SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CWCAPITAL COBALT VR LTD.,

Plaintiff,

- v -

CWCAPITAL INVESTMENTS LLC and CWCAPITAL ASSET MANAGEMENT LLC,

Defendants.

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INDEX NO. 653277/2018

MOTION DATE _____

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 290, 291, 294, 306, 311

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

Upon the foregoing documents, it is

In motion sequence number 006, defendants CWCapital Investments LLC (CWCI) and CWCapital Asset Management LLC (CWCA) move, pursuant to CPLR 2221, for reargument of this court's Decision and Order dated September 7, 2021 (or alternatively this court's Decision and Order dated August 15, 2019) and to dismiss counts five, six, and seven in the amended complaint.

Initially, in its complaint, plaintiff CWCapital Cobalt VR Ltd (Cobalt) alleged the following claims:

> (1) breach of the Collateral Management Agreement (CMA) against CWCI for appointing and retaining CWCA as the Special Servicer and failing to negotiate fair-market value revenue-sharing agreements;
>
> (2) breach of the CMA against CWCI for failing to prevent CWCA's improper actions—hiring providers to sell CMBS Trusts' defaulted loans and real properties—which generated kickback payments to CWFS-Reds, LLC, (Reds) an affiliate of CWCI and CWCA;

(3) breach of the CMA against CWCI for failing to monetize CDO options and permitting sales of the CMBS Trusts' assets to CWCI's affiliates for less than market value;

(4) breach of the CMA against CWCI for colluding with and permitting CWCA to misappropriate funds from certain CMBS Trusts—specifically, the Stuy Town Trusts—in relation to settlement of a legal matter involving CWCA;

(5) breach of the CMA against CWCI for failure to obtain Cobalt's consent to assign, as a matter of law under the Investment Advisors Act (IAA), control over CWCI that occurred in the parent entity merger of Fortress and SoftBank;

(8) breach of fiduciary duty against CWCI for retaining CWCA and failing to prevent CWCA from executing transactions at fair market value with revenue-sharing arrangements, and failing to disclose those corporate opportunities to Cobalt;

(9) breach of fiduciary duty against CWCI arising from the alleged kickback payments to Reds;

(10) breach of fiduciary duty against CWCI for failing to monetize CDO options and permitting, in conjunction with CWCA, CWCI affiliates to sell, exercise, or assign those options to Cobalt's detriment, usurping and transferring to CWCA the corporate opportunities of Cobalt without first disclosing the same to Cobalt;

(11 [becomes (5) in the amended complaint]) breach of fiduciary duty against CWCI in connection with CWCA's Stuy Town Trusts settlement;

(12 [becomes (6) in the amended complaint]) aiding and abetting breach of fiduciary duty against CWCA for inducing CWCI's alleged breaches of fiduciary duty;

(13) conversion against CWCI and CWCA for diverting $515 million of proceeds from assets of the Stuy Town Trusts in connection with the settlement of a legal involving CWCA;

(14) conversion against CWCI and CWCA for CWCA's charging unauthorized, excessive fees when it disposed of the CMBS Trusts' defaulted mortgage loans and REO properties assets;

(15 [with (16) becomes (7) in the amended complaint]) unjust enrichment against CWCA for the economic benefits it improperly attained through each of the above alleged breaches of contract and fiduciary duty apart from those relating to the claims/allegations of kickbacks to Reds; and

> (16 [with (15) becomes (7) in the amended complaint]) unjust enrichment against CWCA and Reds for wrongfully obtaining economic benefits from improper, extra-contractual fees from the disposition of CMBS Trusts' assets to CWCI's affiliates, including the alleged Reds kickback payments.

On February 1, 2019, plaintiff voluntarily dismissed with prejudice its declaratory judgment and permanent injunction claims, Counts 6 and 7 in the complaint. (NYSCEF 173, 177, Stipulations of Partial Discontinuance.)

In a decision dated August 20, 2019, this court granted defendants' motion to dismiss the first, third and fifth causes of action for breach of contract, the eighth, ninth and tenth causes of action for breach of fiduciary duty, the twelfth cause of action for aiding and abetting breach of fiduciary duty, the thirteenth and fourteenth causes of action for conversion, and the fifteenth and sixteenth cause of action for unjust enrichment, to the extent premised on breach of fiduciary duty. (NYSCEF 182, Decision and Order [motion seq. no. 002].) The court did not address defendants' argument that the breach of fiduciary duty, aiding and abetting, and unjust enrichment claims were duplicative since those claims were already dismissed on statute of limitations grounds.

This court also dismissed the complaint in its entirety as against defendant Reds. (*Id.* at 18.) The court directed that the second cause of action, wherein plaintiff alleged breach of contract with respect to kickback payments to Reds, and the fourth and eleventh causes of action, respectively wherein plaintiff alleged breach of contract and breach of fiduciary duty with respect to the Stuy Town settlement, should proceed in their entirety. (*Id.* at 14.) The court also directed that

the twelfth and fifteenth causes of action should proceed "to the extent that they pertain to the alleged Stuy Town settlement misconduct." (*Id.*)

Plaintiff appealed; defendants did not.

Plaintiff filed an amended complaint on October 18, 2019. (NYSCEF 190.)

On May 15, 2020, defendants moved to renew their motion to dismiss asking to dismiss the third, fifth, sixth and eighth causes of action of the amended complaint based on U.S. District Judge Failla's decision in an action where the trustee of the Manhattan apartment complex known as Stuy Town sought instructions as to the allocation and calculation of proceeds from the sale of Stuy Town. (NYSCEF 241, Notice of Motion [Motion Sequence No. 005].) This court denied defendants' motion to dismiss finding that:

> "[i]n the initial motion to dismiss, this court denied the branch of the motion as to the Stuy Town claims, finding that "the claim relates to CWCA's alleged misappropriation of the CMBS Trusts' funds in 2015 in connection with the settlement, not to the foreclosure judgment itself." (NYSCEF 182, Decision and Order, Mot. Seq. No. 002, at 13.) The court found that 'at the very least, there are issues of fact precluding dismissal of these claims at this juncture." (*Id.*) Those issues of fact are not resolved by the Southern District's finding that CWCA was entitled to distributions of penalty interest and the contract rate of interest after entry of the Foreclosure Judgment. As this court has already held, the Stuy Town claims are addressed to the Stuy Town Settlement, not the Foreclosure Judgment. Judge Failla makes no mention of CWCA's alleged misappropriation of funds from the Stuy Town Trusts in paying the Stuy Town Settlement. Defendants' entitlement to penalty interest and to interest at the contract rate does not as a matter of law eliminate the basis of plaintiff's allegations that they acted improperly in using money from the Trusts to pay the Stuy Town Settlement. Defendants have thus failed to identify any change in law that would change this court's prior determination, and the motion to renew must be denied."

(NYSCEF 287, September 7, 2021 Decision at 11-12.)

On April 27, 2021, the Appellate Division, First Department held that the continuing wrong doctrine tolled the six-year statute of limitations, and thus, the first and

third causes of action were not barred by the statute of limitations and restored those claims. (*CWCapital Cobalt VR Ltd. v CWCapital Investments LLC*, 195 AD3d 12 [1st Dept 2021].) Effectively, based on the continuing wrong doctrine, this 3-to-2 decision restored the other claims dismissed by this court as well. However, the Appellate Division dismissed the claims for breach of fiduciary duty, aiding and abetting, and unjust enrichment as duplicative. (*Id.*)

In this motion (seq. 006), defendants seek to leave to reargue this court's September 7, 2021 decision issued on their renewal motion (seq. 005). Defendants assert that this court overlooked the First Department's April 27, 2021 decision while the defendants' renewal motion was *sub judice*. Specifically, defendants argue that the First Department's decision is fatal to plaintiff's Stuy Town claims, Counts V, VI, and VII in the amended complaint (in the original complaint Counts XI, XII, and XV), because the First Department dismissed as duplicative three indistinguishable sets of claims, and the only reason why the Stuy Town claims were not dismissed by the First Department was because they were not before the Court. Defendants also seek to reargue this court's August 19, 2020 decision (seq. 002). (*See* NYSCEF 291, Defendants' Memo of Law at n 2 ["Alternatively, the Court may construe the instant motion as one to reargue the Court's Decision and Order dated August 15, 2019 … denying Defendants' motion to dismiss."].)

"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] [2].) However, "[r]eargument is not designed to afford the unsuccessful party

successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [citations omitted].) The movant bears the initial burden on a motion under CPLR 2221. (*Id.*) The motion must be made within 30 days of service of the relevant decision with notice of entry. (CPLR 2221[d][3].)

Leave to Reargue September 7, 2021 Decision

Duplication was not mentioned in defendants' motion to renew (seq. 005). Accordingly, the court could not have overlooked or misapprehended it. Likewise, it was not an error for this court to decide the motion before it which the parties had well briefed and argued well before the First Department's April 27, 2021 decision. The court also rejects defendants' argument that the court should have incorporated the April 27, 2021 decision in the September 7, 2021 decision in the way that defendants argue here without first hearing argument from the parties. Therefore, the court is compelled to deny this motion to reargue filed on October 1, 2021 to the extent it attacks the September 7, 2021 decision. (NYSCEF 290, Notice of Motion.)

Leave to Reargue the August 20, 2019 Decision

Next, defendants move to reargue their motion to dismiss which was decided on August 20, 2019 with Notice of Entry on August 23, 2019. Defendants argue that the court is compelled to follow the First Department's decision dismissing the breach of fiduciary duty, aiding and abetting breaches of fiduciary duty, and unjust enrichment claims as duplicative and now dismiss the Stuy Town claims for breach of fiduciary duty, aiding and abetting breaches of fiduciary duty and unjust enrichment as duplicative too. This portion of defendants' motion is untimely. (CPLR 2221[d][3].)

Defendants, relying on *Foley v Roche*, 86 AD2d 887 (2d Dept 1982), *People v Chatham*, 88 AD3d 1063 (3d Dept 2011), and *Dreifuss v Cohen*, 177 AD2d 682 (2d Dept 1991), argue that an exception should be made, and this court should permit this untimely motion.

In *Foley*, the Appellate Division, Second Department permitted an untimely reargument motion where the case serving as a basis for the underlying order was overruled by the U.S. Supreme Court and Court of Appeals, an extraordinary circumstance. (86 AD2d at 887.) The Second Department held that a court may ignore the untimeliness of a reargue motion "in 'extraordinary circumstances' vitiating its effectiveness as a rule fostering orderly convenience, such as a change in the law or a showing of new evidence affecting the prior determination. The error sought to be corrected must, however, be so 'plain * * * [that it] would require [the] court to grant a reargument of a cause.'" (*Id.*) In *Chatham*, the Appellate Division, Third Department granted an untimely reargument motion where the First Department case relied on in the underlying decision was overruled by the Court of Appeals. (88 AD3d at 1063.) The lower court relied on that First Department case when it denied defendant a hearing on resentencing. Finally, in *Dreifuss*, the Second Department held that "[g]ranting reargument because the basis for an original determination has since been overruled by an appellate court is proper even if the period within which to appeal the original determination has expired." (177 AD2d at 682.)

Defendants' motion for leave to reargue is distinguishable from the situations presented in *Foley*, *Chatham* and *Dreifuss.* The First Department's April 27, 2021 decision did not change the law to justify permitting this untimely motion.

Plaintiff's case is based on four sets of factual allegations, which are referred to by the parties as (1) the "Fee-Share Allegations" in which plaintiff alleges that CWCI failed to secure a fee-sharing agreement from its affiliate CWCA; (2) the "FVP Option Allegations" asserting that CWCI failed to exercise or monetize the option to purchase at fair value loans from trusts; (3) the "Reds Allegations" asserting that CWCI permitted Reds to receive funds that should have otherwise been paid to plaintiff; and (4) the "Stuy Town Allegations" all predicated on the settlement of a lawsuit by junior lenders on a loan secured by Peter Cooper Village and Stuyvesant Town. Based on the same four sets of allegations, plaintiff alleges breaches by CWCI of the CMA, breach of fiduciary duty by CWCI, aiding and abetting breaches of fiduciary duty by CWCA, and unjust enrichment of CWCA. In its April 27, 2021 decision, the First Department dismissed the noncontract claims as duplicative of the contract claims. (195 AD3d 12.) Defendants insist that the Stuy Town claims are based on exactly the same conduct and seek exactly the same damages as the associated breach of contract claim, and thus, must be dismissed as well as duplicative. The court rejected defendants' duplicative argument in its August 20, 2019 decision which defendants now argue was obviously an error based on the Appellate Division's April 27, 2021 decision. (NYSCEF 182, Decision 16-17.)

While the Appellate Division reversed this court under *Bulova* finding the continuing wrong doctrine applied to toll the statute of limitations, it did not make new law or change the law when it dismissed breach of fiduciary duty, aiding and abetting, and unjust enrichment claims as duplicative. Therefore, defendants cannot rely on the Appellate Division decision as a legal basis to waive the timeliness requirement of

CPLR 2221(d)(3) when there is a change in the law as the *Foley*, *Chatham* and *Dreifuss* Courts did.

Moreover, since defendants did not appeal this court's decision on the Stuy Town claims, those claims were not pending before the Appellate Division. The court rejects defendants' invitation to guess what the Appellate Division would have done if defendants had appealed.

Finally, in addition to no new law or change in the law, the court notes that had defendants brought this motion as one to renew, there are also no new facts to justify a change in the court's August 15, 2019 decision. (*See* CPLR 2221[e][2].) Plaintiff's "Fee-Share Allegations," "FVP Option Allegations," and "Reds Allegations" continue to differ from the "Stuy Town Allegations," as they did in August 2019 when the court initially rejected this argument.

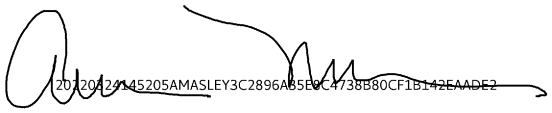
In the claims based on the "Fee-Share Allegations," "FVP Option Allegations," and "Reds Allegations," plaintiff alleges that defendants' repeated misconduct circumvented contractually limited fees or exploited contract-based asset-purchase rights. However, plaintiff's tort claims based on the "Stuy Town Allegations" involve defendants' collusion to settle litigation with strangers to the CMA and the CMBS pooling and servicing agreements. Defendants' alleged misconduct involved the misuse of the CMBS trusts' funds in violation of the duty of loyalty. (NYSCEF 190, Amended Complaint ¶¶ 156–57, 167, 171–72.) It also involved CWCI's failure to disclose to plaintiff that it was allowing CWCA to settle its individual liability for free in violation of the duty of candor, foreclosing plaintiff's ability to negotiate a better deal for the Stuy Town Trusts in the settlement. (*Id*. ¶¶ 9, 50, 95-109.) In sum, just because

one set of claims may be duplicative of a contract claim does not mean that another set of claims, arising from different conduct and involving different duties, are automatically duplicative too.

Therefore, defendants' motion is denied.

Accordingly, it is

ORDERED that defendants' motion to reargue is denied.



3/24/2022
DATE

ANDREA MASLEY, 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