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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 601950/2009
150 BROADWAY N.Y.ASSOCIATES
vs.
SHANDELL, RICHARD
SEQUENCE NUMBER : 009
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 009

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: MAY 08 2012

JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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150 Broadway N.Y. Associates, L.P.,

Plaintiff (s),

-against-

Richard Shandell, Bert Blitz, Arthur Blitz, Shosana Bookson, Shandell Blitz Blitz & Bookson, LLP, Shandell Blitz Blitz & Ashley, LLP, Mitchell H. Ashley, Esquire, Ashley Law Firm, Ameer Benno, Esquire, Drew Benenson, CPA and James H. Shenwick, Esquire,

Defendant (s).

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DECISION/ ORDER
Index No.: 601950/09
Seq. No.: 009

PRESENT:
Hon. Judith J. Gische

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
SBBA, Ashley, Benno n/m (3211) w/ LJS affirm, exhs	1
150 Bway opp w/ARV affirm	2
Bookson opp w/PK affirm, exhs	3
SBBA, Ashley, Benno reply to 150 Bway w/LJS affirm	4
SBBA, Ashley, Benno reply to Bookson	5
Various stips of adj	6
Underlying motion papers	7

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Defendants Shandell Blitz Bookson & Ashley ("SBBA"), Mitchell Ashley, Esq., The Ashley Law firm and Ameer Benno, Esq. ("moving defendants") seek reargument of their prior motion and the prior motion by plaintiff. In this court's decision dated

November 1, 2011 ("11/1/11 order") the court denied the moving defendants' motion for summary judgment dismissing the complaint and granted plaintiff's motion for leave to serve an amended complaint. The moving defendants contend the court's 11/1/11 order is inconsistent with its April 4, 2011 order ("4/4/2011"), in which the court denied plaintiff's motion for a preliminary injunction because: "[t]he relief that plaintiff is seeking reaches too far into the dissolution process and plaintiff has no right to it..." and "[t]he claims that plaintiff has made about how assets are being distributed are far beyond the narrow scope of this case and are more commonly associated with the litigation of these issues in a dissolution proceeding (see, Goldberg v. Harwood, 88 NY2d 911 [1996])." Thus, the moving defendants urge the court to vacate its decision, allowing the amended complaint insofar as it asserts new claims for fraudulent conveyance, transferee liability, injunctive relief and violation of a restraining notice, imposing Part 130 sanctions on the plaintiff and, in addition, granting the moving defendants' underlying motion for summary judgment.

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 [1st Dept 1992]). It is not a vehicle to permit a party to argue again the very questions previously decided (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]; *see also* Frisenda v. X Large Enterprises Inc., 280 A.D.2d 514 [2nd Dept. 2001] and Rodney v. New York Pyrotechnic Products Co., Inc., 112 A.D.2d 410 [2d Dept. 1985]).

At the outset, the court addresses arguments by plaintiff and Bookson that the moving defendants' motion is defective because they did not provide the court with the underlying motion papers and, therefore, this is reason alone to deny the motion. Although this is a correct statement of the law (CPLR § 2212 [c]), the moving defendants subsequently rectified their oversight and provided the motion papers. Furthermore, the plaintiff and Bookson addressed the moving defendants' motion on the merits and have shown no prejudice. Consequently, this is not a reason to deny the moving defendants' motion to reargue. Furthermore, the court will permit reargument of the underlying motions, but upon reargument adheres to its original decision for the following reasons:

In this highly contentious case there has been piecemeal motion practice, consisting of no fewer than four (4) separate motions for summary judgment brought at various stages of this litigation. There was also a post-summary judgment motion by plaintiff for a preliminary injunction. Claims by the moving defendants, that the court is ruling inconsistently, even if true, cannot be laid solely at the court's doorstep. The parties to this action are constantly recasting their arguments each time the court makes a decision and it is virtually impossible to keep up with this fluidity.

That being said, the court denies there is any inconsistency at all between its 4/4/11 order and the 11/1/11 order sought to be reargued, nor have the moving defendants shown that the court either misapprehended the facts or misapplied the law in making its decision. Although the moving defendants maintain that denial of a preliminary injunction motion portends that the claim has no merit, this is entirely their opinion and conjectural, particularly given the unique facts of this case. Likelihood of success is but one consideration in granting or denying a motion for a preliminary

injunction and, in any event, the decision to grant or deny a preliminary injunction does not bind the court under the doctrine of law of the case (Lipsztein v. Donovan, 289 A.D.2d 51 [1st Dept 2001]). Here, plaintiff has a money judgment against an entity that no longer exists under that name. The plaintiff seeks to enforce the unsatisfied judgment against a new entity and/or person(s) who are or have been involved with each of those entities, claiming (among other things) that these are related entities and that monies received are being moved around to circumvent the judgment. Whether any of this can be proved remains to be decided because the moving defendants did not meet their burden of showing they are entitled to summary judgment as a matter of law or that there are no triable issues. The court also allowed plaintiff to amend its complaint so those claims could be pursued.

While the validity of a proposed amended pleading should be examined by the court to gauge its legal sufficiency and merit, this examination is not intended to supplant a motion to dismiss or for summary judgment (Hawkins v. Genesee Place Corp., 139 A.D.2d 433 [1st Dept.1988]). In connection with plaintiff's underlying motion to amend, the requirements for amending a complaint were satisfied which is why it was granted (see Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 354-355 [1st Dept 2005]).

The court observes that in opposing plaintiff's underlying motion, the moving defendants did not argue that were the court to allow the amended complaint, such an order would be inconsistent with its prior order, denying plaintiff's motion for a preliminary injunction. That argument is now being raised for the first time. A motion to reargue does not afford an unsuccessful party another opportunity to present arguments not previously advanced (Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29

A.D.3d 737 [2nd Dept. 2006]).

Statements by the moving defendants' attorney, that the judgment plaintiff obtained cannot be satisfied with the assets of the new law firm, clients are always free to choose the new attorneys they want to have represent them, and legal cases and clients are not "assets," restate the same arguments that were previously made and rejected by the court. The moving defendants' attacks on the language used in the proposed amended complaint not only ignores New York's liberal policy of allowing amended pleadings, but the equally relaxed standards applicable to a motion to dismiss under CPLR 3211 [a][7]. By allowing the plaintiff to serve an amended complaint the court did not make — nor could it have made — a decision on its merits.

Finally, the moving defendants seek the imposition of sanctions if their motion to reargue is granted and the court's prior order, allowing the amended complaint to be served, is vacated. Part 130 sanctions may be imposed for "frivolous conduct." Conduct is "frivolous" if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

Even if the moving defendants had prevailed on this motion to reargue, sanctions are unwarranted and they are denied.

Conclusion

In accordance with the forgoing,

It is hereby

ORDERED that the motion by defendants Shandell Blitz Bookson & Ashley, Mitchell Ashley, Esq., The Ashley Law Firm and Ameer Benno, Esq. for reargument of their prior motion for summary judgment, plaintiff's motion for permission to serve an amended complaint and the court's prior order of November 1, 2011 is granted only to the extent that reargument is permitted but upon reargument, the court adheres to its prior order of November 1, 2011 in all respects; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 8, 2012

So Ordered:

Hon. Judith J. Gische, JSC