

<b>MRC 56 Corp . v Weeks-Lerman Group, LLC</b>
2020 NY Slip Op 30248(U)
January 8, 2020
Supreme Court, New York County
Docket Number: 650201/2018
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----X  
MRC 56 CORP.

Plaintiff,

-against-

Index No. 650201/2018  
Motion Seq. No.: 002

THE WEEKS-LERMAN GROUP, LLC,

Defendant.  
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

were read on this motion to/for

RENEWAL

**DORIS LING-COHAN, J. :**

Defendant The Weeks-Lerman Group, LLC (WLG) moves, pursuant to CPLR 2221 (a) and (e), for renewal or reargument of the decision and order of this court dated July 3, 2019 and entered on July 17, 2019 denying WLG's cross motion for summary judgment (Decision), and, upon renewal or reargument, to grant WLG partial summary judgment on liability on its counterclaim for breach of contract, or in the alternative, to reinstate WLG's Second Amended Answer and Counterclaims. Should the court grant WLG's motion to renew or reargue, plaintiff MRC 56 Corp. (MRC) cross-moves for renewal or reargument of the court's same Decision that denied MRC's motion for summary judgment on its first cause of action for breach of contract.

## DEFENDANT'S MOTION TO RENEW AND REARGUE

Pursuant to CPLR 2221 (d), 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 "(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." CPLR 2221 (e) (2) & (3).

**Motion to Renew**

In support of its motion for renewal, WLG seeks to submit to this court several documents which, though previously known to WLG, were not submitted on the underlying motion. Those documents include WLG's December 16, 2016 letter to the Department of Labor (DOL), requesting a hearing in connection with DOL's Notice of Unemployment Rate, dated December 5, 2016 (Gillett Affirmation, Exhibit G); DOL's affirmance of its December 5, 2016 Notice of Unemployment Rate, dated May 25, 2017 (*id.*, Exhibit E); and DOL's response, dated August 17, 2015, to MRC's July 16, 2015 letter indicating it had only transferred

assets to WLG and, therefore, its experience rating should not be transferred to WLG. *Id.*, Exhibit F.

As WLG recognizes that, normally "[a]n application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." *Foley v Roche*, 68 AD2d 558, 568 (1<sup>st</sup> Dept 1979). WLG contends, however, that, here, the motion is appropriate because the documents, which WLG was clearly aware of, are being submitted in response to issues raised *sua sponte* by the court in its July 3, 2019 decision.

WLG points to the following observations made by the court in its July 3, 2019 decision as a basis for its motion to renew:

"[I]t is not clear whether the Seller has continued to operate a business and has continued to maintain employees who did not have responsibilities for the customer contracts purchased by WLG. If MRC has remained in business and continues to have employees, it, presumably, continues to have an employer account with the Department of Labor, and that account would continue to maintain a negative balance which would impact MRC's unemployment insurance tax rate."

Decision at 20.

"If ... MRC no longer has a general account with the Department of Labor, as it claimed it did in its June 16, 2015 letter to the Department, and is no longer in business and no longer has employees, MRC's financial responsibilities arising for its past employees which constitute Excluded Liabilities may have shifted to WLG, in a manner not intended by section 1.4 of the APA governing Excluded and Assumed liabilities."

Decision at 21.

"It is also unclear to the court whether WLG, in fact, hired any of MRC's prior employees as provided for in section 6.3 (b) of the APA. This question could also have an impact on whether MRC's general account with the Department of Labor, including the negative balance, constitutes an Excluded Liability under the APA which could trigger various rights and responsibilities of the parties with respect thereto."

Decision at 21.

"There is no indication in the record that WLG responded to the December 5, 2016 letter. It appears that, rather than availing itself of the Department of Labor's hearing procedures to challenge the decision to transfer the unemployment insurance experience of the Seller to the account of the Purchaser, and/or the manner in which MRC's experience rating was applied to WLG,<sup>1</sup> WLG chose to withhold installment payments otherwise due to the Seller."

Decision at 8.

"Had WLG availed itself of its right to appeal the Department of Labor's decision, treating the transaction as a business transfer and transferring MRC's experience to WLG, these issues might well have been clarified and the Department of Labor might have altered its decision to transfer MRC's negative balance to WLG."

Decision at 21.

While it is true that the documents on which WLG seeks to base its motion for leave to renew relate to portions of the court's Decision, unlike the decision in *Matter of Bevona* (*Superior Maintenance Co.*) (204 AD2d 136 [1<sup>st</sup> Dept 1994]), relied

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<sup>1</sup> For example, it appears that WLG did not raise the question of whether a total or partial business transfer had occurred, and, therefore, whether the Department of Labor should have effected a total or partial transfer of experience rating to WLG, pursuant to Labor Law § 581 (4). See *Matter of Allegheny Airlines v New York State Dept. of Labor*, 52 AD2d 281, 284 (3rd Dept 1976).

upon by WLG, the observations made by the court quoted by WLG do not relate to entirely new issues that were not previously raised by the parties. Rather, they relate to sections of the Asset Purchase Agreement (APA) that were in fact discussed by both parties. Furthermore, rejection of WLG's motion for renewal based upon the documents which were not previously supplied to this court does not ultimately "foreclose the presentation of evidence and result in the effective exclusion of an entire issue." *Id.* at 139. For unlike in *Matter of Bevona*, this court's July 5, 2019 Decision was not dispositive of this case, and WLG may seek to utilize those documents in connection with a future trial.

Lastly, the final two statements in the court's Decision relied upon by WLG in support of its motion, are merely observations of the court regarding approaches taken by WLG in connection with the initial decision of the DOL, and not a new issue being raised by the court, in contrast with *Matter of Bevona*.

In any case, questions remain in regard to the conflicting positions of the parties concerning the interpretation of the contested provisions of the Asset Purchase Agreement, and, none of the documents on which WLG relies would change the outcome of the court's Decision, as required for a motion to renew. CPLR 3211 (e) (2).

For these reasons, WLG's motion to renew is denied.

#### **Motion to Reargue**

WLG contends that the court overlooked a matter of fact or law when it held that MRC's negative employer account was not a tax liability, contending that the plain language of the Labor Law and the Tax Law establish that MRC's negative balance was the result of a tax that MRC had not paid. With respect to the provisions of the Labor Law cited by WLG, it is essentially reiterating arguments made in the original motion that were rejected by the court. Similarly, with respect to the court's rejection of WLG's second amended answer with counterclaims, WLG reiterates the arguments made in support of its underlying cross motion. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1<sup>st</sup> Dept 1992).

WLG also makes arguments based upon Tax Law § 674 not made in connection with the underlying motion. "Reargument is not available where the movant seeks only to argue 'a new theory of law not previously advanced.'" *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 (1<sup>st</sup> Dept, 2005) (internal citations omitted).

For these reasons, WLG's motion to renew and reargue is denied.

**PLAINTIFF'S CROSS MOTION**

MRC cross-moves to renew and reargue should the court grant's WLG's motion to renew and/or reargue. Since the court has denied WLG's motion, MRC's cross motion is denied as well.

Accordingly, it is hereby

ORDERED that defendant's motion to renew and reargue is denied; and it is further

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

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated: January 8, 2020

Hon. Doris Ling-Cohan, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

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