Wimbledon Fund, SPC (Class TT) v Weston Capital Partners Master Fund II
2019 NY Slip Op 33098(U)
October 17, 2019
Supreme Court, New York County
Docket Number: 160576/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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THE WIMBLEDON FUND, SPC (CLASS TT),

Plaintiff,

- v -

WESTON CAPITAL PARTNERS MASTER FUND II, LTD,
WIMBLEDON FINANCING MASTER FUND, LTD

Defendant.

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INDEX NO. 160576/2017

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 152, 153, 154, 155, 156, 157, 162, 163, 164, 166, 167, 168, 169

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

In this turnover proceeding, respondent Weston Capital Partners Master Fund II, Ltd. ("Weston") moves, pursuant to CPLR §2221(d), for an Order granting Weston leave to reargue so much of this Court's decision and order, dated April 4, 2019 (the "April Order"), to the extent that I denied Weston's motion to dismiss the petition of The Wimbledon Fund, SPC ("Class TT") and granted Class TT's petition for an order to turn over property and money in partial satisfaction of a $23,051,971.31 judgment.[1] Weston argues that the April Order was contrary to my remarks during both a Court conference on March 7, 2018 and an oral argument on August 8, 2018 and also overlooked CPLR §§ 402 and 404(a).

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[11] Class TT obtained the judgment against Swartz IP Services Group Inc. a/k/a Advisory IP Services Inc. ("SIP") on November 24, 2015 in a separate New York litigation.

In its petition, Class TT, a segregated portfolio in The Wimbledon Fund, SPC, alleged that it was the victim of a wide-ranging fraudulent scheme resulting in a loss to investors of more than $17 million. Albert Hallac ("Hallac"), Jeffrey Hallac ("Jeffrey"), and Keith Wellner ("Wellner") managed Class TT through Weston Capital Asset Management, LLC and its related affiliate Weston Capital Management LLC.

The petition alleged that Class TT's investment managers, including Hallac and Wellner, caused Class TT to transfer $17.7 million to SIP pursuant to a Note Purchase Agreement (the "NPA") but that Class TT's monies were not invested in accordance with the NPA. Rather, after receiving Class TT's funds, Hallac, Wellner and David Bergstein ("Bergstein") immediately authorized a series of transfers to third parties, allegedly without any consideration to SIP or Class TT. These transfers depleted SIP's bank accounts shortly after its receipt of Class TT's funds, rendering it either insolvent or with an unreasonably minimal amount of capital.[2]

The scheme spawned SEC complaints and a criminal case brought by the United States Attorney for the Southern District of New York culminating in a conviction for Bergstein following a jury trial, and guilty pleas from Hallac and Wellner.

There were two related proceedings based on the same scheme which were relevant to the April Order: 1) the turnover proceeding before Judge Kornreich (the "Class C Decision"); and 2) the Class TT litigation in the United States District Court for

[2] Class TT alleged that this scheme benefitted Partners II, another Hallac-managed investment fund, because it received $3,525,675 of Class TT's funds through three fraudulent transfers from SIP.

the Central District of California (the "California Action") and the Settlement Agreement in connection with that action.

On March 22, 2018, Weston filed a motion to dismiss in opposition to Class TT's petition, which argued that Class TT failed to state a cause of action for fraudulent conveyance, that the action was barred by Texas' four-year statute of limitations, and that documentary evidence showed that Partners II acted in good faith.

Upon learning of the Settlement Agreement in the California Action, Weston requested, and received, permission to amend its motion to dismiss. Subsequently, on May 14, 2018, Weston asserted the following additional grounds for dismissal: 1) that the petition should be dismissed because Class TT lacked standing; 2) that Partners II was released; 3) the suit was champertous; and 4) Class TT had unclean hands.

In my April Order I denied Weston's motion to dismiss and amended motion to dismiss and granted Class TT's petition because Weston "failed to set forth [any] viable defense to the turnover petition."

Weston now moves for leave to reargue the April Order with respect to the denial of its motions to dismiss and grant of Class TT's petition based on Weston's belief that my remarks at oral argument indicated that Weston would be given an opportunity to answer the petition if I denied the motion to dismiss. Weston also contends that I overlooked CPLR §§ 402 and 404(a) in not affording it a chance to answer the petition.

Class TT opposes Weston's motion arguing that the motion is procedurally defective and fails to meet CPLR § 2221(d)'s standard for reargument.

Discussion

Motions to reargue are "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." *Kent v. 534 East 11th Street*, 80 A.D.3d 106, 116 (1st Dept. 2010) (citations omitted). The determination of whether to grant a motion for leave to reargue is within the court's discretion. *Id*. However, a motion for leave to reargue "is not designed to provide the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992) (internal citation omitted); *see also Ahmed v. Pannone*, 116 A.D.3d 802, 805 (2d Dept. 2014).

As an initial matter, Class TT seeks denial of Weston's reargument motion based on a procedural defect. Class TT contends that Weston failed to comply with CPLR 2214(c)'s requirement that moving parties must attach previously filed papers to its motion or specifically refer to them by citing to the e-filing system's docket numbers and that such noncompliance merits dismissal. In reply, Weston "apologizes" for its procedural failure and asks the Court to "overlook it" as its failure will not overburden the Court.

While Weston's motion to reargue is procedurally defective, the court may exercise its discretion, pursuant to CPLR § 2001,[3] and disregard the defect where the

[3] CPLR 2001 provides that "[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity… to be corrected, upon such terms as

record is "sufficiently complete." *Serowik v. Leardon Boiler Works, Inc.*, 129 A.D.3d 471, 472 (1st Dept. 2015); *see also Washington Realty Owners, LLC v. 260 Wash. St.*, LLC, 105 A.D.3d 675, 675 (1st Dept. 2012); *Wade v. Knight Transp., Inc.*, 151 A.D.3d 1107, 1109 (2d Dept. 2017). Here, the record is sufficiently complete and I decline to deny Weston's motion to reargue on this ground.

Weston's primary argument in favor of the motion before me is that "this Court overlooked the fact that it had, repeatedly over the course of the litigation, indicated that if it denied [Weston's] motion, it would allow [Weston] to answer." It is Weston's position that absent my "pronouncements," Weston would have "interposed a full answer complete with supporting documentary and testimonial evidence" and that it now should be given that opportunity.

In support of its argument, Weston cites to a March 7, 2018 transcript of a conference with the parties, which pre-dates both of Weston's motions to dismiss, where I remarked: "[i]f I deny the motion to dismiss, then there would be an answer to the petition, right?," and "[l]et me say this to you; if I deny the motion to dismiss, what do you think happens, that your petition is considered -- that there's a default, the Respondent doesn't get to answer the petition?"

Weston also cites to the transcript of the oral argument on the motions to dismiss, dated August 8, 2018, where I stated that "I'm not sure that the thing to do is not to grant this petition, but rather to have a trial on these issues." I also noted that there were issues

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may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."

> which I am not sure I can resolve on a petition given the cross-motion to dismiss, but I will look at them again. Again, I read the petition, I read the motion to dismiss, but I haven't looked at all the law. I'm trying to single [sic] to everybody that I haven't made up my mind about this. I am just asking everybody questions to see where it goes.

A judge's view on relevant issues at oral argument is always subject to change/refinement as a result of the parties' presentations at argument, or by a subsequent further examination of the parties' papers and review of applicable caselaw. Here, in the cited transcript excerpts, I was simply engaging with the attorneys and testing their and my view of the action, and I made clear that I was not deciding any issues at that time. My determination in the April Order was not required to, and did not, duplicate the parties' discussion at court appearances and oral argument. *See Marti v. Rana*, 173 A.D.3d 576, 578 (1st Dept. 2019) (rejecting plaintiffs' argument that they were prejudiced on account of statements made by the court during oral argument and stating that "[t]o the extent counsel relied on his impressions of the court's leanings, which were never incorporated into a binding order, he did so at his own peril). I therefore deny the motion to reargue on this ground.

Weston's next argument is that I misunderstood/overlooked the rules governing special proceedings found in CPLR Article 4.[4] Weston posits that it possesses a statutory right to answer the petition and my granting of Class TT's petition, without first allowing

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[4] Tellingly, Weston does not allege that the conclusions in the April Order either overlooked or misapprehended the facts of the case or the applicable law.

Weston to file an answer, requires me to grant Weston's motion to reargue. This argument is plainly refuted by the language of CPLR Article 4.

Section 402 states that "there shall be a petition, which shall comply with the requirements for a complaint in an action, and an answer where there is an adverse party." And, section 404 states that the respondent "may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court **may** permit the respondent to answer…" (emphasis added).

Thus, the statute's language is permissive and, contrary to Weston's position, did not require me to permit Weston to answer following my denial of its motions to dismiss.

Weston also argues that the "mandatory language of § 402 is inconsistent with the permissive language of § 404(a) and the interpretation given to it by the courts." Weston fails to cite to any authority for this argument. Further, the two cases that Weston cites about statutory interpretation do not pertain to CPLR Article 4, are general and inapposite.

Lastly, despite filing two separate motions to dismiss, including more than thirty exhibits, Weston states that there are "myriad factual issues that have yet to be addressed" and therefore it should be permitted to reargue. The standard on a motion to reargue hinges on whether the Court overlooked any facts or controlling law, not on whether the movant is desirous of addressing additional facts. *See Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 ("As we have repeatedly held," a motion to reargue is

solely intended "'to afford a party an opportunity to establish that the court overlooked or misapprehended the *relevant facts*, or misapplied any controlling principle of law.'") (citation omitted).

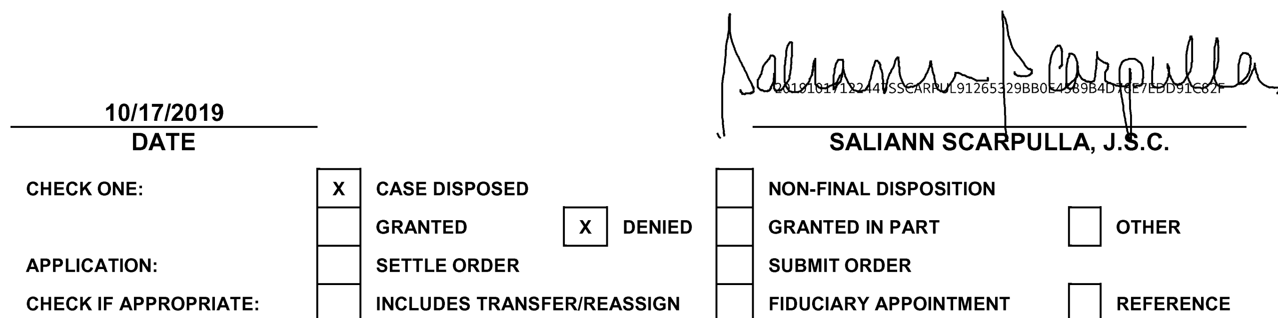
Second, the "issues" that Weston wants to address are simply a rehash of its original arguments, all of which were considered and rejected in the April Order. And, Weston may not utilize a motion to reargue to obtain a do-over of the April Order. See *William P. Pahl Equip. Corp.,* 182 A.D.2d at 27.

As Weston has not demonstrated that I overlooked or misapprehended the facts or the law in arriving at the decision in the April Order, its motion to reargue is denied. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72, 73-74 (1st Dept. 1994).

In accordance with the foregoing, it is hereby

ORDERED that the motion of Weston Capital Partners Master Fund II, Ltd. for leave to reargue this Court's Decision and Order, dated April 4, 2019, is denied in its entirety.

This constitutes the decision and order of this Court.



10/17/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED	X	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE