

<b>PSB Indian Cr. LLC v Halpern</b>
2019 NY Slip Op 33504(U)
November 25, 2019
Supreme Court, New York County
Docket Number: 651406/2017
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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INDEX NO. 651406/2017

PSB INDIAN CREEK LLC, JHPSB INDIAN CREEK VENTURES LLC, JHPSB INDIAN CREEK VENTURES INVESTORS LLC, 2901 JMH, LLC, PSB COLLINS LLC, JHPSB COLLINS VENTURES, LLC, JHPSB COLLINS VENTURES INVESTORS, LLC, JHPSB COLLINS DEVELOPMENT LLC, JHPSB COLLINS DEVELOPMENT 2 LLC

MOTION DATE 09/20/2019

MOTION SEQ. NO. 011

Plaintiff,

- v -

**DECISION + ORDER ON MOTION**

JASON HALPERN, JMH INDIAN CREEK DEVELOPMENT, LLC, 295 COLLINS LLC, 295 LNP LLC, JMH DEVELOPMENT III LLC, GERARD LONGO, 29 ICD, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 361, 362, 429

were read on this motion to/for RENEWAL.

Upon the foregoing documents, it is

In this action to recover damages for, inter alia, breach of contract, plaintiff PSB Indian Creek LLC (“PSB Indian Creek”) directly, and derivatively on behalf of JHPSB Indian Creek Ventures LLC, JHPSB Indian Creek Ventures Investors LLC, and 2901 JMH, LLC (the “Company” and collectively, “Plaintiffs”) moves for leave to renew the section of my September 7, 2018 decision and order (the “September 2018 Decision”) pertaining to PSB Indian Creek’s sixth cause of action.

In the September 2018 Decision, among other things, I granted the motion of defendants Jason Halpern (“Halpern”), JMH Indian Creek Development, LLC (“JMH

Indian Creek”) and JMH Development III, LLC (“JMH III”) (collectively the “Halpern Defendants”) to dismiss the amended complaint as to Plaintiffs’ claim for breach of contract based on a capital call pursuant to Section 2.6 of the parties’ Operating Agreement.<sup>1</sup> Specifically, in the September 2018 Decision, I held that Section 2.6 did not contain a limitation on when a capital call could be made as long as the funding was required for “any bona fide Company reason” and that repayment of a loan and carrying costs constituted bona fide reasons. I further held that:

[t]he language in Section 2.6(a)(i) does not preclude a capital call for the purpose of repayment of a loan and carrying costs and PSB Indian Creek’s claim on this ground fails based on the Operating Agreement’s language and this portion of the Halpern Defendants’ motion to dismiss is granted.

PSB Indian Creek now seeks to have the aforementioned dismissed portion of its breach of contract claim reinstated.

### Discussion

Motions for leave to renew, under CPLR 2221(e),

1. shall be identified specifically as such;

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<sup>1</sup> Section 2.6(a)(i) of the Operating Agreement provided that:

... if JMH Member reasonably believes the Company is in need of additional funding for any bona fide Company reason (other than as already provided in Section 2.2 hereof), then JMH Member shall have the right to deliver (or cause the Manager to deliver) to PSB Member and JMH Member a notice (each, a “Funding Notice”) to that effect setting forth the purposes and amounts of such additional requested funding (the “Required Funds”)... Within sixty (60) days following the date on which such Funding Notice was given, PSB Member shall contribute to the Company, as an additional Capital Contribution, an amount equal to the total amount of the Required Funds.

2. 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
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Moreover, “[r]enewal is granted sparingly and is not a second chance freely given to parties who have failed to exercise due diligence in making their first factual presentation.” *Wade v. Giacobbe*, No. 307118/13, 2019 WL 5606710 at \*1 (1st Dept. Oct. 31, 2019).

In support of its motion to renew, PSB Indian Creek argues that although Halpern represented, in a Court affidavit, that the July 2016 Funding Notice was delivered to PSB Indian Creek pursuant to Section 2.6(a)(i) of the Operating Agreement because the acquisition loan was maturing on July 17, 2016, in fact, prior to the notice’s issuance, the Company had already procured a three-month extension of the maturity date, to October 17, 2016. PSB Indian Creek asserts that the extension constitutes “new facts” yet concedes that “documents reflecting the extension of the acquisition loan’s maturity date were produced by the Halpern Defendants before Plaintiffs’ opposition to the Dismissal Motion was due, [but] they were produced along with approximately 140,000 pages of documents.”

The Halpern Defendants counter that the documents upon which PSB Indian Creek’s motion is based are not “new facts” as they were in the latter’s possession on June 9, 2017 – three months before PSB Indian Creek filed its September 29, 2017 opposition to the motion to dismiss. In addition, the Halpern Defendants argue that PSB

Indian Creek's claim that its failure to previously provide the documents was reasonably justified because the documents were part of voluminous production is at odds with prevailing New York caselaw.

PSB Indian Creek admits that it possessed the documents it is referring to as "new" prior to the filing of its opposition papers. Hence, this motion fails to comply with CPLR 2221(e)'s requirement that renewal motions must be based upon new facts.

