

**Levine Leichtman Capital Partners II, L.P.  
v Inderdent, Inc.**

2021 NY Slip Op 30849(U)

March 16, 2021

Supreme Court, New York County

Docket Number: 657099/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

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

*Justice*

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LEVINE LEICHTMAN CAPITAL PARTNERS II, L.P.,

Plaintiff,

- v -

INDERDENT, INC., PROSPECT CAPITAL CORPORATION,  
PROSPECT CAPITAL MANAGEMENT L.P., JASON  
WILSON, ROBERT NABHOLZ, ROBERT MELMAN, DOES  
1 THROUGH 20

Defendant.

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**INDEX NO.** 657099/2019

**MOTION DATE** 01/30/2020,  
08/26/2020

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 101, 103, 105 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Levine Leichtman Capital Partners II, L.P. (**Levine Leichtman**)’s motion to reargue the court’s prior decision, dated July 27, 2020 (the **Prior Decision**) pursuant to CPLR § 2221(d)(2) or, in the alternative, for leave to amend the complaint, and defendants’ cross-motion for sanctions are denied.

The relevant facts are set forth in the court’s Prior Decision and familiarity is presumed (NYSCEF Doc. No. 90). 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[d]). A motion for leave to reargue is not intended to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (*Setters v AI Prop. and Dev. (USA) Corp.*, 139 AD3d 492, [1<sup>st</sup> Dept 2016], *Foley v Roche*, 68 AD2d 558, 567-68 [1<sup>st</sup> Dept 1979]). Nor is a motion to reargue intended “to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*Foley*, 68 AD2d at 567). Where a motion to reargue is addressed to correct purported factual errors, the factual errors must be material and unmistakable (*Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260, 260 [1<sup>st</sup> Dept 2007]).

Levine Leichtman argues that the court reached the wrong conclusion in its analysis of the structure of the transaction and the transaction documents and the gravamen of its motion is that, as such, they should be permitted to reargue the questions previously decided by this court. This is not a proper basis for reargument. Accordingly, the motion must be denied. For the avoidance of doubt, the email string (*see* NYSCEF Doc. No. 93) that Levine Leichtman offers in support of its incorrect theory of the transaction and the transaction documents was not offered in support of its motion and therefore cannot be considered on its motion to reargue. A motion pursuant to CPLR § 2221(d)(2) “shall ***not include any matters of fact not offered on the prior motion***” (*Mendez*, 39 AD3d at 260 [emphasis added]).<sup>1</sup> In any event, even if the court were to consider the email string, it would not alter the court’s prior determination. The email string is parole evidence that should not be considered in interpreting a contract that is unambiguous. Finally,

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<sup>1</sup> A motion for leave to renew pursuant to CPLR 2221(e) ***may*** be based on new facts not offered on the prior motion that would change the prior determination, but must contain a reasonable justification for the failure to present such facts on the prior motion, which, in any event, Levine Leichtman fails to do. Regardless, a motion to renew is not “a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Queens Unit Venture, LLC v Tyson Court Owners Corp.*, 111 AD3d 552 [1<sup>st</sup> Dept 2013])

the email string's confirmation of the maturity would not change the court's conclusion that the Earnout Payments were structurally subordinate.

The branch of Levine Leichtman's motion for leave to amend the complaint must also be denied because inasmuch as the complaint was previously dismissed, there is "no complaint before the court to amend" (*Panagouloupoulos v Ortiz*, 143 AD3d 792, 792 [2d Dept 2016], citing *Kazakhstan Inv. Fund v Manolovici*, 2 AD3d 249, 250 [1<sup>st</sup> Dept 2003]).

Although this is a much closer call, the cross motion for sanctions is denied. Sanctions pursuant to NYCRR § 130-1.1 further judicial interests, fairness, and equity by deterring vexatious litigation and preventing the waste of judicial resources (*Levy v Carol Mgmt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999] [noting decision to award sanction is within discretion of the court]). . The defendants' argue that sanctions are appropriate because Levine Leichtman's conduct has not only been frivolous but based on a number of blatant misrepresentations: (i) that it was not bound by the Commitment Letter and Loan Agreement, (ii) that there is only one reference in the Merger Agreement to the Commitment Letter when the Commitment Letter is actually referred to multiple times in the Merger Agreement, including Section 13.1, which explicitly makes the Commitment Letter part of the Merger Agreement, (iii) that it did not know and could not raise at the time of Levine Leichtman 2.0 issues about the share issuance with the California Court when, in fact, it submitted an affidavit complaining about the share issuance and raised the issue in a memorandum of law that was submitted to the California Court, (iv) that defendants purportedly acknowledged that Levine Leichtman had a possessory interest in Holdings' shares when defendants actually acknowledged nothing of the sort but only stated that this is what

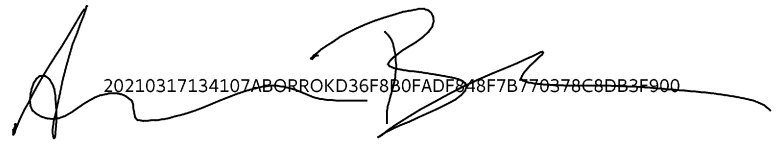
Levine Leichtman alleged in the complaint, and (v) that the Merger Agreement refers to all the defendants being responsible for the Earnout Payments, when in fact, only Holdings is obligated to make the Earnout Payments under the Merger Agreement (and as held in a prior action, which prior action was brought to the attention of this court by the defendants). Inasmuch as the action has been dismissed with prejudice, and giving Levine Leichtman’s counsel every benefit of the doubt, the court is declining to impose sanctions at this time.

Accordingly, it is

ORDERED that the motion for leave to reargue pursuant to CPLR 2221(d)(2) and, in the alternative, for leave to amend, is denied; and it is further

ORDERED that the cross-motion for sanctions is denied; and it is further

ORDERED that the plaintiff is directed to order the transcript of the argument (3/17/2021) and upload the transcript to NYSCEF.



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3/16/2021  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE