

**NY Manhattan 40th St. Lenders, L.P. v 310 Group,
LLC**

2022 NY Slip Op 34037(U)

November 29, 2022

Supreme Court, New York County

Docket Number: Index No. 650177/2021

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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NY MANHATTAN 40TH ST. LENDERS, L.P.,

INDEX NO. 650177/2021

Plaintiff,

MOTION DATE 09/29/2022

- v -

310 GROUP, LLC,

MOTION SEQ. NO. 007

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 240, 241, 242, 243, 244, 245, 246, 259, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279 were read on this motion to RENEW AND REARGUE.

Plaintiff NY Manhattan 40th St. Lenders L.P. (“Plaintiff” or “Lender”) moves for leave to renew and reargue, in part, the Court’s Decision and Order dated and entered August 17, 2022 (“Order” [NYSCEF 192]). For the reasons that follow, the motion is GRANTED IN PART.

BACKGROUND

The Order granted Plaintiff’s motion to declassify (with conditions) certain documents (the “Documents”) marked “Confidential” by Defendant 310 Group, LLC (“Defendant”) pursuant to the Confidentiality Stipulation and Order (NYSCEF 56). The Order determined that declassification of the Documents was necessary for Plaintiff to comply with the U.S. Citizenship and Immigration Services’ (“USCIS”) EB-5 Immigrant Investor Program (“the EB-5 Program”). However, as relevant here, the Order held that the Confidential Documents were not to be provided to Plaintiff’s investors (“Investors”) “without further order of the Court based upon a showing of necessity as to particular documents and individuals” (Order at 2-3).

Shortly after the Order was entered, on August 22, 2022, Plaintiff filed a letter application (NYSCEF 194) to permit the Investors to access the Documents because the EB-5 Program requires each Investor to certify to USCIS under penalty of perjury that they “reviewed and understand” their submission which necessarily requires that they access the Documents. On August 29, 2022, Defendant responded (NYSCEF 209) by stating that the Plaintiff’s application should have been made by motion pursuant to CPLR 2221 and that Defendant was nevertheless amenable to a conference.

Later on August 29, 2022, Plaintiff requested a conference (NYSCEF 210), which was held on September 13, 2022. On September 26, 2022, the Court granted leave to file this motion, notwithstanding the temporary stay (NYSCEF 230).

On September 29, 2022, Plaintiff moved for leave to reargue and renew. Plaintiff argues that the Order, as a practical matter, would not permit the Investors to comply with their obligations under the EB-5 Program because (1) the Investors could not truthfully certify to USCIS that they reviewed their entire EB-5 Program applications and (2) the Investors could not agree to destroy or return the Documents within 60 days of the end of the litigation as required by the Confidentiality Stipulation and Order given the requirements of the EB-5 Program (Moving Brief at 1-2 [NYSCEF 245]). Plaintiff suggests that access to the Documents pertinent to each Investor be conditioned “upon their signing a certification that such Documents will be furnished solely to USCIS” (Moving Brief at 2).

DISCUSSION

CPLR 2221(a) provides that a party may seek modification of an order. CPLR 2221(d) governs motions for leave to reargue and CPLR 2221(e) governs motions for leave to renew.

CPLR 2221(f) provides that a combined motion for leave to reargue and renew may be made and instructs that the Court consider each branch of the motion as though it were separately made.

“A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law” (*Cortlandt St. Recovery Corp. v Bonderman*, 75 Misc 3d 469, 475 [Sup Ct, NY County 2022] [collecting cases]). “A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221[e][2]) and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e] [3]) (*Luna v Port Auth. of New York and New Jersey*, 21 AD3d 324, 325 [1st Dept 2005]).

Defendant urges denial of the motion on the ground that Plaintiff failed to attach a complete set of papers underlying the Order or properly cite the NYSCEF electronic record as authorized by CPLR 2214(c) (Opp. Brief at 3-4 [NYSCEF 259]). The balance of Defendant’s opposition argues, generally, that Plaintiff has not met the standards required for leave to reargue or renew (Opp. Brief at 4-8).

The Court has considered Plaintiff’s motion on the merits. Plaintiff’s motion adequately sets forth the issues to be addressed, including necessary record references (*Leary v Bendow*, 161 AD3d 420, 420 [1st Dept 2018]). Further, the Order contemplates further motion practice and modifications; Plaintiff has filed a complete set of the original papers in reply (NYSCEF 267-278); and the Court has the discretion to entertain a motion “notwithstanding the lack of strict compliance with CPLR 2214(c)” (*Nazor v New York City Loft Bd.*, 179 AD3d 609, 611 [1st Dept 2020], *lv to appeal dismissed in part, denied in part*, 35 NY3d 1053 [2020]).

The Court grants leave to reargue because the Order specifically contemplates the potential need for the Investors to access the Documents. The Court finds that modification, as authorized by CPLR 2221(a), is appropriate in this circumstance. Specifically, a new motion should not be required each time an Investor needs to submit a Document to USCIS. The Court denies leave to renew because no new facts or changes in law have been advanced by Plaintiff.

Upon reargument, the Court adheres to its earlier determination (CPLR 2221[f]) to the extent that an Investor may only be provided access to the specific Documents necessary to comply with their obligations under the EB-5 Program. However, the Order is modified to the extent that Investors may be provided access to the Documents on the terms and conditions below.

Access to Documents shall be provided only upon advance written notice to Defendant of which Documents are to be provided to an Investor or Investors. Further, access shall be conditioned upon each Investor's execution of a certification that the Documents will be used only for purposes of assessing their EB-5 application and not disseminated to any person or entity other than USCIS. The certification need not include the sixty (60) day period for return or destruction of the Documents as required by the Confidentiality Stipulation and Order. Instead, counsel for Plaintiff may maintain the Documents for so long as is necessary for the Investors to comply with the EB-5 Program. However, the Investor(s) shall not maintain permanent copies (hard copy or electronic) of any Documents unless otherwise agreed by Defendant.

The parties are strongly encouraged to agree to a protocol (which they may submit as a stipulation to be "So Ordered") pursuant to which access to the Documents can be facilitated while also maintaining the requisite degree of confidentiality. The parties should follow the

Commercial Division Rules and Part 3 Practices and Procedures to the extent any disputes arise in the future.

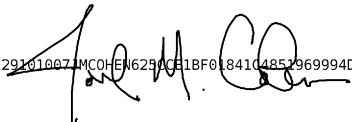
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Accordingly, it is

ORDERED that Plaintiff's motion for leave to reargue and renew is **GRANTED IN PART** to the extent that leave to reargue is granted and the Order is modified to the extent specified above.

This constitutes the Decision and Order of the Court.

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 JOEL M. COHEN, J.S.C.

11/29/2022

 DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE