

**JDS Fourth Ave. JV II LLC v Largo 613 Baltic St.
Partners LLC**

2024 NY Slip Op 31653(U)

May 10, 2024

Supreme Court, New York County

Docket Number: Index No. 651948/2020

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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JDS FOURTH AVENUE JV II LLC, JDS CONSTRUCTION
GROUP, LLC, JDS FOURTH AVENUE DEVELOPER LLC

INDEX NO. 651948/2020

Plaintiff,

MOTION DATE 01/15/2024

- v -

MOTION SEQ. NO. 005

LARGO 613 BALTIC STREET PARTNERS LLC, MAXX
LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 244, 245, 246, 247, 248, 250, 252, 253, 254, 255, 256, 257

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

Upon the foregoing documents, the motion to reargue (Mtn. Seq. No. 005) is granted and the cross-motion is granted in part.

Reference is made to a Decision and Order (the **Prior Decision**; NYSCEF Doc. No. 228), dated December 14, 2023. As relevant, in the Prior Decision the Court dismissed the Amended Complaint because the evidence demonstrated that the plaintiffs had suffered no damages but made no finding as to whether the plaintiffs breached the LLC Agreement or the Maxx Agreement (hereinafter defined). Terms used but not otherwise defined shall have the meaning ascribed thereto in the Prior Decision.

In this motion, the plaintiffs seek reargument of the Prior Decision to the extent that the Prior Decision held that “[t]he Defendants are also entitled to reasonable attorneys’ fees pursuant to the LLC Agreement” arguing that reargument is appropriate because (i) Maxx is not a party to

the LLC agreement and therefore is not entitled to the attorneys' fees provided for in Section 11.18 "Prevailing Party" of the LLC Agreement and is subject to the rights and obligations of the Maxx Agreement (the **Maxx Agreement**; NYSCEF Doc. No. 157), which does not contain a fee shifting provision, (ii) the Court improperly considered Maxx's argument first raised in Reply that Maxx is "an *affiliate of Largo*," and (iii) Maxx is not entitled to indemnification under the LLC Agreement. Upon reargument, the plaintiffs argue that the Court should modify the Prior Decision to hold that Maxx is not entitled to reasonable attorneys' fees. For the reasons set forth below, the motion is granted and the Prior Decision is modified to reflect that "Largo" is entitled to "costs, fees (inclusive of reasonable attorneys' fees and disbursements) and expenses related to...[the]...dispute" (NYSCEF Doc. No. 151 §11.18) but Maxx is not.

A motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but cannot 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, [1st Dept 2016], *Foley v Roche*, 68 AD2d 558, 567-68 [1st 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 [1st Dept 2007]).

1. Maxx is not a Member under the LLC Agreement and thus the Prevailing Party Provision does not apply to Maxx

Section 11.18 of the LLC Agreement (the **Prevailing Party Provision**) provides that in the event of a dispute between the Members, the prevailing Member is entitled to the reimbursement or payment of costs, including reasonable attorneys' fees:

11.18. Prevailing Party. In the event of a dispute between the Members, the prevailing Member (determined by a judgment, court order or agreement) shall be entitled to seek and receive from the non-prevailing Member the reimbursement or payment of such prevailing Member's costs, fees (inclusive of reasonable attorneys' fees and disbursements) and expenses related to such dispute.

(NYSCEF Doc. No. 151 §11.18). The Members are JDS Fourth Avenue JV II LLC and Largo 613 Baltic Street Partners LLC, "the Persons designated as Members in the first paragraph of this Agreement, together with any Person who becomes a substituted or an additional Member as provided herein" (*id.*, §1.38). A "Person" is "any individual or Entity, and the heirs, executors, administrators, legal representatives, permitted successors and assigns of such individual or Entity where the context so admits" (*id.*, §1.52). Maxx is thus not a "Member," and Section 11.18 simply does not apply to them or form a predicate for Maxx to be awarded reasonable attorneys' fees. To the extent that the Court held otherwise, this constitutes a material and unmistakable factual error, and reargument is appropriate.

Upon reargument, it is clear that Maxx is not entitled to reasonable attorneys' fee pursuant to the Prevailing Party Provision. However, as discussed below, it is also clear, that the award should have been not merely referring to "reasonable attorneys' fees" but should more precisely referred

to “costs, fees (inclusive of reasonable attorneys’ fees and disbursements) and expenses related to such dispute” of Largo.

2. Maxx improperly raised on Reply that it is an Affiliate and therefore entitled to Indemnification

In their Reply papers in connection with the Prior Decision, Maxx argued for the first time a new legal theory – that Largo could pursue recovery of attorneys’ fees on behalf of Maxx (rather than Maxx in its own name as a “prevailing party”) *pursuant to Section 7.9 “Indemnification”* of the LLC Agreement. More specifically, on Reply, and for the first time, Maxx argued that it was entitled to reasonable attorneys’ fees because it is an “Affiliated Person.” This argument fails procedurally and substantively. Procedurally, the argument fails because consideration of this then freshly raised argument on Reply is not appropriate and to the extent that the court relied on this argument, the Court misapprehended the law (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]). JDS had no opportunity to respond to this argument, and an award of reasonable attorneys’ fees on this basis was inappropriate. Thus, reargument is appropriate for this reason as well and Maxx is simply not correct that JDS was required to assume that the Court would inappropriately consider this argument first raised on Reply to preserve its objection by requesting leave to file a Sur-Reply or to object at oral argument to the Court’s consideration of this argument; They were entitled to assume the Court would get it right.

