

Frame v Maynard

2009 NY Slip Op 33314(U)

January 30, 2009

Supreme Court, New York County

Docket Number: 601736/2004

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 601736/2004

FRAME, ALEXANDER M.

vs

MAYNARD, KENNETH L.

Sequence Number : 008

OTHER

INDEX NO. 601736/2004

MOTION DATE 12-3-08

MOTION SEQ. NO. 008

MOTION CAL. NO. 2

C

The following is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

112

Answering Affidavits - Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

FILED

FEB 05 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1-30-09

[Signature]
J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
ALEXANDER M. FRAME,

Plaintiff,

against

KENNETH L. MAYNARD,
5008 BROADWAY ASSOCIATES, LLC,

Defendants.

Index Number: 601736/2004

Mot. Seq. No.: 008

Submission Date: 12/3/08

Cal. No.: 2

DECISION AND ORDER

-----X
R.H. GUTHRIE, BEATRICE GUTHRIE,
PAUL HINES, and CAROLINE PAULSON,

Cross-Claimants,

against

KENNETH L. MAYNARD,
5008 BROADWAY ASSOCIATES, LLC,

Defendants.

-----X
Appearances:

For Cross-Claimant Paul Hines
William J. Dockery, Esq.
17 Battery Place, Suite 1226
New York NY 10004

For Defendants Kenneth L. Maynard & 5008 Broadway Associates, LLC:
Law Offices of Kennedy Johnson & O'Connell LLP
By: James W. Kennedy, Esq.
99 Wall Street, 15th Fl.
New York NY 10005

Papers considered in review of this motion to set aside the court's decision dated October 6, 2008

Papers

Notice of Motion & Annexed Affirmation & Exhibits
Hines' Affidavit in Support of Motion
Affirmation in Opposition to Cross-Motion
Reply Affirmation in Support of Motion

FILED
FEB 05 2009
COUNTY CLERK'S OFFICE
NEW YORK
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PAUL G. FEINMAN, J.:

Cross-claimant Paul Hines moves the court pursuant to CPLR § 4404 (b) for an order setting aside the decision after trial of the court rendered on October 6, 2008, and substituting in its stead a decision directing entry of judgment in favor of the cross-claimant Paul Hines. In the alternative, Hines seeks an order directing a new trial on the issue of "reasonable reliance" in the interest of

justice. For the reasons which follow, the motion is denied.

The underlying case, which is the basis of the movant Paul Hines' motion to set aside the court's decision, involved numerous causes of action, including a claim by the movant for breach of fiduciary duty. At the conclusion of the bench trial and review of the trial testimony and other evidence in the case, the court rendered a verdict finding that although the defendant Maynard owed a fiduciary duty to the limited partners, Hines, as a sophisticated investor, did not justifiably rely on the defendant's letter regarding the value of the partnership property. On this basis, the court then dismissed Hines' claim for breach of fiduciary duty.

Hines seeks reargument based on what he believes is the court's misinterpretation of the facts and holding of *Global Minerals and Metal Corp. v Home*, 35 AD3d 93 (1st Dept. 2006), *lv denied* 8 NY3d 804 (2007), when it found that like the plaintiff in *Global Minerals*, Hines was a sophisticated investor who had a duty to investigate the terms of Maynard's offer. He also seeks to introduce new evidence, certain items in his personal and professional life which he did not bring to the court's attention during the trial, in particular concerning his health, which he contends if known by the court at the time it rendered its decision, would have caused it to treat him no differently from the other co-limited partners.

Addressing the second argument first, at trial Hines testified that he relied on Maynard's representations based upon his friendship with him and based on Maynard's fiduciary relationship, and that Hines was not represented by counsel at the time he received Maynard's offer letter nor through February 2002.¹ He testified that he did not participate in the management or operation of the partnership's business, and that he had no notice of wrongdoing. He also testified that he

¹The following is taken from the court's decision and order after trial, *Alexander M. Frame v Kenneth L. Maynard, et al.*, Sup. Ct., NY County, Oct. 6, 2008.

graduated from Harvard Business School as well as Columbia Business School, that he was a certified public accountant and although retired, is doing consulting work, that his employment history includes 17 years at E.F. Hutton, where he was an Executive Vice President, Member of the Executive Committee, and Director, and was also the Chief Financial Officer working for the former United States Secretary of the Treasury where his job consisted primarily of investing considerable assets in various forms of investments, including a number of sizeable real estate projects. He testified also that he had made a couple of additional personal investments, including an investment in Marriott Hotels as a limited partner. Weighing the evidence, the court found that Hines is a sophisticated business person. Accordingly, it found that the decision in *Global Minerals and Metal Corp. v Home*, is persuasive authority, and that Hines had a duty to investigate Maynard's offer.

CPLR 4404 (b) allows a court to set aside its decision or judgment entered, and make new findings of fact or conclusions of law, render a new decision, or order a new trial of a cause of action or a separable issue. Hines asks the court to set aside its decision, consider his newly divulged evidence, and either order a new trial or issue a new decision that holds that similar to the other limited partners, and unlike the party in *Global Minerals*, he lacks the sophistication that would have triggered a duty to investigate the offering plan. He submits an affidavit that presents a different picture of his experience. Hines states that he has not practiced as a certified public accountant, and has "extremely limited real estate experience" (Hines Aff. in Supp. ¶ 3). He states that his position at E.F. Hutton did *not* involve real estate, although in his next position, he had "some responsibility for overseeing real estate investments as they related to [] overall investments," but that others "actually made investment decisions" (Hines Aff. in Supp. ¶ 4 [d], [e]).

He describes several unsuccessful ventures (Hines Aff. in Supp., pp. 3-5, 7). He also states that he has been disabled either physically or mentally, for "most of the last nineteen years," and that he suffers from a heart condition as well as severe periodic mental illness (Hines Aff. in Supp. ¶ 3, pp. 5 et seq.).

None of this was introduced at the very lengthy and otherwise comprehensive bench trial, although Hines attempted to prove that Maynard should be held liable to him for the losses that he sustained because of Maynard's investment strategies. Hines states only that he had not believed this personal information was "relevant to the case at hand" (Hines Aff. in Supp. ¶ 2). In effect, he seeks a new trial because of his decision to withhold pertinent, albeit sensitive information.

The principal of claim preclusion embraces not only the matters which are actually litigated but those relevant issues which could have been litigated (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-348 [1999]). Hines chose not to put forward certain information at the time of trial which he argues is relevant for the court to have considered. Instead, he chose to present himself in one light, and only when the court ruled against him, has he come forward with a completely different characterization of his business acumen and background. He is not entitled to another bite of the apple and the court sees no reason to order a retrial on this issue in the interest of justice. The interest of justice also militates in favor of finality. The motion is denied. It is

ORDERED that the motion by cross-claimant Paul Hines to set aside the decision and judgment pursuant to CPLR 4404 (b) is denied.

This constitutes the decision and order of the court.

Dated: January 30, 2009
New York, New York

Paul G. Feinman
J.S.C.
HON. PAUL G. FEINMAN
FILED
FEB 05 2009
COUNTY CLERKS OFFICE
NEW YORK