Similarly, here, the alleged false statements in Respondent's pleadings were known to Petitioner at the time of the Court's April 2018 decision. Petitioner could have immediately challenged the 2018 decision via motion or appeal but failed to do so, and it "should not now be allowed to resurrect its causes of action … long since

dismissed" (*A. Resnick Textile Co*. at 2). While the Court's "determination to vacate a judgment is a discretionary one" (*Nash,* 22 NY3d at 225), "that discretion should not be exercised where . . the moving party has . . . been dilatory in asserting its rights" (*Greenwich Sav. Bank,* 126 AD2d at 452).

Accordingly, the branch of Petitioner's motion seeking vacatur is denied as untimely. However, *assuming arguendo* that the motion was timely commenced, the Court proceeds to address whether Petitioner has asserted valid grounds for vacatur.

Vacatur Based on Fraud, Misrepresentation, or other Misconduct

Petitioner moves for vacatur pursuant to subsection 3 of CPLR 5015(a), which provides that a court may vacate a prior judgment on the grounds of "fraud, misrepresentation, or other misconduct of an adverse party." Material misrepresentations made in a pleading can trigger application of the statute (See *Matter of Travelers Ins. Co. v. Rogers*, 84 AD3d 469,469 [1st Dept 2011] [vacatur should have been granted under CPLR 5015(a)(3) where a review of the record revealed instances of intentional and material misrepresentations of fact by petitioner "which, at least in part, may have formed the basis of the Supreme Court's decision and order.. .."]). The court's authority to review a prior order obtained through alleged misrepresentations is rooted in the idea that "a party successful in obtaining an order by means of misconduct does not render a court powerless to undo that order when the truth is brought to light" (*Cohoes Realty Assocs. v Lexington Ins. Co*., 292 AD2d 51, 54-55 [1st Dept 2002]). However, "[w]hile CPLR 5015(a) vests a court with discretionary power to relieve a party from its judgment or order . . . where the moving party's claim is of dubious merit … that discretionary power should be subordinated to the policy favoring the finality of judgments" (*Greenwich Sav. Bank v JAJ*

Carpet Mart, 126 AD2d 451, 452-53 [1st Dept 1987], see also *Diaz-Tirado v Rivera*, 169 AD2d 576, 577 [1st Dept 1991]).

As mentioned in the discussion of the timeliness of the motion, Petitioner moves for vacatur on the grounds that Respondent made false denials in its answering papers that "undermined the integrity of the special proceeding and altered the outcome" (NYSCEF doc No. 40, ¶ 13). Petitioner contends these alleged false statements are material as they involved denials of the Nussdorf family's ownership and control of Cloudbreak and Respondent (*id.*, ¶ 8). The Court notes that while Petitioner's papers in support of the instant motion make this assertion without providing an evidentiary basis, Petitioner did introduce evidence in its reply papers under the prior dismissal motion demonstrating that the Nussdorf family owned a both a majority of Cloudbreak and 57% of the outstanding common stock of Respondent's parent company, Perfumania (NYSCEF doc No. 21, ¶ ¶ 28-29).

Critically, however, Petitioner does not put forth an argument demonstrating that the alleged denials prevented Petitioner from fully and fairly litigating its claims, or that the outcome would have been different (See *GEM Invs. Am. LLC v. Marquez,* 2019 N.Y. Misc. LEXIS 2287, *10 [NY Sup. Ct. April 26, 2019], *aff'd* 180 AD3d 513 [1st Dept 2020] [there was no basis to vacate the prior decision under CPLR 5015[a][3] as the "prior judicial calculus" was not altered by the alleged misstatement]). As detailed in the procedural history of both this decision and the challenged 2018 decision, the transfer was made among three companies, Cloudbreak Group, Respondent, and Xcel, the Licensor that had entered into a prior agreement with Cloudbreak. Petitioner does not deny Xcel's participation in the transfer, nor has it provided evidence at any point in this proceeding indicating that Xcel is also owned by the Nussdorfs or related to an entity owned by the Nussdorfs.

Therefore, even *assuming arguendo* that Respondent made a false statement regarding the Nussdorfs' control and ownership of Cloudbreak in its Answer, it cannot be said that the denial tainted this Court's "judicial calculus" when it concluded that the subject transfer was an arm's length transaction made in good faith. Petitioner also provides no argument detailing why Respondent's alleged false denials precluded it from proving a lack of fair consideration. Petitioner also provides no explanation for why Respondent would have been unable to demonstrate fair consideration had this Court decided to shift the burden of proof. As discussed, the Court held that all terms of the asset transfer was fully available to Petitioner and Petitioner could not demonstrate the existence of any "badges of fraud" in the transaction. Petitioner thus cannot argue that the Court would have ruled in its favor if the burden of proof was shifted due to the alleged mutual ownership of Cloudbreak and Respondent.

Accordingly, the Court concludes that even had Petitioner timely commenced the motion for vacatur after this Court issued its challenged decision, Petitioner would not have demonstrated entitlement to vacatur pursuant to CPLR 5015(a)(3).

Reargument Pursuant to CPLR 2221

CPLR 2211(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."

A motion for leave to reargue under CPLR 2221 "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, [1992], *rearg. denied* 81 NY2d 782 [1993]). Reargument is not designed to afford the unsuccessful

party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790 [1st Dept 1981]).

Timeliness of the Motion for Reargument

CPLR 2221(d) requires that a motion to reargue be made within thirty days after service of the copy of the challenged order with written notice of its entry. The time to file a motion for relief under CPLR 2221(d) begins to run when service of Notice of Entry is made (See *Garcia v City of New York*, 72 AD3d 505, 506-07 [1st Dept 2010]). Here, Petitioner served Notice of Entry of this Court's April 2018 decision on May 8, 2020, the same day the instant motion was filed (NYSCEF doc No. 29).

Respondent argues that the Court should deem the motion for reargument untimely as Petitioner was ordered to serve Notice of Entry of the April 2018 decision within ten days of the date of the decision, and Petitioner should not be rewarded for its undue delay (NYSCEF doc No. 39 at 18). In reply, Petitioner does not offer an excuse for its delay in serving Notice of Entry beyond "oversight" of its counsel's office (NYSCEF doc No. 40, ¶ 4).

The Court finds that, notwithstanding Petitioner's delay in serving Notice of Entry, Petitioner's application for reargument is still timely pursuant to CPLR 2221(d) as the motion was filed within 30 days of service of the challenged order with Notice of Entry. The Court thus proceeds to address the merits of the motion for leave to argue.

Petitioner's Motion for Leave to Reargue

Petitioner argues that it has asserted a meritorious claim for reargument pursuant to 2221(d) as the Court misconstrued "the pivotal issue of fair consideration" in its challenged decision (NYSCEF doc No. 40, ¶ 9). Petitioner argues that as Respondent was on both sides of the subject asset transfer transaction and paid less than fair consideration, the Court should have shifted the burden of proof of fair consideration to Respondent, or alternatively, allowed Petitioner the benefit of proof offered in reply.

The Court finds that Petitioner has not demonstrated a proper basis for reargument under CPLR 2221(d). First, it cannot be said that the Court erred in failing to shift the burden of proof of fair consideration to Respondent.

As the Court outlined in the challenged decision, the burden of proof in a turnover proceeding typically rests with the judgment creditor to establish that contested transfer was made without fair consideration (*Petrocelli v Petrocelli Elec. Co.*, 121 AD3d 596 [1st Dept 2014]; *CIT Group/Commercial Services, Inc. v 160-09 Jamaica Ave, Ltd,* 25 AD3d 301, 306 [1st Dept 2006]). However, courts have shifted the burden of evidence of the fairness of consideration to the transferee when "the evidentiary facts as to the nature and value of the consideration are within the transferee's control" (*ACLI Go't Sec. v Rhoades,* 653 F. Supp. 1388, 1391 (SDNY 1987), *aff'd mem*, 842 F2d 1287 [2d Cir. 1988]).

Petitioner argues that the burden ought to have shifted as Petitioner "pled what was public information and undeniable regarding the Nussdorf family's ownership and control of the parties to the challenged conveyance – that there was an intra-family affiliation between the transferor and transferee" (NYSCEF doc No. 32, ¶ 53). Petitioner contends that the Court mistakenly held that Petitioner was required to show that the conveyance was made between

family members for "no" consideration, or that the nature of consideration was concealed, and thus overstated what was actually required of Petitioner to shift the burden.

In support of its argument that the Court misstated what was required for Petitioner to shift the burden of proof, Petitioner cites to the case of *Gelbard v Esses*, 96 AD2d 573 (2nd Dept 1983), the same case it relied on in the underlying motion. In *Gelbard,* the Second Department held that "where the creditor asserts that the transferees paid insufficient consideration and the evidentiary facts as to the nature and value of the consideration are within the transferees' control, the burden of coming forward with evidence . . . and the fairness of the consideration therefor, should be cast upon the transferees." Petitioner also cites to *National Communications Corp. v Bloch,* 259 AD2d 427 (1st Dept 1999), where the First Department cited to *Gelbard* for the proposition that a respondent on both sides of a debtor-creditor transaction was required "to produce evidence of the nature and value of the consideration, such evidence being solely within their control" (*id.* at 428).

The Court again finds that the circumstances here are inapplicable to those in *Gelbard* and *Bloch*. The Court's April 2018 decision specifically found that the nature and value of the consideration was not within the sole possession of Respondent. As detailed above under the discussion of Petitioner's motion for vacatur, the subject asset transfer here did not solely involve entities within Respondent's control. The Court additionally held in the challenged decision that the evidence of the nature and value of the consideration exchanged in the transfer were not in Respondent's exclusive control; the termination agreement between the three parties set forth all terms of the transfer in plain detail and was provided to Petitioner (NSYCEF doc No. 28 at 7). Accordingly, the Court did not misapprehend the law when it held that the burden of proof of fair consideration remained with Petitioner in this proceeding.

Petitioner's second argument in support of its motion is that the Court improperly refused to consider Petitioner's evidence submitted on reply. In its reply papers to the underlying motion, Petitioner offered extrinsic proof that it claimed detailed the intra-family affiliation between Cloudbreak and Respondent and illustrated the inadequacy of the $200,000 consideration paid by Respondent in the subject transfer (NYSCEF doc No. 21).

In the challenged decision, the Court held that the extrinsic proof submitted by Petitioner for the first time on reply was not properly before the Court, noting that "Petitioner cannot rely upon evidence which is submitted for the first time in its reply papers to satisfy its *prima facie* burden, or to remedy basic deficiencies in its *prima facie* showing (*see, e.g., Rengifo v City of New York,* 7 AD3d 773, 773 [2nd Dept 2004], *Migdol v City of New York*, 291AD21 201, 201 [1st Dept 2002]. *Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 561-62 [1st Dept 1992])". It is well settled law that the motion court has discretion to not consider statements offered for the first time on reply when assessing whether a party has satisfied its *prima facie* burden, given that the nonmoving party has neither had the obligation nor opportunity to respond (*Batista v Santiago*, 25 AD3d 326 [1st Dept 2006], citing *Azzopardi v American Blower Corp.*, 192 AD2d 453 [1993]).

Given that an exercise of the Court's sound discretion cannot be deemed a misapplication of the law, it cannot be said that the Court misapprehended the law by declining to allow Petitioner to remedy the basic deficiencies in its pleading with evidence offered for the first time on reply.

Accordingly, this Court adheres to its decision and order dated April 24, 2018 and declines to restore this case to active status. Petitioner's motion is thus denied in its entirety.

Respondent's Request for Sanctions

In addition to opposing the instant motion, Respondent argues that sanctions should be imposed against Petitioner pursuant to 22 NYCRR 130-1.1(c)(1) given "Petitioner's failure to specifically identify any misstatement or omission upon which the Court purportedly relied to reach its decision in the Dismissal Order, as well as its two-year, unexplained delay" in filing the motion (NYSCEF doc No. 39 at 17). Petitioner argues the remedy of sanctions is "neither appropriate nor applicable" here. (NYSCEF doc No. 40, ¶ 15).

The Court agrees with Petitioner that the instant motion is not so patently meritless as to support an award of sanctions under 22 NYCRR 130-1.1(c)(1). As discussed above, Petitioner did cite to specific provisions of Respondent's papers that constituted alleged misstatements and offered arguments in support of its position that both branches of the motion were timely commenced. Accordingly, Respondent's application for sanctions is denied.

CONCLUSION

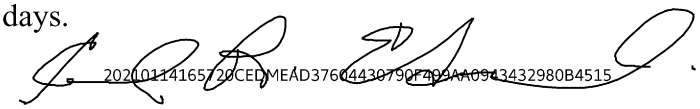
Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Hearst Magazines, a Division of Hearst Communications, Inc. for order pursuant to CPLR 5015(a)(3) vacating the Decision and Order of this Court dated April 24, 2018, or in the alternative, for an order pursuant to CPLR 221(d) grating leave to reargue its petition (Motion Seq. 002) is denied in its entirety; and it is further

ORDERED that the application of Respondent Five Star Fragrance Company, Inc. for sanctions against Petitioner is denied; and it is further

ORDERED that this proceeding remains disposed in accordance with this Court's Decision and Order dated April 24, 2018 resolving Motion Seq. 001; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.



1/14/2021
DATE

CAROL R. EDMEAD, 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	