

Zuckerbrod v 355 Co. LLC
2012 NY Slip Op 33814(U)
March 20, 2012
Supreme Court, New York County
Docket Number: 015075-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ELAINE ZUCKERBROD, PHILIP SCHATTEN
and HARVEY SCHATTEN, and all other
members of the limited liability companies
similarly situated,

TRIAL/IAS PART: 16

NASSAU COUNTY

Plaintiffs,

Index No: 015075-10

Motion Seq. No: 3

-against-

Submission Date: 2/22/12

355 COMPANY LLC, 60 WEST 76 CO. LLC, 68
MONTAGUE CO. LLC, JANOFF & OLSHAN
INC., MORTON OLSHAN, and

JOHN DOE'S # 1-5 and XYZ Corporations (Said
names being fictitious, it being the intention of
Plaintiffs to designate any and all parties,
corporations or entities having or claiming an
interest as the other members and/or managing
agents of the limited liability companies.),

Defendants.

-----X
Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Attachment.....X**
- Plaintiff's Memorandum of Law.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation and Exhibits.....X**

This matter is before the court on the motion filed by Plaintiff Elaine Zuckerbrod ("Plaintiff") on January 26, 2012 and submitted on February 22, 2012 following oral argument before the Court. ¹ For the reasons set forth below, the Court denies the motion.

¹ As noted in the Court's prior decision, Plaintiffs Philip Schatten and Harvey Schatten previously consented to dismissal of the Complaint.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 2221, for an Order granting Plaintiff leave to reargue Defendants' motion for summary judgment ("Prior Motion") and, upon such reargument, vacating the Court's prior decision dated December 8, 2011 granting the Prior Motion ("Prior Decision") (Attachment to Zuckerbrod Aff. in Supp.) and setting this matter down for pre-trial proceedings and trial.

Defendants 355 Company LLC ("355 Company"), 60 West 76 Co. LLC ("60 West"), 68 Montague Co. LLC ("68 Montague") ("LLCs"), Janoff & Olshan Inc. ("J&O"), and Morton Olshan ("Morton") ("Defendants") oppose Plaintiff's motion.

B. The Parties' History

The parties' history, including a summary of the allegations in the Complaint and the affidavits and affirmations in support of and opposition to the Prior Motion, is set forth at length in the Prior Decision. The Court incorporates the Prior Decision by reference as if set forth in full herein.

As noted in the Prior Decision, Plaintiff is a member of the LLCs which own certain New York City properties ("Properties"). Plaintiff alleges that the Defendant managing members ("Managers") engaged in a plan to reduce the value of the shares of the LLCs, resulting in damages to Plaintiff. Plaintiff alleges that Defendants engaged in improper conduct including 1) Defendants' failure to produce financial records of and information regarding the LLCs, despite Plaintiffs' demand, 2) Defendants' failure to notify Plaintiffs of, and provide Plaintiffs with an opportunity to participate in, LLC meetings ("Meetings"), and 3) the Managers' negligent and unprofessional management of the Properties, and misuse of income from the Properties.

In the Prior Decision, the Court granted Defendants' motion and dismissed the Complaint in its entirety based on the Court's conclusion that the causes of action in the Complaint were not viable in light of the following: 1) the LLCs were not required to hold meetings; 2) the financial

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decisions made by Defendants were appropriate under the Business Judgment Rule, and there is no admissible evidence to the contrary; 3) the cause of action alleging fraud is not pled with adequate particularity; 4) even assuming that the fraud cause of action were pled with sufficient particularity, that action is not viable because Defendants did not make representations on which Plaintiff reasonably relied; 5) the cause of action for conversion is not viable because Plaintiff did not possess a superior right to the funds at issue, and has not established that Defendants exercised unauthorized control over those funds; 6) the cause of action for breach of fiduciary duty cannot survive in light of the fact that the POAs were limited to authorizing Olshan to execute documents necessary to convert the companies to LLCs and transfer the Properties to the LLCs, and terminated upon completion of those duties; and 7) there is no agreement, or legal authority, supporting Plaintiff's request for counsel fees.

C. The Parties' Positions

Plaintiff submits, *inter alia*, that 1) the affidavits and affirmations in support of the Prior Motion do not respond to the allegations in the Complaint; 2) the affirmation of Defendants' counsel in support of the Prior Motion constituted inadmissible hearsay and was of no probative value; 3) the Olshan, Lay and Meltzer affidavits in support of the Prior Motion lacked sufficient detail regarding relevant facts, including the need for certain repairs and the affiants' experience and qualification, to be of probative value; 4) Defendants failed to explain satisfactorily the reason that no distributions were made; and 5) the Court was required to analyze not only the applicability of the business judgment rule but also whether Defendants, as fiduciaries, acted in good faith. Plaintiff submits that she has raised sufficient questions of fact to necessitate a trial, and make summary judgment inappropriate.

Defendants oppose Plaintiff's motion. First, Defendants argue that Plaintiff's motion is procedurally defective by virtue of Plaintiff's failure to include the papers submitted in connection with the Prior Motion. Defendants also argue that the Court should deny Plaintiff's motion on the grounds that 1) Plaintiff has failed to demonstrate that the Court misapprehended any matter of law or fact; 2) Plaintiff did not raise, in opposition to the Prior Motion, the

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argument she now makes regarding the insufficiency of Defendants' supporting affidavits and affirmations; 3) Plaintiff's contentions regarding Defendants' supporting affidavits and affirmations are, nonetheless, without merit as those affidavits properly detailed the basis for the affiants' knowledge and set forth facts rebutting Plaintiff's allegations; 4) Plaintiff did not raise, in opposition to the Prior Motion, the argument she now makes regarding the Court's obligation to evaluate the Defendants' good faith and may not now make that argument; and 5) even if the Court were to consider Plaintiff's new arguments, the Court should nonetheless deny Plaintiff's motion to reargue because Plaintiff failed to raise triable issues regarding the Manager's good faith. Defendants submit that "Plaintiff's motion either rehashes previous arguments or raises new ones - neither of which [is] proper on a reargument motion" (Kassenoff Aff. in Opp. at ¶ 19).

RULING OF THE COURT

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, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 2012 N.Y. LEXIS 32 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

The Court denies Plaintiff's motion based on the Court's conclusions that 1) the Court properly considered the affirmations and affidavits submitted by Defendants in support of the Prior Motion, which contained extensive detail regarding the affiants' knowledge of relevant facts and the basis for that knowledge; 2) Plaintiff has not established that the Court overlooked or misapprehended matters of fact or law in determining the Prior Motion; and 3) the Court should not consider arguments now raised by Plaintiff that are different from those originally presented, including Plaintiff's argument regarding the applicability of the business judgment rule and the analysis of Defendants' good faith.

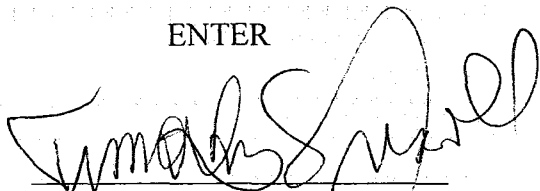
In light of the foregoing, the Court denies Plaintiff's motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
March 20, 2012

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAR 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE