CDR Creances S.A.S. v First Hotels & Resorts Invs., Inc.
2012 NY Slip Op 33642(U)
August 9, 2012
Supreme Court, New York County
Docket Number: 650084/2009
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

CDR CRÉANCES S.A.S.,

Plaintiff,

-against-

FIRST HOTELS & RESORTS INVESTMENTS, INC, *et al.*,

Defendants.

INDEX NO. 650084/2009

MOTION DATE July 18, 2012

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, plaintiff's motion for leave to reargue the court's decision, dated April 27, 2012, denying its motion for leave to amend the complaint, is decided in accordance with the accompanying decision and order.

Dated: August 9, 2012

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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CDR CRÉANCES S.A.S.,

Plaintiff,

-against-

FIRST HOTEL & RESORTS INVESTMENTS INC., *et al.*,

Defendants.

----------X

DECISION AND ORDER
Index No. 650084/2009
Motion Seq. No. 014

O. PETER SHERWOOD, J.:

Plaintiff CDR Créances S.A.S. ("CDR") moves for leave to reargue this court's decision and order dated April 27, 2012, which denied its motion for leave to serve an amended complaint, contending that the court failed to address three of the four grounds upon which it sought leave to amend and that it overlooked the fact that HSBC was already a named defendant in the action. The motion is opposed by HSBC Bank USA, N.A ("HSBC"). For the reasons that follow, the motion for leave to reargue is granted, in part, with respect to that branch of plaintiff's prior motion as sought an order discontinuing the action as against defendants Board of Managers of the Trump World Tower Condominium, State of New York, City of New York and "John Doe #1" through "John Doe #10, and, upon reargument, the claims as against those defendants are dismissed. In all other respects, the motion is denied.

The standards for reargument are well settled. Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group,* 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola,* 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

Upon review of the record, the Court denies plaintiff's motion for leave to reargue as CDR has failed to demonstrate that the Court overlooked any relevant facts or misapplied any controlling principle of law in reaching its prior decision denying plaintiff's motion for leave to amend (CPLR §2221). The issues upon which CDR sought leave to amend were subject to extensive briefing and addressed by counsel and the Court at a lengthy oral argument. Thereafter, upon conducting a detailed review of the record and the transcript of oral argument, the Court issued a written decision and order denying CDR's motion. Here, the papers submitted by CDR in support of its motion for leave to reargue raise essentially the same arguments which were the basis of its previous unsuccessful motion for leave to reargue and which were fully considered by the Court.

The Court rejects plaintiff's argument that the Court overlooked the fact that HSBC is already a named party. HSBC was initially named a party defendant in this action because of its interest as mortgagee of the condominium unit (the "Unit") that is at the core of the instant action. It is undisputed that all the parties to this action have treated HSBC as a non-party since the sale of the Unit in 2009. Since October 2009, the parties have failed to serve HSBC with any notices of hearings and/or conferences depriving HSBC of the opportunity to engage in any discovery in this action. In addition, former Justice Tolub of this court issued a grey sheet order, dated October 19, 2009, granting a motion to dismiss the action against HSBC and directing the parties to "Settle Order". Although there is no evidence that any party settled an order as directed by Justice Tolub, the absence of such order should not result in HSBC being considered a party to this action. Such conclusion would elevate form over substance and ignore the realities of the parties' conduct in the course of discovery. Rather, the Court, in the exercise of discretion and as a matter of substantial justice, gives effect, *nunc pro tunc,* to Justice Tolub's order dismissing this action as against HSBC.

As to the other issues that were raised and not specifically addressed in the Court's previous decision and order, the failure of a court to specifically address a movant's request for relief is generally deemed a denial thereof (*see e.g., Genger v Ari Genger 1995 Life Ins. Trust,* 84 AD3d 471, 472 [1st Dept 2011]; *Kaplan v Einy,* 209 AD2d 248, 251 [1st Dept 1994]; *see also, Fisher v Flanagan,* 89 AD3d 1398, 1399 [4th Dept 2011]). Therefore, while, as plaintiff contends, the Court in its April 27, 2012 decision and order did not specifically mention each of the issues plaintiff raised in support of its motion for leave to amend, such failure cannot and should not be read as a failure

by the Court to consider plaintiff's arguments. Rather, the Court in reaching its prior determination found plaintiff's arguments unpersuasive.

Based upon the foregoing discussion, it is

ORDERED that plaintiff's motion for leave to reargue the Court's decision and order dated April 27, 2012, is granted, in part, as to the branch of plaintiff's prior motion as sought an order discontinuing the action as to certain named defendants and, upon reargument, that branch of plaintiff's prior motion is **GRANTED,** the action is **DISMISSED** as against defendants Board of Managers of the Trump World Tower Condominium, State of New York, City of New York, and John Doe #1" through "John Doe #10", and the Clerk is directed to enter judgment accordingly dismissing the complaint as against such defendants; and it is further

ORDERED that the action is severed and shall continue as against the remaining defendants; and it is further

ORDERED that in all other respects plaintiff's motion for leave to reargue is **DENIED**.

This constitutes the decision and order of the Court.

DATED: August 9, 2012

ENTER,

O. PETER SHERWOOD
J.S.C.