SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
COUNTY OF NEW YORK: IAS PART 3

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SONIA GLUCKMAN, WARREN R. GRODIN, MANDEL AIRPLANE FUNDING AND LEASING, INC. d/b/a MANDEL AIRPLANE FUND AND LEASING, INC. AND SUSAN STEIGER,

Plaintiffs,

-against-

Index No. 601687/08
Motion Date: 8/6/12
Mot. Seq. No.: 006

LASERLINE-VULCAN ENERGY LEASING, LLC, LASERLINE LEASE FINANCE CORP., W. MARK EDDINGTON, FORD F. GRAHAM, VULCAN ENERGY, LLC, VULCAN POWER LEASING, LLC, VULCAN AMPS, LLC, VULCAN ADVANCED MOBILE POWER SYSTEMS, LLC, VULCAN ENERGY SOLUTIONS, LLC, VULCAN CAPITAL MANAGEMENT, INC., KEVIN DAVIS, "JOHN DOE," and RICHARD ROE,

Defendants.

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

The following papers, numbered 1 to 3, were read on this motion for argument and cross-motion for sanctions.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: x Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

Dated: January 15, 2013

Hon. Eileen Bransten, J.S.C.

Check One: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

[* 2]

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BRANSTEN, J.:

In June 2008, plaintiffs Sonia Gluckman, Warren R. Grodin, Mandel Airplane Funding and Leasing, Inc., and Susan Steiger brought suit against two sets of defendants in connection with certain loans they had made to defendant Laserline-Vulcan Energy Leasing, LLC ("LVEL"). Plaintiffs each claim to have loaned money to LVEL to provide part of the funding needed to construct a mobile power generator known as a VAMPS Unit, which, upon completion, was to be sold for a considerable profit. However, the VAMPS Unit was never constructed, and LVEL never repaid plaintiffs.

In 2009, both sets of defendants (the "Laserline defendants," comprised of defendants W. Mark Eddington, Laserline Lease Finance Corp. and LVEL; and the "Vulcan defendants," comprised of defendants Vulcan Energy, LLC, Vulcan Power Leasing, LLC, Vulcan AMPS, LLC, Vulcan Advanced Mobile Power Systems, LLC, Vulcan Energy Solutions, LLC, Vulcan Capital Management, Inc., Ford F. Graham and Kevin Davis) moved to dismiss the first amended complaint. Plaintiffs cross-moved for leave to serve a proposed second amended complaint.

On June 4, 2009, this court heard oral argument on the motions. By order and decision dated December 17, 2009, this court dismissed the first amended complaint, ruling that each claim "failed to state a cause of action as a matter of law." December 17, 2009 Decision and Order (the "Decision"), at 8. This court also ruled that plaintiffs' claims were "defective" and "fatal[ly] flawed" because "virtually all of the operative allegations ... are pled solely 'upon information and belief.'" *Id.* Finally, with respect to the proposed second amended complaint, this court denied plaintiffs' motion for leave to amend, holding that "an examination of each of the proposed [amended] causes of action reveal that they lack merit as a matter of law." *Id.* at 37.

On January 4, 2010, defendants served a Notice of Entry, and on January 12, 2010, a Judgment was entered. Plaintiffs timely served a Notice of Appeal with a detailed Pre-Argument Statement, contending that the Decision "was wrong" in several respects;

improperly "failed to recognize" certain facts and argument; and improperly "failed to consider" certain other points. However, plaintiffs never perfected their appeal, and never sought an extension of the deadline to perfect.

Now, more than two and half years after this court issued the Decision, plaintiffs seek an order granting reargument and/or renewal of the motions to dismiss this action and the cross motion to amend the first amended complaint, and, upon reargument and/or renewal, reversing the dismissal of the action and granting amendment of the first amended complaint. Plaintiffs also seek to sever the claims against Kevin C. Davis ("Davis") and Vulcan Advanced Mobile Power Systems, LLC ("Vulcan Advanced") from the rest of the claims in this action, on the grounds that they have both filed for bankruptcy.

The Laserline defendants cross-move for an order imposing costs and sanctions upon plaintiffs and/or their counsel.

Analysis

I. Motion for Leave to Reargue

CPLR 2221 (d) (3) requires that "[a] motion for leave to reargue ... shall be made within thirty days after service of ... notice of ... entry." Here, Notice of Entry was served on January 4, 2010. Consequently, plaintiffs' time to move to reargue expired on February 3, 2010, and the motion should be denied on this basis alone.

This court rejects plaintiffs' argument that the bankruptcy of co-defendants Davis and Vulcan Advanced operated to toll their time to move for reargument. By plaintiffs' own admission, the bankruptcy occurred in "October 2009, prior to the time that this Court issued the Decisions and Order." Plaintiff's Memo., at 5. Thus, notwithstanding the bankruptcy, the action continued without objection or application from plaintiffs. Specifically, this action was not stayed in December 2009, when this court issued its ruling, nor had plaintiffs requested such a stay. Moreover, in January 2010, plaintiffs filed a Notice of Appeal and a Pre-Argument Statement, without ever asserting any purported stay or tolling as to the non-bankrupt defendants. Plaintiffs are thus estopped from making this argument more than two years after the bankruptcy.

In addition, "[t]he automatic stay provisions of the Federal bankruptcy laws do not extend to non-bankrupt codefendants." *Rosenbaum v. Dane & Murphy*, 189 A.D.2d 760, 761 (2d Dep't 1993); *see also Shakir v. U.S. Leasing Intl.*, 14 Misc. 3d 1208(A), 2007 NY Slip Op 52447(U), *5 (Sup. Ct., Kings County 2006) ("it has been termed well-settled that the automatic stay provisions of the Federal bankruptcy laws do not extend to nonbankrupt codefendants").

Accordingly, plaintiffs cannot escape their extreme tardiness in moving for reargument.

In any event, plaintiffs have not demonstrated a valid basis for their motion for reargument. "A motion for reargument, addressed to the discretion of the court, is designed

to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979); *see also* CPLR 2221(d)(2); *McGill v. Goldman*, 261 A.D.2d 593 (2d Dep't 1999); *Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72 (1st Dep't 1994). It is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided. *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dep't), *lv. dismissed in part, denied in part* 80 N.Y.2d 1005 (1992); *Matter of Bliss v. Jaffin*, 176 A.D.2d 106 (1st Dep't 1991). Neither is it designed to allow a party to present arguments different from those originally asserted. *Foley v. Roche*, 68 A.D.2d 558, *supra*.

In addition, plaintiffs' papers merely restate the same arguments that were already considered and rejected in the Decision, or set forth new arguments that are not appropriate for resolution on reargument.

For instance, plaintiffs once again argue, as they did in their original motion papers, that the action should not be dismissed because the Loan and Security Agreements (the "LSAs") and the Promissory Notes – the written agreements that govern the transactions at issue – "lack mutuality" and, therefore, are unenforceable. Plaintiffs also again argue that the court overlooked the relevant law, including California law which makes it clear that the transactions were the sales of securities; that defendants owed plaintiffs a fiduciary duty; and that defendants were all involved in securities fraud. Thus, plaintiffs merely repeat and

rehash the same arguments that were originally presented and rejected on the prior motion. This argument is insufficient to grant a motion for reargument. *See Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dep't 1984); *Foley v. Roche*, 68 A.D.2d 558, *supra; see, e.g., O'Kelly v. North Fork Bank*, 2008 WL 3243826, 2008 NY Slip Op 32153[U], * 7 (Sup. Ct. Nassau Cty. 2008) (denying motion for reargument of opposition to motion to dismiss the plaintiffs' claims where "the same arguments advanced in support of reargument were made by the plaintiffs in support of their original cross motion, considered by the Court and rejected in a detailed decision").

Plaintiffs also raise the new argument that the LSAs are unenforceable because two of the plaintiffs, Mandel Airplane Funding and Leasing Corporation ("Mandel") and Warren R. Grodin ("Grodin"), never signed the LSAs. Plaintiff's Memo., at 36. This argument, however, is completely devoid of merit. A motion for reargument is not a vehicle for parties to "advance arguments different from those tendered on the original application" and "may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion." *Foley v. Roche*, 68 A.D.2d at 568; *see, e.g., Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 436 (2d Dep't 2005) (denying motion for leave to reargue on ground that such motion "does not offer an unsuccessful party, as here, successive opportunities to present arguments not previously advanced"); *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 (1st Dep't 20050 (same). Moreover, plaintiffs offer no reason why this argument was not raised in their

original motion papers. *See Matter of Hua Nan Commercial Bank v. Albicocco*, 270 A.D.2d 265 (2d Dep't 2000).

Plaintiffs' motion for reargument is denied. Plaintiffs fail to demonstrate that the court overlooked or misapplied any controlling principle of law in granting the dismissal motion. *See* CPLR 2221(d)([2); *Spinale v. 10 West 66th Street Corp.*, 193 A.D.2d 431 (1st Dep't 1993) (denying motion for leave to reargue since there was no showing that the court overlooked or misapprehended relevant facts or controlling law in prior decision); *see also Daluise v. Sottile*, 15 A.D.3d 609 (2d Dep't 2005); *Matter of Armstead v. Morgan Guar. Trust Co. of N.Y.*, 13 A.D.3d 294 (1st Dep't 2004).

II. Motion to Renew

Plaintiffs' motion for renewal is likewise denied. A motion for leave to renew must be based on new facts not offered on the prior motion that would change the prior determination. CPLR 2221(e)(2); *see Kaufman v. Kunis*, 14 A.D.3d 542 (2d Dep't 2005); *Herrera v. Matlin*, 4 A.D.3d 139 (1st Dep't 2004). Moreover, "[r]enewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application." *Matter of Weinberg*, 132 A.D.2d 190, 210 (1st Dep't 1987), *lv. dismissed* 71 N.Y.2d 994 (1988); *see also Miller v. Fein*, 269 A.D.2d 371 (2d Dep't), *lv. dismissed* 95 N.Y.2d 887 (2000) (moving party must offer a reasonable

justification for not previously presenting the allegedly new facts). No such excuse was presented here.

Plaintiffs contend that the motion to renew is based upon the newly discovered facts that (1) defendants were incapable of building a power generator; (2) the collateral for building a power generator was not owned by defendants or otherwise available to them; (3) and defendants never intended to return plaintiffs' investment money.

However, plaintiffs offer no justification for having failed to bring the "new facts" to the court's attention at the time of their original motion. Plaintiffs merely claim that "this motion is being filed two years after the [dismissal because] Plaintiffs were hopeful that they could discover additional evidence to support their claims." Aff. of Martin S. Rappaport, ¶ 5. This argument fails. Renewal is not available as a second chance for parties who have not exercised due diligence in making their first factual presentation. *See Linden v. Moskowitz*, 294 A.D.2d 114 (1st Dep't 2002), *lv. denied* 99 N.Y.2d 505 (2003); *Chelsea Piers Management v. Forest Electric Corp.*, 281 A.D.2d 252 (1st Dep't 2001).

For the above reasons, the motion to renew must be denied. *Estate of Brown v. Pullman Group*, 60 A.D.3d 481, 482 (1st Dep't 2009), *lv. dismissed* 13 N.Y.2d 789 (2009) (motion to renew denied because "evidence was available at the time of the initial motion, and the failure to submit it was unexplained"); *see also Interpublic Group of Cos., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa*, 8 A.D.3d 169 (1st Dep't 2004); *Aviles v. San*

Rafael Cooperativa de Ahorro y Credito, 7 A.D.3d 431 (1st Dep't 2004), *lv. dismissed* 4 N.Y.3d 739 (2004).

III. Cross-Motion for Sanctions

The Laserline defendants' cross motion for sanctions is also denied. The imposition of sanctions is not appropriate here. While Plaintiff's motion fails, there is no indication that the motion is completely frivolous and without merit. *Grossman v. Pendant Realty Corp.*, 221 A.D.2d 240 (1st Dep't 1995), *lv. dismissed* 88 N.Y.2d 919 (1996); *North American Van Lines, Inc. v. American Intl. Cos.*, 11 Misc. 3d 1076[A], 2006 NY Slip Op 50576[U] (Sup. Ct., NY County 2006), *aff'd* 38 A.D.3d 450 (1st Dep't 2007).

The court has considered the remaining arguments, and finds them to be without merit.

Order

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to reargue and/or renew is denied; and it is further

ORDERED that defendants' cross motion for sanctions is also denied.

This constitutes the order and decision of this court.

Dated: New York, New York
January 15, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.