To avoid the conclusion that its facts are not new, PSB Indian Creek argues that Halpern's and David Friedman's<sup>2</sup> deposition testimony, in which each confirmed that PSB Indian Creek was not advised in July 2016 that the acquisition loan had been extended and thus \$4 million was not then needed to repay it, somehow contradicts Halpern's affidavit. And, PSB Indian Creek states that the deposition testimonies were not offered in opposition to the dismissal motion because the depositions only recently occurred and post-dated the original motion thereby constituting new evidence.<sup>3</sup> I find that the fact that the 2019 depositions discussed loan extensions that were referenced in documents which were produced in 2017 does not render the information new.

Additionally, PSB Indian Creek lacks reasonable justification for its failure to present these facts at the time of the original motion because reasonable justification cannot exist "where the new evidence consists of documents which the [moving party]

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<sup>2</sup> Friedman was a consultant to the Company.

<sup>3</sup> Halpern's deposition took place on April 5, 2019 and Friedman's deposition took place on April 11, 2019.

knew existed, and were in fact in his own possession at the time the initial motion was made.” *Countrywide Home Loans, Inc. v. Ward*, 167 A.D.3d 842, 844 (2d Dept. 2018) (internal quotation and citation omitted).

Reasonable justification can also not be established by arguing that the documents in the moving party’s possession at the time of the original motion were part of a “voluminous” production. *See Abu Dhabi Commercial Bank, P.J.S.C. v. Credit Suisse Sec. (USA) LLC*, 114 A.D.3d 432, 432-33, 979 N.Y.S.2d 571, 573 (1st Dept. 2014) (finding that plaintiff did not provide reasonable justification for its failure to submit documents that were in its possession prior to the original motion and that plaintiff’s contention that the documents were part of a voluminous production was unavailing); *Am. Audio Serv. Bureau Inc. v. AT & T Corp.*, 33 A.D.3d 473, 476 (1st Dept. 2006) (“Plaintiff’s explanation that the documents were overlooked because the files are voluminous is simply not a reasonable justification.”). Thus, PSB Indian Creek’s voluminous production argument is unavailing.

PSB Indian Creek also argues that the Halpern Defendants’ “lack of candor” during sworn testimony reasonably excuses its failure to present facts about the loan extension in its opposition to the motion to dismiss. First, the cases cited by PSB Indian Creek are inapposite.<sup>4</sup> Second, Halpern’s and Friedman’s depositions do not contradict

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<sup>4</sup> For example, in *Torres v. Gamma Taxi Corp.*, 97 A.D.3d 440 (1st Dept. 2012), the defendants sought renewal based on its discovery, after the decision of its prior motion, that plaintiff was involved in two previous car accidents causing injury to the same body parts at issue in the case. *Id.* at 441. The court affirmed the lower court’s decision granting defendants’ motion to renew holding that plaintiff’s lack of candor at his deposition about the earlier injuries constituted a reasonable excuse for defendants’

Halpern's original affidavit simply because the affidavit did not discuss the extension. In fact, an exhibit attached to Halpern's affidavit explicitly stated that the loan was extended, which undermines PSB Indian Creek's argument regarding lack of candor. Further, because the documents concerning the extension were produced to PSB Indian Creek (independently of the affidavit), it is irrelevant that Halpern's affidavit did not reference the extension except in an exhibit.

Nor would these facts about the extension of the loan change my finding in the September 2018 Decision. Indeed, repayment of a loan and carrying costs constitute bona fide reasons for a capital call, pursuant to the Operating Agreement, regardless of whether the loan was due on the original due date or on the extension date. *See Singh v. QLR Five LLC*, 171 A.D.3d 614, 614 (1st Dept. 2019) (finding that plaintiff's motion to renew failed because it was not supported "with 'new facts not offered on the prior motion' and 'reasonable justification' for [plaintiff's] failure to present those facts on the prior motion" and the cited facts would not "'change the prior determination.'" (internal citations omitted).

At bottom, PSB Indian Creek's motion to renew is improper as it does not submit any "new facts" and does not offer a reasonable justification for failing to submit the documents in its original opposition papers. *See Entech Engineering, P.C. v. Leon D. DeMatteis Construction Corp.*, 176 A.D.3d 500, 500 (1st Dept. 2019). Further, the alleged new facts would not have changed my September 2018 Decision.

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failure to present these facts on the prior motion. *Id.* Here, unlike in *Torres*, PSB Indian Creek was already aware of the extension as of June 9, 2017 before its motion was filed.

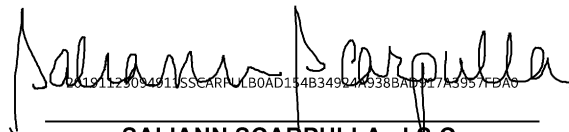
In accordance with the foregoing, it is

ORDERED that plaintiff PSB Indian Creek's motion to renew is denied in its entirety.

This constitutes the decision and order of the Court.

11/25/2019

DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE