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

PRESENT: Bernard J. Fried Justice PART 60M

E-FILE

Family M. Foundation, Ltd

INDEX NO. 605207/1998

MOTION DATE

v

Ninotchka Manus A/K/A Ninotchka Lenhoopen and Ninam International Ltd., S.A

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
Mar 20 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/17/09

J.S.C.
HON. BERNARD J. FRIED

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

E-FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----------X

FAMILY M. FOUNDATION LTD.,

Index No. 605207/98

Plaintiff,

- against -

NINOTCHKA MANUS a/k/a
NINOTCHKA TENHOOPEN and
NINAM INTERNATIONAL LTD. S.A.,

Defendants.

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APPEARANCES:

For Plaintiff:

Davidoff Malito & Hutcher LLP
605 Third Avenue
New York, New York 10158
(Ralph E. Preite, Esq.)

For Defendant Ninotchka Manus:

Morton S. Minsley, Esq.
101 Lafayette Street
New York, New York 10013

FRIED, J.:

Defendant Ninotchka Manus (Ninotchka) moves for an order dismissing the action, and vacating the final order and judgment, dated June 25, 2004 (Judgment).

In 1994, by written agreement, Family M. Foundation Ltd. (Foundation) loaned $400,000 to defendants Ninotchka and Ninam International Ltd. S.A., a company that Ninotchka owns, evidenced by a promissory note. In 1998, the Foundation commenced this action for breach of the loan agreement and default under the promissory note. In 1999, the parties entered into a "Stipulation of Settlement," pursuant to which the Foundation discontinued the action, without prejudice to its right to renew in the event of defendants' default under the terms of the Stipulation of Settlement.

In 2004, the Foundation moved to restore the action to the calendar, and for a judgment against defendants based upon their default under the Stipulation of Settlement. In opposition, Ninotchka claimed that, in 2000, her ex-husband, the late Allen Manus (Allen), the Foundation's founder and former control person, told her that the Foundation was releasing her from all liability on the promissory note. Ninotchka also challenged the propriety of the motion, noting that there was no supporting affidavit by anyone purporting to act on the Foundation's behalf. Ninotchka contended that she had been told that Libby Manus (Libby), a former wife of Allen's, was purporting to act on behalf of the Foundation, but that Libby is only a one-third stockholder of the Foundation, and that she was acting without the approval or authorization of the other two one-third stockholders – Jane Manus von Richthofen (Jane) and Ellen Sue Goldberg (Ellen Sue). Libby, purportedly on the Foundation's behalf, stated that she was the sole shareholder, officer, and director of the Foundation, and that she had the sole authority to either enforce the Foundation's rights under the Stipulation of Settlement, or to forgive the loan indebtedness.

Libby also stated that Jane and Ellen Sue resigned as directors in 1996. In 2000, the three of them decided to wind up the Foundation's affairs, and, because the liabilities exceeded the assets, and neither Jane nor Ellen Sue wanted to remain as owners, and subject themselves to personal liability, it was agreed that Libby would own 100% of the Foundation. Included in the opposition papers was an affidavit by Jane, stating that, to the best of her knowledge, she holds a one-third stock interest in the Foundation, and that her cousin Ellen Sue, and her step-mother Libby, both hold a one-third stock ownership interest. She stated that, in 2000, it was determined that the Foundation should be dissolved, and that

she and Ellen Sue, at her father's request, tendered back all of their legal share interest in the Foundation to effectuate its dissolution, but that she retained a beneficial interest in the Foundation. She expressed her unwillingness to participate in a lawsuit to enforce a promissory note against her father's former wife, Ninotchka.

I granted the Foundation's prior motion for a judgment against defendants based upon their default under the Stipulation of Settlement, finding that (1) defendants defaulted under the express terms of the Stipulation of Settlement, (2) defendants' contention that Allen forgave the debt was unavailing, because the agreement's general merger clause barred enforcement of the alleged oral amendment, (3) the Stipulation of Settlement expressly conferred the right upon the Foundation to foreclose upon the "Apartment Shares" so as to satisfy defendants' financial obligation to it, and (4) as president and sole director of the Foundation (the other shareholders having resigned as directors), Libby had authority to bring the motion on behalf of the Foundation, and the consent of a majority of shareholders was not required for an act that is part of a corporation's ordinary course of business. I found further that the statements that Libby made in her bankruptcy filing as to her share ownership in the Foundation was inconsequential, and I directed entry of the Judgment, and the release of the Apartment Shares that were being held in escrow pursuant to the Stipulation of Settlement.

Defendants then moved for reargument and renewal, contending that the decision contained the following errors: (1) the alleged release by Allen of defendants' obligation did not have to be in writing, because the writing requirement only refers to the Stipulation of Settlement, (2) Libby's bankruptcy petition contradicted her statement that she owns 100%

of the Foundation's stock, and that the Foundation holds a valid undischarged debt from defendants, and (3) Allen had the capacity to act on behalf of the Foundation, because of a power of attorney granted to him. I denied the motion, finding that defendants had not made any showing of entitlement to either reargument or renewal.

On this motion, Ninotchka asserts that, although Libby previously represented to the court that she had authority to act for the Foundation, and bring a motion in 2004 to enforce the 1999 Stipulation of Settlement, in fact, she had failed to disclose that she had lost, in 2002, any interest that she had with the Foundation. Allegedly, the "essence of the misrepresentation" is that Libby tried to hide the Judgment asset from the Bankruptcy Court in Florida and "make a quick $400,000 on a claim by a company that she had no interest in" (Oral Arg. Tr., at 26).

Ninotchka also asserts that the Foundation abandoned the claim that led to the Judgment, because Allen informed Ninotchka that he would not hold her to the terms of the Stipulation of Settlement, and that he had canceled her obligation under that agreement. Had he not canceled the obligation, the payment obligation would have matured on June 28, 2000, yet the Foundation did not make an application to enforce the Stipulation of Settlement until March 2004. Ninotchka also alleges in her affidavit, that the original promissory note was procured through fraud and forgery.

None of her assertions have merit, and the motion is denied.

The attempt to dismiss the action, and vacate the Judgment, fails for two reasons. First, Ninotchka's argument about the authority of Libby to act on the Foundation's behalf, and the allegations about Allen's desire to forgo Ninotchka's obligation, have been

previously decided in the original motion, and, again, upon the prior motion for reargument and renewal. In essence, this is a second attempt to obtain reargument of the prior decision that culminated in the Judgment. The purpose of reargument is not to serve as a vehicle to permit 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 [1st Dept], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]), albeit with different counsel, as is the case here.

The implied attempt at renewal (based upon statements made in Bankruptcy Court as to share ownership) fails because, as previously stated, Libby had authority to act on the Foundation's behalf as an officer and sole director – the issue of share ownership in the Foundation was inconsequential to the right of the Foundation to bring this action in the first instance. Resolution of the issue of share ownership of the Foundation is presently being litigated in a related action (Index Number 602326/04), and Ninotchka is a party to that action as an assignee of Jane's right, title, and interest (if any) in the Foundation via an irrevocable assignment (*Von Richthofen v Family M. Found. Ltd.*, 44 AD3d 573, 575 [1st Dept 2007]).

Second, the assertion presently made by Ninotchka – that the underlying promissory note that resulted in the Judgment was procured through fraud and forgery – is barred by the doctrine of law of the case (*Mohamed v Defrin*, 45 AD3d 252 [1st Dept 2007], *lv dismissed* 11 NY3d 783 [2008]; *Avalon, LLC v Coronet Props. Co.*, 16 AD3d 209 [1st Dept 2005]). Although the "law of the case doctrine is not so inflexible as to preclude correction of a ruling based on a change in the law," the error must be "so plain" that it would require the

court to grant reargument (*Miller v Schreyer*, 257 AD2d 358, 361 [1st Dept 1999]). Here, the Judgment resulted from a "largely factual determination, as opposed to a decision on a narrow point of law that clearly requires reversal in view of subsequent developments in case law," thereby militating in favor of adhering to the law of the case doctrine (*id.*). Ninotchka has had several opportunities to litigate any issues pertaining to the enforceability of the underlying loan agreement, as well as the Stipulation of Settlement. A "party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 206, 269 [2005]).

Accordingly, it is

ORDERED that the motion is denied.

Dated:

ENTER:

J.S.C.

HON. BERNARD J. FRIED

3/17/09

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