SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

----------X

TRIBECA SPACE MANAGERS, INC.,

Plaintiff,

- v -

TRIBECA MEWS LTD., HAROLD THURMAN, BRAD THURMAN, 25 MYRENTCO, LLC,

Defendants.

----------X

INDEX NO. 653292/2013

MOTION DATE 10/09/2019

MOTION SEQ. NO. 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 442

were read on this motion for REARGUMENT.

Smith, Gambrell & Russell, LLP (John T. Van Der Tuin, John G. McCarthy, and Morgan V. Manley of counsel), and *Stroock & Stroock & Lavan LLP* (Melvin A. Brosterman of counsel), for plaintiff.
Meltzer, Lippe, Goldstein & Breitstone, LLP (Jason K. Blasberg of counsel) and *Braunstein Turkish, LLP* (William J. Turkish of counsel), for defendants.

Gerald Lebovits, J.:

In this action, the board of managers of a condominium apartment building asserts various claims against the condominium sponsor (and the sponsor's principals and affiliates) arising out of the construction of the building and sounding in breach of contract, breach of fiduciary duty, and fraudulent conveyance. The action was previously tried before a jury in Supreme Court, New York County (Nervo, J.). That trial ended in a mistrial, and the case was later transferred to the undersigned for retrial scheduled for October 2019.[1]

In preparation for the retrial, the parties filed a number of motions relating to what evidence could be presented at trial (motion sequences 007 through 012). This court consolidated the motions for disposition and resolved them in a decision and order dated August 15, 2019. (*See Tribeca Space Mgrs. v Tribeca Mews Ltd.*, 2019 NY Slip Op 51373 [U] [Sup Ct, NY County Aug. 19, 2019].) Plaintiff now moves under CPLR 2221 (d) for leave to reargue some of this court's determinations in that decision and order.

[1] The retrial has since been adjourned by the parties' agreement until February 2020.

In particular, plaintiff seeks to reargue that portion of this court's decision on motion sequence 009 denying plaintiff's motion to strike the limitations-period defense asserted in the ninth and tenth affirmative defenses of defendants' answer; that portion of this court's decision on motion sequence 011 granting defendants' motion to preclude plaintiff from offering evidence in support of claims that are subject to that limitations defense; and that portion of this court's decision on motion sequence 010 denying plaintiff's motion to amend the ad damnum clause of the complaint.

DISCUSSION

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].) "Reargument is not available where the movant seeks only to argue a new theory of liability not previously advanced." (*DeSoignies v. Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005] [reversing grant of reargument that had been based on new legal theory] [quotation marks omitted].) Nor is reargument "designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [reversing grant of reargument].) And the "decision whether to entertain reargument is committed to the sound discretion of the court." (*Rostant v Swersky*, 79 AD3d 456, 456 [1st Dept 2010].)

A. The Branch of Plaintiff's Motion for Leave to Reargue Challenging this Court's Determination on Motion Sequence 009

In motion sequence 009, plaintiff sought to strike affirmative defenses raised in defendants' answer against plaintiff's allegations about patent and latent defects in the common elements of the condominium building.

The condominium offering plan provided that the Sponsor would be obliged to correct patent defects only after receiving written notice of the defects from the Board of Managers "within two months after the first meeting of Unit Owners" and that the Sponsor would be obliged to correct such latent defects only if the Board provided Sponsor written notice "within six months of the first meeting of unit owners." (Offering Plan, NYSCEF No. 351, at 49.) The Board undisputedly did not provide written notice to the Sponsor of patent or latent defects within these time periods. Defendants assert affirmative defenses that any claim in this action premised on patent or latent defects is time-barred due to the lack of timely written notice. (*See* Answer, NYSCEF No. 5, at 7-8.)

In motion sequence 009, plaintiff argued that the notice-of-defect remedial preconditions should not be given effect, and therefore that the affirmative defenses based on plaintiff's failure to meet these preconditions should be stricken. Plaintiff asserted that the remedial preconditions were effectively superseded by other offering-plan provisions that (assertedly) had imposed actionable obligations on the Sponsor whether or not the Board provided timely written notice of defects. (*See* Mem. Law in Supp. of Mot. to Strike, NYSCEF No. 253, at 10-14.) This court disagreed. This court's August 15, 2019, order concluded instead that because this court had to

read the offering plan to give effect to *all* its provisions, plaintiff's interpretation was untenable because it would read out the notice-of-defect remedial preconditions from the plan. (*See* NYSCEF No. 358, at 4-5.)

Plaintiff now seeks leave to reargue this court's conclusion, claiming that this court misapprehended the terms of the condominium offering plan and their relationship to one another. But plaintiff's contentions on this point largely duplicate its prior interpretive arguments about which terms of the plan should be given priority in assessing the availability of a damages remedy. (*See* Mem. of Law in Supp. of Mot. to Reargue, NYSCEF No. 377, at 11-12, 15-18; *see also* Reply Mem., NYSCEF No. 442, at 1-6.) Rehashing existing arguments is not a proper basis for granting leave to reargue.

Plaintiff also cites this court's statement in the prior order that defendants had "the better reading" of the contested provisions of the offering plan. (*See Tribeca Space Mgrs*, 2019 NY Slip Op 51373, at *3.) Plaintiff argues that this wording shows that the court disregarded the interpretive doctrine that ambiguous contracts are to be interpreted against their drafters. (NYSCEF No. 377, at 15-17.) But the language on which plaintiff relies merely reflected this court's rejection of plaintiff's preferred reading because that reading effectively would require striking the plan's notice-of-defect provisions—as indeed plaintiff now acknowledges (*see* NYSCEF No. 377, at 18)—whereas defendant's interpretation gives effect to all the plan's terms. (*See Tribeca Space Mgrs*, 2019 NY Slip Op 51373, at *3-*4.)

The interpretive doctrine on which plaintiff relies does not apply when one party's interpretation would fail to give meaning to contractual terms.[2] (*See Diamond Castle Partners IV PRC, L.P. v IAC/InterActive Corp.*, 82 AD3d 421, 422 [1st Dept 2011] [noting the "elementary" principle that contractual provisions must be "read together contextually in order to give them meaning" and avoid "adopt[ing] an interpretation" that would render a "portion of the contract meaningless"] [internal quotation marks omitted]; *Lesal Assocs. v Board of Mgrs. of Downing Court Condominium*, 309 AD2d 594, 595 [1st Dept 2003] [holding that the "doctrine of contra proferentum . . . is inapplicable" where only the drafter's "proffered reading of [the contract's] provisions gave meaning and effect to each of the terms at issue"].)

To be sure, plaintiff disagrees strongly with this court's conclusion on these points. But plaintiff has not persuaded this court that it misapprehended either the plan or the legal arguments before it, as required to warrant granting leave to reargue.

---

[2] Plaintiff also asserts that this court misapprehended the legal doctrine that contractual limitations on liability be strictly construed against the party invoking them. (*See* NYSCEF No. 377, at 15-16.) But that doctrine requires only that a provision limiting liability must be expressed in "unmistakable language," and may not be given effect beyond its precise terms. (*See Arnold v New City Condominiums Corp.*, 78 AD2d 882, 882 [2d Dept 1980] [internal quotation marks omitted].) Here, the offering plan fully expressed, in clear and unmistakable language, the limits on liability asserted by defendants' ninth and tenth affirmative defenses. (*See* NYSCEF No. 351, at 49.)

B. The Branch of Plaintiff's Motion for Leave to Reargue Challenging this Court's Determination on Motion Sequence 011

Plaintiff also argues in the alternative that should this court decline to revisit its determination on motion sequence 009 denying plaintiff's motion to strike, the court should at least grant leave to reargue its determination on motion sequence 011 granting in part defendants' motion to preclude. Plaintiff claims for the first time that it should be permitted to argue to the jury that defendant is estopped from relying on the notice-of-defects remedial preconditions. Plaintiff also contends that it should be permitted to argue to the jury that defendants waived reliance on those preconditions. (*See* NYSCEF No. 377, at 18-22.) These arguments do not warrant granting leave to reargue.

Plaintiff's estoppel argument has two branches. One branch relies on testimony from the first trial in this case that (putatively) demonstrates that defendants had actual notice of the defects at issue such that timely written notice was not required. (*See id.* at 19-20.) But it is undisputed that most of the trial testimony to which plaintiff cites was not put before this court on the prior motion. (*See* Aff. of John Van Der Tuin, NYSCEF No. 378, at ¶ 70.) That evidence, therefore, cannot support granting leave to reargue. (*See* CPLR 2221 [d] [2] [providing that a motion to reargue "shall not include any matters of fact not offered on the prior motion"].) And the court is not persuaded that it overlooked or misapprehended the import of the trial evidence that plaintiff *did* introduce on the prior motion (including certain trial testimony of Arodis Castillo and evidence that defendant Brad Thurman was a member of plaintiff Board during the notice period).

The other branch of plaintiff's argument is that defendants are estopped from seeking to enforce the notice preconditions in light of defendants' asserted ongoing failure to construct the building in accordance with filed plans and specifications and to obtain a certificate of occupancy. (*See* NYSCEF No. 377, at 19-20.) Plaintiff provides a First Department decision in which the Court held that on the factual record in that case, "the failure of defendants to satisfy their own contractual obligations" under the offering plan could potentially estop defendants from seeking to enforce notice-of-defect deadlines. (*See Board of Mgrs. of Alfred Condominium v Carol Mgmt., Inc.*, 214 AD2d 380, 381-382 [1st Dept 1995].) Under the circumstances of this litigation, though, plaintiff's contention does not warrant the granting leave to reargue.

Most fundamentally, plaintiffs did not make this argument in either motion sequence 009 or motion sequence 011.[3] "Reargument is not available where the movant seeks only to argue a new theory . . . not previously advanced." (*DeSoignies v. Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005].) That consideration has particular force here. As plaintiff itself previously acknowledged (*see* NYSCEF No. 253, at 14 n 4), plaintiff raised the issue of the availability of defendants' notice-of-defect affirmative defenses at the time of the *first* trial, at

[3] Plaintiffs did cite the decision in *Alfred Condominium* in their papers in motion sequence 009—but only on reply, and only for a different proposition that plaintiffs do not press on the current reargument motion. (*See* Reply Mem. in Supp. of Mot. in Limine, NYSCEF No. 336, at 14.)

least two years ago.[4] Motion sequences 009 and 011 thus provided at least plaintiff's second bite at the proverbial apple; and yet plaintiff failed to make (or chose against making) its present estoppel argument on those motions. This court sees no basis to grant leave to reargue to afford plaintiff at least a *third* opportunity—more than six years into this litigation—to make the argument now.[5]

Moreover, even were this court otherwise inclined to overlook plaintiff's failure previously to make this argument—and the court is not so inclined—prudential considerations would counsel against doing so. Plaintiff contends that the estoppel issue is a disputed factual question that should go to the jury. (*See* NYSCEF No. 377, at 19.) But plaintiff has not identified precisely what that dispute consists of—in particular, which types of failures by a defendant sponsor to live up to its contractual obligations (or the length of time of such failures) plaintiff believes to be generally sufficient to permit a jury to find estoppel. Nor does the *Alfred Condominium* decision on which plaintiff relies purport to provide such a general rule, either. (*See* 214 AD2d at 381-382.) For that matter, plaintiff has not adequately identified the particular evidence of failure on which it is relying here: The estoppel section of its reargument motion makes only limited reference either to record evidence on this issue or to representations about the evidence that plaintiff would put before the jury if permitted.[6] (*See* NYSCEF No. 377, at 20.)

In short, plaintiff seeks leave to reargue to raise a new argument; and one that would require this court to permit the jury to hear as-yet-unspecified evidence under an amorphous legal standard whose contours the appellate courts have yet to define. This court concludes, in its discretion, that in these circumstances leave to reargue on this ground must be denied.

In addition to raising this new estoppel argument, plaintiff separately asserts that defendants have waived their notice-of-defect defenses because defendants sought to address the defects at issue after receiving oral notice. (*See* NYSCEF No. 377, at 21-22.) This claim is also premised on evidence not submitted on the prior motion. (*See id.* at 10, 22). Again, therefore, it is not a proper basis to grant leave to reargue.

---

[4] The parties explained at oral argument on the present motion to reargue that they had handed up to Justice Nervo opposing motions on the notice-of-defect issue at the beginning of the first trial, that Justice Nervo reserved decision on the motions, and that he had not yet decided the motions when he declared a mistrial.

[5] Plaintiff also has not argued—either in motion sequences 009 and 011 or in the present reargument motion—that the notice-of-defect provisions should be disregarded because some or all the defects at issue were impossible for plaintiff to have discovered by prompt, reasonable inspection of the premises.

[6] The one citation that plaintiff does provide on this point is to evidence that, as noted above, was not part of the record on underlying motion sequence 009. (*See* NYSCEF No. 377, at 20 [citing NYSCEF No. 432]; NYSCEF No. 378, at ¶ 70.)

C. The Branch of Plaintiff's Motion for Leave to Reargue that Seeks Clarification of This Court's Rulings in Motion Sequences 009 and 011 About What Evidence Plaintiff May Present at Trial

Plaintiff also seeks leave to reargue to allow this court to clarify its rulings in motion sequences 009 and 011 about what evidence plaintiff may present at trial. (*See* NYSCEF No. 377, at 23-24.) In particular, plaintiff perceives a tension between this court's rulings (i) on motion sequence 009, that plaintiff may introduce evidence to support a breach-of-contract claim that is based on defendants' obligations to construct the building in accordance with filed plans and specifications and to obtain a permanent certificate of occupancy; and (ii) on motion sequence 011, that plaintiff may not assert a breach-of-contract claim or provide evidence of damages if that claim or those damages stem from patent or latent construction defects as to which notice was not timely provided. (*Id.*) Plaintiff states that it understands this court's prior order to mean that plaintiff may introduce evidence of defendants' alleged breaches of those obligations—even if those breaches stem from construction defects as to which plaintiff did not provide timely written notice. (*Id.* at 24.) And plaintiff asks this court to grant reargument and make clear that plaintiff is reading this court's order correctly.

Plaintiff's interpretation of this court's prior order is ingenious but incorrect. In framing its prior order, this court was mindful that it had not yet seen the evidence that plaintiff will introduce at trial. This court therefore did not wish to foreclose prematurely the possibility that plaintiff could support a damages claim sounding in breach of contract by evidence *other than* the presence of defects for which notice was not timely provided. To the extent that any injunctive or damages claim by plaintiff—whether sounding in breach of warranty, breach of contract, or otherwise—relies on evidence of defects for which plaintiff did not provide timely written notice, this court held in motion sequence 011 that such a claim is time-barred in light of the court's determination on motion sequence 009.

Plaintiff, therefore, is not seeking "clarification" of this court's prior order, but reversal. Plaintiff has not demonstrated that leave to reargue to seek such a fundamental change in this court's prior order would be warranted.

D. The Branch of Plaintiff's Motion for Leave to Reargue that Challenges this Court's Denial of Plaintiff's Request in Motion Sequence 010 to Increase the Amount of its Ad Damnum Clause

Finally, plaintiff seeks leave to reargue this court's denial of plaintiff's request in motion sequence 010 to increase the amount given in the ad damnum clause. Plaintiff contends that this court overlooked the legal principle that a plaintiff is presumptively entitled to amend its ad damnum clause given evidence in the record or introduced at trial. (*See* NYSCEF No. 377, at 25-27.) But plaintiff has not shown that the evidence in the record here would support the requested amendment. Plaintiff claims that it can demonstrate that its potential damages have "increased to in excess of $26 million" (NYSCEF No. 377, at 29); but plaintiff does not address whether the evidence that it would use to establish those damages remains admissible in light of this court's evidentiary rulings in its August 2019 order.

In any event, as plaintiff itself notes, the complaint's ad damnum clause "sought 'at least' $6 million in money damages." (*Id.* at 30; *see also* Complaint, NYSCEF No. 2, at 12-13.) Plaintiff thus does not face a self-imposed cap on the amount of damages it may recover at trial. If plaintiff can, consistent with this court's evidentiary rulings on motion sequences 007 through 012, present evidence that persuades the jury that plaintiff is entitled to more than $6 million in damages, a corresponding award in plaintiff's favor will not be foreclosed by the language of its original ad damnum clause. The motion to amend the clause is academic. Leave to reargue is not warranted in these circumstances.

Accordingly, for the foregoing reasons it is

ORDERED that plaintiff's motion for leave to reargue portions of this court's decision and order dated August 15, 2019, is denied.

12/17/2019
DATE

GERALD LEBOVITS, J.S.C.

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