3. Even if Maxx were an Affiliated Person, it would still not be entitled to Indemnification because there has been no finding of breach

As a substantive matter, the argument fails too. Section 7.9 of the LLC Agreement provides that Company, Largo and its Affiliated Persons are indemnified by JDS in connection with any breach of the LLC Agreement or any other agreement of its Affiliated Persons:

(b) To the fullest extent permitted by applicable law, the Company, Largo and its Affiliated Persons are hereby indemnified by JDS for any loss, damage or claim incurred by such Persons by reason of the gross negligence, criminal acts, willful misconduct, fraud, voluntary or involuntary bankruptcy, or any breach (including, failure an omission) of any provisions or representation of this Agreement, the Fourth Avenue JV Agreement and/or any other agreement of the Company or its Subsidiaries or Affiliates by JDS or any of its Affiliated Persons. By execution of this Agreement, the JDS Principal guaranties the indemnification set forth in this Section 7.9(b)

(NYSCEF Doc. No. 151, §7.9; the **Indemnification Provision**).¹ An “Affiliated Person” is defined as:

“Affiliated Person” or “Affiliate” means, with respect to any Person, any other Person controlling or controlled by or under common control with such Person who is related to the project contemplated by this Agreement. For purposes of this definition, the term “control” when used with respect to any Person means the power to direct the management and policies of such Person, directly or indirectly, whether as an officer, director, member, or otherwise through the ownership of voting securities, by contract or otherwise, and the terms “controlling” and “controlled” shall have meanings correlative to the foregoing

(NYSCEF Doc. No. 151, §1.3). Even assuming that Maxx is an Affiliated Person (either because it actually meets the definition) or because the Amended Complaint alleges that Maxx is indeed “an affiliate of Largo” (NYSCEF Doc. No. 69, ¶7) and JDS is held to mean that they meant that they were an “Affiliated Person” for the purpose of the Indemnification Provision,² the Indemnification Provision would still not be triggered because the record before the Court

¹ The Court notes that the Maxx Agreement (NYSCEF Doc. No. 157) does not have a fee shifting provision. Thus, Maxx finds no basis to claim attorneys’ fees under the terms of the Maxx Agreement itself.

² This issue was not previously briefed because it was only raised on Reply.

does not establish a predicate breach of either the LLC Agreement or the Maxx Agreement. The finding in the Prior Decision was simply that JDS' affirmative claims for breach of contract failed because JDS had already been fully compensated for Maxx's alleged breaches (*see* NYSCEF Doc. No. 228, at 3) and its loan claims failed because the record firmly established that it was decidedly not a loan. Stated differently, Maxx is not entitled to an award of reasonable attorneys' fees because the satisfaction of a condition precedent (*i.e.*, a finding of breach) has not been proven.³ Thus, on the record before the Court, the Indemnification Provision too can not form a basis for Maxx to recover its reasonable attorneys' fees, and the Prior Decision must be modified to reflect that.

Finally, the cross-motion is granted solely to the extent that the Court should not have limited Largo's recovery pursuant to the Prevailing Party's Provision to "reasonable attorneys' fees." The Prevailing Party's Provision provides for "costs, fees (inclusive of reasonable attorneys' fees and disbursements) and expenses related to such dispute." As such, the cross-motion must be granted to reflect that. The defendants are not however entitled to conform the pleadings to the proof now post summary judgment to assert a claim that they never made in this lawsuit because they have failed to demonstrate good cause for this lengthy delay in asserting a counter-claim based on facts that the parties have litigated for years (*see Endothelix, Inc. v Vasomedical, Inc.*, 202 AD3d 620, 621 [1st Dept 2022]; *Lattanzio v Lattanzio*, 55 AD3d 431, 432 [1st Dept 2008]).

³ Maxx did not make a claim for indemnification at time prior to their Reply papers in their summary judgment motion in this lawsuit, there are no counter-claims, Maxx never made a demand for indemnification and Max did not move to have the Court find that JDS breached the LLC Agreement or the Maxx Agreement. To the extent that they argue here that they argued that JDS failed to provide certain schedules or notices, the Court ultimately rejected these arguments because the record was disputed and instead held only that JDS could not maintain their claims for the reasons set forth in the Prior Decision.

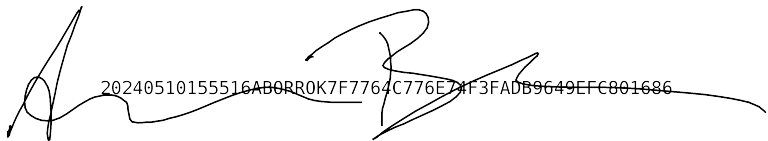
The Court has considered the defendants' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the motion to reargue is granted to the extent set forth above; and it is further

ORDERED that the cross-motion is granted solely to the extent set forth above; and it is further

ORDERED that the matter is hereby referred to a JHO/Special Referee on the issue of costs, fees and expenses.



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5/10/2024

DATE

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