| **ATX Debt Fund 2, LLC v Paul** |
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| 2024 NY Slip Op 31784(U) |
| May 17, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 650728/2020 |
| 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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ATX DEBT FUND 2, LLC,

Plaintiff,

- V -

NATIN PAUL A/K/A NATE PAUL, ATX DEBT FUND 1, LLC,KARLIN REAL ESTATE, LLC,KARLIN REAL ESTATE 2, LLC,KARLIN ASSET MANAGEMENT, INC.,KARLIN RIVER PLACE, LLC,KARLIN CESAR CHAVEZ, LLC,KARLIN EAST SIXTH, LLC,KARLIN MOUNTAIN RIDGE, LLC,KARLIN PHILLIPS BUILDING, LLC,KARLIN 320 CONGRESS, LLC,KARLIN 422 CONGRESS, LLC,MATTHEW SCHWAB, TUEBOR REIT SUB LLC,LADDER CAPITAL FINANCE LLC,LADDER CAPITAL CORP., ELIZABETH LIZ NICOLLE BOYDSTON, JAMES H. BILLINGSLEY, JOHN DOES 1-10,

Defendant.

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**INDEX NO.** 650728/2020

**MOTION DATE** 02/26/2024, 03/06/2024

**MOTION SEQ. NO.** 036 037

**DECISION + ORDER ON MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 036) 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 037) 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1443, 1444, 1445, 1446

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

Upon the foregoing documents and for the reasons set forth on the record (5.16.24) and as set forth below, Natin Paul (**Mr. Paul**)'s motion to reargue or renew (Mtn. Seq. No. 037) is denied. Simply put, the branch of Mr. Paul's motion seeking reargument must be denied because Mr. Paul fails to point to any principle of law or fact that this Court misapprehended or overlooked in its February 2024 Order (hereinafter defined; CPLR 2221[d]). In fact, as discussed below, Mr.

Paul acknowledges that the Court correctly understood the facts and applied the relevant controlling case law in its February 2024 Order (*see Small v DMRJ Grp. LLC*, 197 NYS3d 232 [1st Dept 2023]). As to the branch of Mr. Paul's argument seeking renewal, Mr. Paul fails to point to any facts not in his possession at the time of the February 2024 Order (CPLR 2221[e]). Thus, renewal is not appropriate. In other words, at bottom, Mr. Paul merely seeks another bite at the apple to "argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979], *citing Fosdick v Town of Hempstead*, 126 NY 651, 652 [1891]; *Am. Trading Co., Inc. v Fish*, 87 Misc 2d 193 [Sup Ct 1975]). This not a basis for reargument or renewal.[1]

ATX Debt Fund 2 LLC (the **Lender**)'s motion for summary judgment (Mtn. Seq. No. 036) is granted because it has met its burden of coming with *prima facie* evidence of its entitlement to judgment and Mr. Paul fails to raise a material issue of fact warranting trial or further proceeding (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

**The Relevant Facts and Circumstances**

The facts of this case are set forth in the prior orders and decisions issued by this Court and the SDNY Court. Familiarity is presumed.

Briefly, in a Decision and Order of this Court dated March 2, 2022, which granted the Lender's previous motion for summary judgment (the **March 2022 Order**) the Court held:

[1] Indeed, the United States District Court for the Southern District of New York (the **SDNY Court**) came to a similar conclusion as to Mr. Paul's motion seeking reargument filed in that court (*ATX Debt Fund 1, LLC v Paul*, 19-CV-8540 [JPO], 2024 WL 2093387, at *3 [SDNY May 9, 2024] [holding that Mr. Paul "seeks to relitigate issues that have already been decided."]).

> [a]s discussed above, the Lender adduces the (i) the affidavit of Liz Boydston on behalf of Original Lender and she attests to the Borrowers' default under the Loan Documents, (ii) the Default Notice, and (iii) the Guarantor's obligations pursuant to the Guaranties. In their opposition papers, the Guarantor fails to raise a material issue of fact requiring the denial of summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, summary judgment must be granted.

(March 2022 Order, at 7).

On appeal, the Appellate Division held that:

> Order, Supreme Court, New York County (Andrew Borrok, J.), entered March 7, 2022, which denied defendant guarantor's motion to strike plaintiff lender's note of issue and certificate of readiness, granted plaintiff's motion to dismiss the affirmative defenses, denied defendant's cross motion to file an amended answer, and granted plaintiff's motion for summary judgment on its claims, unanimously modified, on the law and the facts, to grant defendant's motions to strike the note of issue and to amend the answer to the extent of asserting the fraud-based affirmative defenses and counterclaim, and deny plaintiff's motion for summary judgment, and otherwise affirmed.

(*ATX Debt Fund 2, LLC v Paul*, 206 AD3d 465, 466 [1st Dept 2022]; the **Appellate Division Decision**).

Following the Appellate Division Decision, discovery ensued. As discussed in the Decision and Order of this Court dated February 5, 2024 (the **February 2024 Order**), Mr. Paul was indicted. He did not seek a stay of discovery in this case. Significantly, in fact, he elected to pursue discovery and voluntarily attended his own deposition. The Lender sought a stay. Mr. Paul indicated that he was not interested in a stay unless the Lender agreed not only to stay this case but also a parallel case pending in the SDNY Court, and called the possibility that he would invoke his Fifth Amendment rights "speculative" and a "red herring" (NYSCEF Doc. No. 784, at 13). At his deposition, however, he did just that. He invoked his Fifth Amendment rights **over**

**400 times**. Following Mr. Paul's deposition (or non-deposition as it were), the Lender and counterclaim-defendants moved to dismiss Mr. Paul's counterclaims and affirmative defenses (Mtn. Seq. Nos. 020-023) and Mr. Paul moved to compel discovery and sought a stay of this lawsuit (Mtn Seq. Nos. 032-034). In the February 2024 Order, this Court held:

> **I. Mtn. Seq. No. 34**
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> Natin Paul's motion for a stay is denied. He voluntarily chose to appear at a deposition and take the Fifth Amendment. He did not have to. He could have refused to appear, litigated that, and litigated any contempt or sanction finding based on his refusal to appear. He did not do those things. Hence, by his own litigation decision, he exposed himself to the consequences of that decision (*Access Cap. v DeCicco*, 302 AD3d 48, 52 [1st Dept 2002]; *Small v DMRJ Grp. LLC*, 197 NYS3d 232 [1st Dept. 2023]. As discussed by the Appellate Division in *Small*, the issue is whether the questions that the counterclaim plaintiff refused to answer were "material and necessary" to his claims (*Small*, citing CPLR 3101; *see e.g., Batista v City of New York*, 15 AD.3d 304, 306 [1st Dept 2005]). Here, Mr. Paul took the Fifth Amendment over 400 times at his deposition including about his allegations that this was a rigged foreclosure sale. These questions are unquestionably material and necessary to the maintenance of his counterclaims and affirmative defenses in this case. As such, and as discussed below (Mtn. Seq. No. 20), the plaintiff's motion to dismiss the counterclaims and affirmative defenses is granted.
>
> By way of background, the plaintiffs in this case moved for a stay of this case. In his opposition papers, Mr. Paul indicated he was only willing to agree to a stay if there was agreement of a stay of not only this case but also the case pending in the United States District Court for the Southern District of New York, where the Silicon Hills loan transaction is being litigated.[2] Ultimately, the parties apparently litigated the case in the SDNY as well, and recently the SDNY issued a decision (NYSCEF Doc. No. 1318, Pgs. 11-17) on issues similar to or overlapping with the issues pending in this Court:
>
> > Paul contends that, based on a decision by a New York court, the doctrine of collateral estoppel supports his contention that Section 2.14 preserves his ability to raise defenses grounded in gross negligence or willful misconduct. (ECF No. 204 at 19.) But that decision addressed Section 2.14 of the Guaranty, which is not the relevant section that this Court discusses. Moreover, that decision merely granted Paul the ability to serve an amended answer "to the extent it asserts affirmative defenses based on fraudulent conduct"; such a decision about Paul's ability to serve an

[2] For completeness, the Court notes that there was a request for a stay for "settlement purposes" by the parties which the Court denied. But this was long before Mr. Paul's deposition and nothing prevented Mr. Paul for making a motion for a stay based on his criminal indictment which at that time had already been pending for months.

amended pleading does not collaterally estop this Court from making substantive determinations about the merits of such defenses. *ATX Debt Fund 2, LLC v. Paul*, 206 A.D.3d 465, 466 (1st Dep't 2022).

As to the four defenses that Paul raises for the first time in his opposition to ATX's motion for summary judgment—(11) breach of contract, (12) promissory estoppel, (13) gross negligence, and (14) willful misconduct—they are not raised in Paul's answer and are therefore forfeited. In addition to being untimely, these purported defenses, to the extent they are supported by facts, are encompassed by the waiver. The breach of contract and promissory estoppel defenses fall within Section 2.1 of the Guaranty, as both of those defenses rely on Lender's purported failure to grant Paul a third extension of the Loan. The gross negligence and willful misconduct defenses also appear to fall under the waiver. Although Paul's briefing on those two defenses is less than clear, those defenses appear to be premised on ATX's alleged "loan to own scheme," which similarly involves claims that fall within the waiver. (ECF No. 204 at 5.) As a result, Paul is barred from raising those defenses.

2. Merits

Beyond largely being subject to the waiver in the Guaranty, Paul's defenses all fail on the merits, as no rational jury could conclude that the asserted defenses apply in this case.

The four defenses that arguably do not fall under the waiver—(1) lack of personal jurisdiction, (2) lack of subject matter jurisdiction, (6) whether ATX owns the Loan, and (7) lack of standing—plainly fail on their merits. On (1) lack of personal jurisdiction, Paul explicitly abandoned that defense (ECF No. 204 at 16 n.7), and "the personal jurisdiction requirement is a waivable right." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). Even had Paul not abandoned that defense, he explicitly submitted to this Court's jurisdiction in the Guaranty. (ECF No. 165-3 § 6.3(b).) On (2) lack of subject matter jurisdiction, the parties were completely diverse and the amount in controversy exceeded $75,000 at the time the action was filed, granting the Court jurisdiction under 28 U.S.C. § 1332. (See ECF No. 26 ¶¶ 1-3.) Even though ATX stepped into the shoes of Tuebor after Tuebor assigned its interest to ATX, the later substitution of a non-diverse party pursuant to Rule 25(c) does not destroy diversity jurisdiction. *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 427-28 (1991). And on (6) whether ATX was assigned the Loan and Guaranty and (7) lack of standing, Paul cannot make a serious argument that ATX is not entitled to bring this action. While Paul asserts that ATX has "failed to submit admissible proof to support its prima facie case as a holder in due course of the Guaranty in question" (ECF No. 204 at 4), Tuebor "assigned all right, title, and interest under the Loan and the

Guaranty to ATX" (Def.'s SOF Opp. ¶ 58), and ATX has introduced evidence of such assignment (see ECF No. 165-13).

The four additional defenses Paul belatedly raised in his opposition to ATX's motion for summary judgment—(11) breach of contract, (12) promissory estoppel, (13) gross negligence, and (14) willful misconduct—also fail because Paul forfeited them by neglecting to raise them until in his opposition to ATX's motion for summary judgment. *See Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 843 (2d Cir. 2013) (affirming district court's refusal to consider a claim that "had never [been] asserted . . . until [the] brief in opposition to the motion for summary judgment"); *see also In re Image Innovations Holdings, Inc.*, 391 B.R. 255, 260 (S.D.N.Y. 2008) ("Affirmative defenses are generally waived if not timely asserted." (citing *Travellers Int'l A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1580 (2d Cir. 1994))). Thus, even if Paul's new defenses are not barred by the waiver in the Guaranty that he signed, as the Court concluded earlier, The Court declines to consider them. Moreover, even if the gross negligence and willful misconduct defenses did not fall within the waiver, they would fail on the merits, as Paul has not adduced any facts showing that ATX owed a duty to Paul outside the Guaranty, or that ATX evinced a reckless disregard or conscious indifference to the rights of others—both of which are necessary for those defenses. *See Pasternack v. Lab'y Corp. of Am.*, 892 F. Supp. 2d 540, 547 (S.D.N.Y. 2012); *Taylor Precision Prods., Inc. v. Larimer Grp., Inc.*, No. 15-CV-4428, 2018 WL 4278286, at *18 (S.D.N.Y. Mar. 26, 2018).

Paul's remaining defenses also fail on the merits. On (3) accord and satisfaction and (10) failure to mitigate damages, both of those defenses are premised on ATX's alleged improper decision to "decline[] a settlement offer from the Borrowers" and ATX's alleged improper behavior in "rigging" the foreclosure sale that resulted in the Property being sold for less than it was worth. (ECF No. 49 ¶¶ 90, 97; ECF No. 204 at 2, 12-13.) As an initial matter, Paul has forfeited any defense based on (3) accord and satisfaction by failing to mention that defense anywhere in his opposition to the motion for summary judgment, despite ATX's briefing of it in its motion for summary judgment. (See ECF No. 162 at 13, 19-20.) More importantly, even if ATX received certain settlement offers, ATX "was not required to accept the breaching party's offer"—here, an offer from Borrower—and a "breach victim is rarely required to accept a new offer in order to mitigate damages." *SuperCom, Ltd. V. Sabby Volatility Warrant Master Fund Ltd.*, __ F. Supp. 3d __, 2023 WL 7151717, at *15 (S.D.N.Y. 2023) (internal quotation marks and citation omitted). That is especially so when, as Paul puts it himself, that rejected offer required "refinancing by a substitute lender" (ECF No. 49 ¶ 90), as the duty to mitigate damages requires only "reasonable effort" and does not require a plaintiff to incur "undue risk, burden, or expense," *U.S. Bank*

*Nat'l Ass'n v. Ables & Hall Builders*, 696 F. Supp. 2d 428, 441 (S.D.N.Y. 2010).

Defenses based on claims about the rigged foreclosure sale must also dismissed due to the law of the case doctrine, which "commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise." *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (internal quotation marks and citation omitted). Here, Paul's claims about the "rigged" foreclosure sale all amount to a complaint that the Property sold for far less than what it was worth. But as this Court explained in its prior opinion, "[t]wo federal courts—one bankruptcy court and one district court sitting in review—have examined the issue of valuation and determined that the Property was not worth more than $53 million," which was the value of ATX's bid, and those determinations are binding. *ATX I*, 2023 WL 2585714, at *6 (ECF No. 110 at 11-12). Thus, to the extent that Paul's defenses of accord and satisfaction and failure to mitigate damages (and any other defenses) are based on the Property's selling for less than its actual worth, those defenses are barred by law of the case.

With respect to (4) unclean hands, (5) equitable estoppel, and (8) fraud, Paul has not pointed to any conduct by ATX that could plausibly support those defenses. To begin, Paul's affirmative defense of fraud again relies on claims that this Court has already rejected. To "raise[] fraud as an affirmative defense," one must prove, among other elements, a misrepresentation that "was made . . . to [one's] injury." *Swig Weiler and Arnow Mgmt., Inc. v. Stahl*, 817 F. Supp. 404, 407 (S.D.N.Y. 1993); *see also State St. Global Advisors Tr. Co. v. Visbal*, 462 F. Supp. 3d 435, 440 (S.D.N.Y. 2020) (explaining that "[t]o plead fraudulent inducement as an affirmative defense, a party must allege . . . resulting damages" from material misrepresentations (internal quotation marks and citation omitted)). Here, although Paul's allegations are, at times, difficult to understand, the crux of his fraud claim against ATX is that it ran a "loan to own scheme" in which it "ma[d]e fraudulent representations to the bankruptcy court in Texas regarding the value of the property" and then ran a "rigged" foreclosure sale. (ECF No. 204 at 1, 3, 10-11.) Paul cannot show that there were any resulting damages from those alleged misrepresentations, however, because it is law of the case that the Property was not worth more than $53 million. Paul insists that the law of the case doctrine should not apply because there is "new evidence," but that evidence largely revolves around a claim that ATX internally valued the Property at much more than $53 million. (ECF No. 204 at 14-16.) ATX's subjective views of the Property's value do not constitute a "cogent or compelling reason[]" to upend the bankruptcy court's (and subsequently, a

federal district court's) conclusions on a full evidentiary record. Johnson, 564 F.3d at 109 (internal quotation marks and citation omitted).

Similarly, Paul asserts that ATX has "unclean hands" because of new evidence that ATX "had rigged the system in advance to take the Property 'under market value,'" but that claim cannot succeed, again, given the established fact that the Property was not more than $53 million. (ECF No. 204 at 16.) As for Paul's defense of equitable estoppel, it is unclear what conduct that defense is based on, as Paul fails to mention that defense anywhere in his opposition to the motion for summary judgment despite ATX's briefing of the defense, arguably rendering it forfeited. (See ECF No. 162 at 13, 18-19.) But assuming it is based on the same conduct that the fraud and unclean hands defenses are based on it, that defense, too, fails.

Finally, on (9) breach of implied covenant and duty of good faith and fair dealing, Paul bases that defense on Lender's refusal to grant a third extension of the Loan maturity date. (ECF No. 204 at 10-11.) But Tuebor was the relevant Lender at the time negotiations regarding a third extension were ongoing (see Def.'s SOF Opp. ¶ 58), and Paul does not explain why ATX owed Paul any duty with respect to the extension, or why Tuebor's conduct should be attributed to ATX, which is now the Plaintiff. (See ECF No. 223 at 8-9 & nn. 9-10.) As a result, that defense fails as well

(NYSCEF Doc. No. 1318, 11-17).

Again, Mr. Paul did not have to go to his deposition or litigate the case in the SDNY. He could have sought stays and then litigated those issues, including via a mandamus motion in the SDNY. He did not do that. Defendants cite no case in which a stay has been granted after a Defendant chose to attend a deposition, and there invoked the Fifth Amendment repeatedly. *Britt v Intl. Bus Services, Inc.*, 255 AD2d 143, 144 [1st Dept 1998] is inapposite. Indeed in *Britt,* relied on by Mr. Paul, the Court held that a stay was appropriate because the witness there had not yet been deposed and intended to invoke his right against self-incrimination and that his testimony was critical and necessary and that without his testimony he would be unable to assert a competent defense. Significantly, Mr. Paul has already been deposed in this case and never sought a stay. Accordingly, Mr. Paul has by his own litigation strategy undermined any claim of irreparable harm or unfair prejudice or the idea that he should not be compelled to attend a deposition because without his testimony he can not assert his counterclaims or defenses such that no stay now is appropriate. Thus, the motion seeking stay is denied and the plaintiff's motion seeking dismissal of the counterclaims and defenses is granted.

**II. Mtn. Seq. No. 33**

No additional discovery from Ladder is appropriate. Mr. Perelman testified credibly on the subjects that were material and necessary to the Plaintiff's claim in this case and Mr. Paul's affirmative defenses and counterclaims. Significantly, Mr. Paul is now collaterally estopped from relitigating certain factual determinations that were made in the SDNY action. The factual allegations that support these positions have already been determined adverse to Mr. Paul's position and the issues are *res judicata*.

**III. Mtn. Seq. No. 32**

No additional discovery in support of Mr. Paul's affirmative defenses and or counterclaims is appropriate. They are not sustainable. Thus, additional discovery at this point amounts to nothing more than a baseless fishing expedition in attempt to further stall the inevitable. As the SDNY Court observed "this is a simple contract case which ought to have proceeded more efficiently to resolution." *ATX Debt Fund 1, LLC v. Paul*, 2023 WL 6554363, at *1 (SDNY Aug. 4. 2023).

**IV. Mtn. Seq. No. 23**

The counterclaim defendant Ladder Capital Finance LLC and Tuebor REIT Sub LLC are entitled to dismissal. The counterclaim fails to adequately allege a basis upon which liability can be asserted against them. They are not parties to the Guaranty and do not have any obligations under the Guaranty. Equally importantly, Ladder sold all right title and interest to the H8 Loan to ATX and this Court permitted substitution pursuant to CPLR 1018 without opposition from Mr. Paul. There simply are no facts that support liability against Tuebor REIT. There are also no facts which support allegations of alter-ego or veil piercing. Also, significantly, the counterclaims cannot be maintained at this point for the reasons set forth above. Thus, the motion is granted in its entirety.

**V. Mtn. Seq. No. 22**

The claims regarding the Silicon Hills Loans and the Guaranty are dismissed. The Silicon Hills Loans based claims have been resolved by the SDNY. The value of the Silicon Hills Property has been litigated by Mr. Paul and established to be $53 million. Finality for collateral estoppel and *res judicata* are different than for the purposes of an interlocutory appeal under FRCP 54. The Counterclaims based on gross negligence and willful misconduct are also dismissed. They are premised on the same factual predicates as the federal case and are subject to dismissal under *res judicata*. In this case, like in that case, Mr. Paul alleges that this was a loan to own scheme through "rigged foreclosure sales." These allegations have been thoroughly considered by other courts (three) and rejected. Those decisions matter. Thus, the counterclaims are dismissed.

Dismissal is required for a number of other reasons as well. First, Mr. Paul's counterclaims as to the value of the properties were determined in the bankruptcy proceedings and Mr. Paul is collaterally estopped from relitigating those values. The counterclaim allegations do not support alter ego jurisdiction. Moreover, dismissal is

appropriate for the reason set forth above. Finally, the Court notes that it is wholly irrelevant that this Court permitted the filing of the Second Amended Answer with Counterclaims on March 16, 2023, because leave to amend is freely given not based on any determination of sufficiency. Now, on the merits, the SDNY Court has interpreted the Guaranty and, on the merits, has determined that there is no claim under the waiver carve-out.

