SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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REED SMITH LLP

Plaintiff,

- v -

LEED HR, LLC

Defendant.

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INDEX NO. 654213/2012

MOTION DATE 06/25/2020

MOTION SEQ. NO. 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399

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

Upon the foregoing documents and for the reasons set forth on the record (2/18/2021), LEED HR, LLC's **(LEED)** motion to reargue the court's decision and order dated May 11, 2020 (the **Prior Decision**; NYSCEF Doc. No. 384) is denied.

To succeed on a motion for reargument pursuant to CPLR § 2221 (d)(2), a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Familiarity with the facts is presumed (*see* Mtn. Seq. No. 012). Pursuant to the Prior Decision, the court granted LEED's motion for summary judgment dismissal of the complaint solely to the extent that its cross-claims for breach of fiduciary duty and conspiracy to breach a fiduciary duty (NYSCEF Doc. No. 384). The court held that dismissal of the remaining claims would be inappropriate because there remained material issues of fact concerning various steps in the allegedly fraudulent transfers:

> Even if the Intervenors were not creditors of Big Red, LEED concedes that a transferee is a proper party to a fraudulent conveyance claim. And, there remain material issues of fact concerning various steps in the allegedly fraudulent transfers.
>
> By way of example, when Mr. Bean initially acquired On-Site, DMCC, and RFFG before these entities were sold to GEE, Mr. Wagenseller testified that one of the River Falls Entities – i.e. a Huff-Controlled Entity – provided Mr. Bean with undocumented loans to facilitate these purchases. Further, Mr. Wagenseller was not aware of details of the purported loans and whether they were repaid with interest. As a result, the ultimate source of the funds that Mr. Bean used to purchase those entities which were then later sold to GEE, and transmitted down the alleged chain of fraud, is an issue of fact that cannot be resolved on the instant motion.
>
> The Intervenors also adduce evidence of insufficient consideration in the chain of transfers, including the 1,476,015 GEE shares received by WTS and Mr. Bean for the sale of On-Site. The SEC Form 13D indicates that these shares were subsequently transferred from WTS to Big Red, an entity wholly owned by Mr. Bean, for no consideration (NYSCEF Doc. No. 368).
>
> There also remain material issues of fact concerning whether LEED's purchase of the Shares from Big Red was for adequate consideration. Mr. Schroering only adduces a conclusory affidavit attesting that the $220,000 down payment was used to pay for the Shares, but provides no documentary evidence to corroborate his assertion that the payment was ever actually made or that the $150,000 note provided by Mr. Boone was repaid. Further, it is undisputed that LEED did not provide any security for the remaining purchase price of the Shares as would be customary. The Intervenors also dispute whether the August 15 Agreement's purchase price of $0.18 per GEE share constituted adequate consideration. With respect to the Trinity Transactions, Mr. Schroering has also adduced no documentary evidence to substantiate those payments to Trinity HR Services LLC and Trinity HR LLC

(*id.* at 12-13).

LEED's argument that the Intervenors' evidence was insufficient to raise a material issue of fact in opposition to the prior summary judgment motion fails. The court did not misapprehend the facts on the prior motion. As the court explained in the Prior Decision, Mr. Wagenseller's evidence that a Huff-Controlled Entity provided Mr. Bean with undocumented loans to acquire entities that were sold to GEE raised a material issue of fact as to the source of funds that were used to purchase entities, which were sold to GEE, and then transmitted down the alleged chain of fraud to LEED (*id.*). In addition, the Intervenors provided evidence of insufficient consideration in the chain of transfers, namely between WTS to Big Red (*id.* at 13).

Inasmuch as LEED argues that the affidavit of Michael Schroering was unrebutted by the Intervenors and that it was therefore entitled to summary judgment, the argument fails. Simply put, the court held that Mr. Schroering's self-serving uncorroborated affidavit in the context of the other evidence which includes both a lack of security and other adequate consideration for the substantial acquisition from Big Red was insufficient to demonstrate LEED's entitlement to summary judgment as a matter of law (*id.*). Although LEED evidently disagrees with the Prior Decision, LEED fails to raise any factual basis to warrant reargument.

In addition, the court did not misapply a controlling principle of law. With respect to the choice of law analysis, the court held that New York law should apply because the laws of New York and Kentucky were not inconsistent where "***both*** jurisdictions do not impose liability for a claim of conspiracy or aiding and abetting a fraudulent conveyance on a non-transferee" (*id.* at 11). Although LEED argues that Kentucky law does not permit recovery against a beneficiary of a fraudulent transfer while New York law does, there is no conflict of law to the extent that the

Intervenors argued that LEED was only liable for a fraudulent conveyance as a *transferee* (*see* NYSCEF Doc. No. 360 at 14; NYSCEF Doc. No. 384 at 12). In any event, as discussed above, the court previously held that there are also material issues of fact as to the alleged chain of fraudulent transfers which preclude dismissal of any claims against LEED as a transferee. Accordingly, LEED's motion to reargue is denied.

Accordingly, it is

ORDERED that LEED's motion to reargue is denied.

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2/18/2021
DATE

ANDREW BORROK, J.S.C.

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