

Weingarten v S&R Medallion Corp.

2012 NY Slip Op 33336(U)

July 9, 2012

Sup Ct, NY County

Docket Number: 102230/2008

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT SHIRLEY WERNER KORNREICH
J.S.C.
Justice

PART 54

Index Number : 102230/2008
WEINGARTEN, VICTOR
vs.
S&R MEDALLION CORP.,
SEQUENCE NUMBER : 007
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for reargued & ruled
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 121, 122, 123, 124
Answering Affidavits — Exhibits _____ No(s) 133, 134, 125-131
Replying Affidavits _____ No(s) 135, 136, 137

Upon the foregoing papers, it is ordered that this motion is denied - on reargument
with the attached decision/order

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

Dated: 7/9/12

SHIRLEY WERNER KORNREICH
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: PART 54

-----X
VICTOR WEINGARTEN,

Plaintiff,

Index No. 102230/2008
DECISION & ORDER

-against-

S&R MEDALLION CORP.,
SHIMON WOLKOWICKI a/k/a SAM WOLKOWICKI,
RHODA RYKLIN, JONATHAN ZUHOVITZKY and
DAVID BEIER,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Defendants S&R Medallion Corp., Sam Wolkowicki, Rhoda Ryklin, and Jonathan Zuhovitzky (collectively, the “S&R Defendants”) filed a motion: (1) pursuant to CPLR 2221(d), seeking leave to reargue the Order and Memorandum Decision of the Court dated July 11, 2011, and upon such reargument, vacating so much of the Order of the Court as denies the S&R Defendants’ motion for summary judgment and granting said motion; (2) pursuant to CPLR 2221(e), granting leave to renew the motion for summary judgment to the extent that the Court previously denied it, and upon such renewal, to vacate the Order of this Court insofar as it denied the S&R Defendants’ motion for summary judgment; and (3) pursuant to CPLR 3212(g), to the extent that, upon granting the motion for reargument or renewal, and vacating the Order of this Court accordingly, if any issues remain, limiting the issues of fact as more specifically set forth herein. The S&R Defendants’ motion is denied for the reasons that follow.

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.” CPLR 2221(d)(2). A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR 2221(e)(2)-(3).

This action arises from a 1997 profit-sharing agreement between plaintiff Victor Weingarten and the S&R Defendants. The verified complaint alleges that the S&R Defendants breached the agreement by failing to remit to plaintiff his share of profits including a one-third share of the funds that the S&R Defendants received pursuant to a settlement agreement with Banco Popular North America (“Banco Popular”) – a non-party to this action.

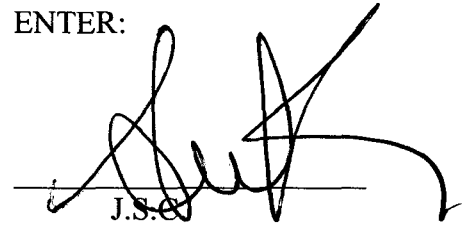
On July 11, 2011, this Court entered an order that, *inter alia*, granted the S&R Defendants’ motion for summary judgment only with respect to plaintiff’s fraud and constructive fraud claims (the Third Cause of Action). The motion for summary judgment on plaintiff’s claims for breach of contract was denied, because this Court found that the meaning of “renewal” and “customers of the Program” was ambiguous and that plaintiff’s entitlement to a portion of S&R’s “Management Back Up Fee” remains an issue of fact. Nothing in the record is dispositive of these issues, including the lists attached to Exhibit E to the Zuhovitzky Affidavit (Document No. 35-5) and plaintiff’s admission that he renegotiated the terms of his loans with Banco Popular (Document 35-6). A material issue of fact exists as to whether the program, governed by the 1997 Agreement, was continued with Banco Popular in 2000. Accordingly, it is hereby

ORDERED that the motion of S&R Medallion Corp., Sam Wolkowicki, Rhoda Ryklin,

and Jonathan Zuhovitzky, seeking leave to reargue and renew, is denied.

Dated: July 9, 2012

ENTER:



A handwritten signature in black ink, appearing to be 'J.S.C.', is written over a horizontal line. The signature is stylized and somewhat illegible.