## VI. Mot. Seq. No. 20

As discussed above, Mr. Paul voluntarily appeared at a deposition and there invoked his Fifth Amendment rights some 400 times (NYSCEF Doc. No. 874 at 2). It is well settled that invocation of the Fifth Amendment right does not relieve a party of the usual evidentiary burden attendant to a civil proceeding (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51 [1st Dept 2002]; *United States v Rylander*, 460 US 752, 761, [1983]). In deciding whether the Court should invoke its inherent power to dismiss a claim when its proponent refuses to answer questions on the grounds of the Fifth Amendment privilege against self-incrimination, "[t]he only inquiry" is whether the questions the plaintiff refused to answer were "material and necessary" to the defendant's defense (*Small v DMRJ Group LLC*, 221 AD3d 418, 419 [1st Dept 2023]; CPLR 3101).

In his deposition, Mr. Paul invoked the Fifth Amendment in refusing to answer questions about (i) the evidentiary bases of each of the counterclaims alleged in his Second Amended Answer and Complaint, (ii) his conduct at the foreclosure sales he alleges were rigged, (iii) the value of the properties he alleges were sold for an unfairly low value at those foreclosure sales, (iv) what documents he has in his possession to substantiate his claims, (v) whether he performed under the Guaranties that are the bases of this lawsuit, and (vi) the activities of his business, World Class, in relation to the loans and properties at issue in this case (NYSCEF Doc. No. 874 at 2-3). In particular, Mr. Paul brings counterclaims sounding in fraud, but refused to answer questions relating to his state of mind and his dealings with those he alleges defrauded him. Thus, the "material and necessary" standard is met, and dismissal of Mr. Paul's counterclaims is warranted.

## VII. Mot. Seq. 21

Mr. Paul also counterclaims against one Matthew Schwab and a slew of other entities allegedly owned and operated by Mr. Schwab (collectively, the **Karlin Counterdefendants**). Mr. Paul's claims against the Karlin Counterdefendants suffer many of the same fatal defects as his claims against Ladder Capital Finance LLC and Tuebor REIT Sub LLC. Namely, Mr. Paul fails to allege any facts to provide a basis for the Karlin Counterdefendants' alleged liability. None of the Karlin Counterdefendants are parties to the Guaranty. There are no facts alleged upon which the Court could find that any of the Karlin Counterdefendants were alter egos of ATX 2. Lastly, these claims are dismissed because Mr. Paul cannot carry his evidentiary burden in light of his refusal to answer questions about the bases of his claims about the Karlin Counterdefendants.

> As discussed on the record (2.5.24), the Plaintiff is granted leave to move by Order to Show Cause for summary judgment by February 26, 2024. Mr. Paul shall submit opposition papers by March 18, 2024. The parties shall email Part 53 when the order to show cause is fully submitted.

(NYSCEF Doc. No. 1320).

As discussed above, now, the Lender moves for summary judgment and Mr. Paul moves for reargument and renewal. Since the parties briefed these motions, the SDNY Court issued a decision dated May 9, 2024 (the **2024 SDNY Decision**) holding, in relevant part:

> Plaintiff ATX Debt Fund 1, LLC ("ATX") brought this action against Defendant Natin Paul ("Paul") for breach of a loan guaranty. The Court granted summary judgment in favor of ATX and directed ATX to file a proposed judgment specifying the amount of damages that ATX is to be awarded under the guaranty.
>
> Before the Court are Paul's motion for reconsideration of the summary judgment decision, as well as AT"s request for the entry of judgment against Paul. For the reasons that follow, Paul's motion for reconsideration is denied and ATX is directed to file another proposed judgment that is consistent with this opinion and order.
>
> **2. Discussion**
>
> The Court assumes familiarity with the facts and procedural history of this case. *See ATX Debt Fund 1, LLC v. Paul*, No. 19-CV-8540, 2024 WL 324780 (S.D.N.Y. Jan 29, 2024) ("*ATX II*") (ECF No. 231) (granting summary judgment to ATX); *ATX Debt Fund 1, LLC v. Paul*, No. 19-CV-8540, 2023 WL 6554363 (S.D.N.Y. Aug. 4, 2023) (ECF No. 221) (denying Paul's motion for reconsideration of the denial of the motion for reconsideration and his motion to certify an interlocutory appeal); *ATX Debt Fund 1, LLC v. Paul*, No. 19-CV-8540, 2023 WL 4238910 (S.D.N.Y. June 28, 2023) (ECF No. 199) (denying motion for reconsideration of dismissal of the counterclaims brought by Paul); *ATX Debt Fund 1, LLC v. Paul*, No. 19-CV-8540, 2023 WL 2585714 (S.D.N.Y. Mar. 21, 2023) ("*ATX I*") (ECF No. 110) (dismissing Paul's counterclaims).
>
> **A. Motion for Reconsideration**
>
> Paul brings his motion under Local Rule 6.3 of this Court and Federal Rule of Civil Procedure 60(b)(2) and 60(b)(6). (*See* ECF No. 239 at 1.) ATX first contends that Paul's motion for reconsideration is untimely: Local Rule 6.3 requires a motion for reconsideration to be filed "within fourteen (14) days after the entry of the Court's

determination of the original motion," but Paul filed his motion twenty-three days after the Court's opinion and order issued. (*See* ECF No. 253 at 9-10.) Still, the Court proceeds to evaluate Paul's motion under Rule 60, as the timeliness requirement in Local Rule 6.3 does not apply if another "statute or rule" provides otherwise. Local Civ. R. 6.3. Under Rule 60, a motion need only "be made within a reasonable time," and in certain circumstances, "no more than a year after the entry of the judgment or order." Fed. R. Civ. P. 60(c)(1).

To be sure, ATX is correct that the "prevailing rule in this Circuit and elsewhere is that an order is final for purposes of Rule 60(b) when it is appealable," *Ferring B.V. v. Serenity Pharms., LLC*, No. 17-CV-9922, 2019 WL 7283272, at *4 (S.D.N.Y. Dec. 27, 2019) (internal quotation marks and citation omitted), and "[a]n order granting summary judgment on the issue of liability, but requiring a calculation of damages, is not an appealable final order," *Mead v. Reliastar Life Ins. Co.*, 768 F.3d 102, 110 (2d Cir. 2014) (internal quotation marks and citation omitted). But upon entry of an award of damages to ATX, the Court's summary judgment opinion would become final and subject to a motion for reconsideration.

The Court therefore exercises its discretion to entertain Paul's motion at this stage and make clear that Paul does not meet the standard for relief under Rule 60(b). *See Hassan v. Fordham Univ.*, 533 F. Supp. 3d 164, 167 (S.D.N.Y. 2021) ("[A] district court also possesses the inherent authority to sua sponte reconsider its own interlocutory orders before they become final." (internal quotation marks and citation omitted)). "The decision whether to grant a motion for reconsideration under Local Rule 6.3 ... or a motion under Rule 60(b) lies in the sound discretion of the district court." *Farez-Espinoza v. Napolitano*, No. 08-CV-11060, 2009 WL 1118098, at *3 (S.D.N.Y. Apr. 27, 2009) (citing *Bennett v. Watson Wyatt & Co.*, 156 F. Supp. 2d 270, 272-73 (S.D.N.Y. 2001)). Rule 60(b) is "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (internal quotation marks and citation omitted). Such relief is "generally not favored and is properly granted only upon a showing of exceptional circumstances." *U.S. v. In'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001). The circumstances that Paul invokes here are the alleged existence of "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," as well as the existence of "(6) any other reason that justifies relief." Fed. R. Civ. P. 60(b)(2), (6). Because neither situation applies here, the Court denies Paul's motion for reconsideration.

**1. Newly Discovered Evidence**

A party seeking relief from a judgment under Rule 60(b)(2) "has an onerous standard to meet," and must show that "(1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching." *Teamsters*, 247 F.3d at 392 (internal quotation marks and citation omitted).

To begin, "[e]vidence is not 'newly discovered' if it was in the moving part's possession prior to the entry of judgment." *Johnson v. Askin Cap. Mgmt., L.P.*, 202 F.R.D. 112, 114 (S.D.N.Y. 2001); *see also* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2859 (3d ed. 2023) ("[I]f [the evidence] was in the possession of the party before the judgment was rendered it is not newly discovered and does not entitle the party to relief."); *LaSalle Bank Nat'l Assoc. v. Capco Am. Securitization Corp.*, No. 02-CV-9916, 2006 WL 177169, at *2 (S.D.N.Y. Jan. 25, 2006). ATX explains that Paul has been in possession of the allegedly new evidence since November 30, 2023—two months before the Court issued its summary judgment opinion—if not much earlier. (*See* ECF No. 253 at 15-16.) Paul does not appear to contest that characterization, and his only response is that the Court should still grant relief from the judgment because ATX intentionally delayed the production of the relevant evidence. (*See* ECF No. 257 at 8-9.) But if Paul possessed the relevant information before the date of the summary judgment decision, regardless of ATX's behavior, Paul has not met the "onerous standard" for relief. *Teamsters*, 247 F.3d at 392.

Moreover, even if Paul could not have discovered the evidence before the decision was rendered, the Court declines to grant relief because any allegedly new evidence is not "of such importance that it probably would have changed the outcome." *Id.* First, as the Court explained in its summary judgment opinion and order, Paul largely waived his ability to raise defenses by signing a broad waiver in the Guaranty. *See ATX II*, 2024 WL 324780, at *5-6 (ECF No. 231 at 10-13.) Thus, even if the evidence Paul cites is truly new, all of it appears to pertain to defenses covered by the waiver.

Finally, the Court already rejected arguments relating to Tuebor-Ladder's and ATX's allegedly unlawful conduct, such as inducing Paul not to proceed with refinancing, purchasing the property at below-market value, engaging in an unlawful "loan-to-own" scheme, and conducting a flawed auction. For example, the Court explained that Paul cannot show any damages from the allegedly fraudulent scheme, as it is law of the case that the Property was not worth more than $53 million. Id. at *8 (ECF No. 231 at 16-17). The Court also explained that any "new evidence" about the fact that ATX internally valued the Property at more than $53 million does not justify ignoring the bankruptcy court's and a federal district court's conclusions, based on a full evidentiary record, about the value of the Property. Id. And the Court explained that ATX was not obligated to accept just any offer to purchase the Property. Id. at *7 (ECF No. 231 at 15).

**2. Controlling Law**

Paul also contends that the Court overlooked controlling law. But his position is "based on legal error alone," which is "inadequate" for relief under Rule 60(b), as that rule "may not be used as a substitute for appeal." *United Airlines, Inc. v. Brien*, 588 F.3d 158, 176 (2d Cir. 2009) (internal quotation marks and citation omitted). Thus, "a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

Paul first submits that the Court overlooked controlling law regarding contract interpretation in determining the scope of the waiver, but Paul simply quibbles with the Court's reading of the contract. Paul next contests the Court's conclusion that a New York court's decision to allow him to file an amended answer has no preclusive effect here, but that argument again simply represents a disagreement with the Court's determination of how the doctrine of estoppel applies in this case. Paul then objects to the Court's determination that he waived any fraud-based defenses, but the Court's rejection of such defenses did not depend upon the waiver alone—as the Court explained, Paul cannot succeed on such claims because they would require relitigation of the valuation of the Property, which is subject to the law of the case doctrine. *ATX II*, 2024 WL 324780, at *6 n.3 (ECF No. 231 at 12 n.3).

For similar reasons, the Court did not err by accepting the $53 million valuation of the Property as law of the case, even though the foreclosure sale happened a few months after that valuation. As the Court explained in a prior opinion (of which Paul also unsuccessfully sought reconsideration), Paul has not sufficiently alleged factual changes in the intervening months to upend a conclusion by a bankruptcy court and a federal district court about the Property's value, and the "familiar and general rule" of preclusion "applies and disposes of" Paul's arguments. *ATX I*, 2023 WL 2585714, at *6-7 (ECF No. 110 at 12-14).

Finally, the Court also did not overlook controlling law regarding successor liability, as Paul never raised such an argument, and a "motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court." *Bennett*, 156 F. Supp. 2d at 271. Moreover, even if Paul's allegations about Tuebor's conduct had any grounding in fact, the Court explained that such a defense is covered by the waiver. *ATX II*, 2024 WL 324780, at *5-6 (ECF No. 231 at 10-12).

In sum, Paul does not identify any controlling precedent that the Court overlooked in its original summary judgment opinion and order. Because Paul instead seeks to relitigate issues that have already been decided, the Court denies his motion for reconsideration.

(*ATX Debt Fund 1, LLC v Paul*, 19-CV-8540 (JPO), 2024 WL 2093387, at *1-3 [SDNY May 9, 2024]).[3]

## DISCUSSION

### *I. Mr. Paul's Motion for Reargument and Renewal is Denied, and the Lender's Cross-Motion for Costs is Denied*

[3] Upon review of the briefing of the Lender's motion for summary judgment motion and Mr. Paul's motion seeking reargument, the Court inquired whether the 2024 SDNY Decision had been issued and requested two-page letter briefing from the parties as to the significance of any such 2024 SDNY Decision.

### *A. Mr. Paul is Not Entitled to Reargument*

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" (CPLR 2221[d]). Mr. Paul is not entitled to reargument because he simply fails to point to any fact or principle of law that this Court overlooked or misapplied when the Court struck Mr. Paul's counterclaims and affirmative defenses in its February 2024 Order.

As discussed above and in the February 2024 Order, this Court held that the material and necessary standard of *Small v DMRJ Group LLC*, 221 AD3d 418, 419 (1st Dept 2023) was more than satisfied and carefully considered appropriate remedy and ultimately decided that the record warranted dismissal of Mr. Paul's affirmative defenses and counterclaims. Significantly, Mr. Paul concedes in his reply papers that "***[w]hile Defendant has preserved his rights to challenge the Court's severe penalty for Paul's invocation of the Fifth Amendment, it was clear from the comments that the Court did not overlook facts or controlling law in deciding that issue***" (NYSCEF Doc. No. 1443, at 9-10 [emphasis added]). As such, reargument is not appropriate.[4]

[4] Mr. Paul leans in too heavily to this Court's description of the SDNY Summary Judgment Decision as bearing on issues "similar to or overlapping with the issues pending in this Court" (NYSCEF Doc. No. 1320, at 3) in attempt to mischaracterize the basis for this Court's February 2024 Order. As discussed above, the SDNY Court decided certain issues on collateral estoppel grounds, and, to the extent that the SDNY Court applied collateral estoppel to the valuation of the real estate portfolio at issue in the SDNY Action, this Court gave no consideration to that valuation as those properties are not at issue in this case. In any event, Mr. Paul's counterclaims predicated on a "loan to own" scheme and "rigged foreclosure sales" were "premised on the same factual predicates as the federal case" (*id.*, at 7). In addition, even if this Court had applied collateral estoppel to the SDNY Court's decision (*see ATX Debt Fund 1, LLC v Paul*, 19-CV-8540 [JPO], 2024 WL 324780 [SDNY Jan. 29, 2024]; the **SDNY Summary Judgment Decision**]) in the manner in which Mr. Paul suggest, his argument is also largely mooted now because the SDNY Court recently issued the 2024 SDNY Decision denying Mr. Paul's reargument motion filed there and permitting the Lender to file judgment (*ATX Debt Fund 1,*

***B. Mr. Paul is Also Not Entitled to Renewal***

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e]). Mr. Paul is also not entitled to renewal to the extent Mr. Paul's motion is predicated on "new evidence." This argument fails because all of the purportedly "new evidence" was in Mr. Paul's possession as of December 2023 when discovery closed and prior to issuance of the February 2024 Order (NYSCEF Doc. No. 783) and Mr. Paul fails to provide "reasonable justification" as to why these facts could not have been presented before or adequately explains why they would change the prior determination (CPLR 2221[e][2]; *Mooklal v Clermont Farm Corp.*, 187 AD3d 740, 741 [2d Dept 2020]). In addition, this "new evidence" relates to affirmative defenses and counterclaims which Mr. Paul voluntarily elected to prevent ATX from asking him about at his deposition and which has been expressly rejected by the SDNY Court. Thus, renewal would not result in a change in the prior determination.

The Court additionally notes that Mr. Paul also fails to adduce any new facts to support his wholly conclusory allegations of alter ego liability which were also dismissed in the February 2024 Order.

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*LLC v Paul*, 19-CV-8540 [JPO], 2024 WL 2093387, at *6 [SDNY May 9, 2024]). The Court also notes that Mr. Paul is simply not correct in suggesting that bringing a motion to reargue prevents a finding of finality for the purposes of collateral estoppel (*Strauss v Credit Lyonnais, S.A.*, 06CV702DLIMDG, 2017 WL 4480755, at *3 [EDNY Sept. 30, 2017] [rejecting argument that "a ruling subject to a motion for reconsideration has no preclusive effect."]).

Finally, Mr. Paul is not entitled to a stay of this proceeding pending his appeal of the SDNY Summary Judgment Decision to the Second Circuit Court of Appeals (NYSCEF Doc. No. 1413, ¶ 30) because Mr. Paul has not demonstrated the appeal has merit or that any further delay in this already long-running case would not prejudice the Lender or counterclaim defendants (CPLR 5519[c]; *64 B Venture v Am. Realty Co.*, 179 AD2d 374, 376 [1st Dept 1992]).

Thus, Mr. Paul's motion is denied in its entirety.

The Lender's cross-motion for costs is also, however, denied. Although it appears that "what might have otherwise been a relatively simple case to enforce a guaranty has spanned almost five years, largely due to litigation tactics by Paul" (*ATX Debt Fund 1, LLC v Paul*, 19-CV-8540 [JPO], 2024 WL 2093387, at *6 [SDNY May 9, 2024]), the Court declines to impose sanction because Mr. Paul's conduct does not rise to the level contemplated by Rule 130.

## *II. The Lender's Motion for Summary Judgment is Granted*

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521 [1st Dept 2015]). Previously, the Lender adduced the Affidavit of Liz Boydston (NYSCEF Doc. No. 171) in which she attested to, among other things, Mr. Paul's obligations under the Guaranties pursuant to a Notice of Default and the Borrowers' filing bankruptcy, and the deficiency owed to Lender by Mr. Paul. Now, the Lender adduces the affidavit of Navid Moshtaghi on behalf of the

Lender, attesting to (i) Mr. Paul's obligation under the Guaranties (NYSCEF Doc. Nos. 1361, 1376-1382); (ii) the Lender's January 7, 2020 and January 28, 2020 letters to the Borrowers and Mr. Paul, notifying them of their defaults under the loan documents and master leases (NYSCEF Doc. Nos. 28, 1384) and Borrowers' petitions for bankruptcy, the filing of which triggered Mr. Paul's obligations under the Guaranties (NYSCEF Doc. Nos. 1385-1392); and (iii) Mr. Paul's failure to perform his obligations under the Guaranties (NYSCEF Doc. No. 1350, ¶¶ 31-32). Thus, the Lender has met its *prima facie* burden of coming forward with evidence to support the entry of judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In his opposition papers, Mr. Paul fails to raise an issue of material fact requiring denial of summary judgment. To wit, Mr. Paul again argues that the foreclosure sales were rigged as part of a "loan-to-own" scheme to manufacture a deficiency. As an initial matter, the SDNY Court, however, expressly rejected these assertions, including the assertion that the Lender may have internally attached some value to the properties that was higher than what they paid at the foreclosure sale presumably because if the Lender valued the properties lower they would have bid less (*ATX Debt Fund 1, LLC v Paul*, 19-CV-8540 (JPO), 2024 WL 324780, at *8 [SDNY Jan. 29, 2024], *reconsideration denied*, 19-CV-8540 (JPO), 2024 WL 2093387 [SDNY May 9, 2024]). More importantly, and fatal here, is that Mr. Paul offers no factual basis to warrant further proceeding and, after having chosen to sit for a deposition and invoke his Fifth Amendment rights, Mr. Paul cannot now submit an affidavit in opposition to this motion (*Small*, 197 NYS3d 232 [1st Dept 2023]). This is patently improper.

Lastly, the master lease guaranties (NYSCEF Doc. Nos. 1376-1382) expressly disavow any offset for monies received pursuant to the foreclosure sales, such that the Lender is not seeking a double recovery under the Guaranty and Master Lease Guaranties:

> Section 2.11 Offset. The Note, the Guaranteed Obligations and the liabilities and obligations of the Guarantor to Lender hereunder shall not be reduced, discharged or released because of or by reason of any existing or future right of offset, claim or defense of Master Tenant against Borrower, or any other party, or against payment of the Guaranteed Obligations, whether such right of offset, claim or defense arises in connection with the Guaranteed Obligations (or the transactions creating the Guaranteed Obligations) or otherwise.

(NYSCEF Doc. Nos. 1376-1382, § 2.11).[5]

Thus, the Lender is entitled to summary judgment, and may submit a proposed judgment on notice.

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

Accordingly, it is hereby

ORDERED that the Lender's motion for summary judgment (Mtn. Seq. No. 036) is granted; and it is further

ORDERED that Mr. Paul's motion for reargument or renewal (Mtn. Seq. No. 037) is denied; and it is further

[5] Guaranteed Obligations in the Lease Guaranties means "(i) payment when due of all Rent (as defined in the Master Lease) and all other amounts to be paid by the Master Tenant pursuant to the Master Lease and (ii) the performance of all other obligations of Master Tenant under the Master Lease" (NYSCEF Doc. Nos. 1376-1382, § 1.2).

ORDERED that the Lender's cross-motion for costs is denied; and it is further

ORDERED that the Lender shall submit a proposed judgment on notice within 28 days of this decision and order.

5/17/2024
DATE

ANDREW BORROK, J.S.C.

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| CHECK ONE: | [X] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
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| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
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