SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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NEW CHAPTER CAPITAL, INC.,

Plaintiff,

- v -

ANDREA KARAMBELAS, WILDON KAPLAN,

Defendant.

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INDEX NO. 653965/2019

MOTION DATE 01/05/2020, 08/10/2020

MOTION SEQ. NO. 003 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 50, 52, 53, 54, 55, 56, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 77, 78, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 94, 95, 96, 97, 98, 99, 100, 101, 103, 104

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, (i) Andrea Karambelas' motion (Mtn. Seq. No. 003) to dismiss the verified complaint (the **Complaint**) is granted and her motion for joinder and summary judgment is denied, (ii) New Chapter Capital, Inc.'s (**New Chapter**) cross motion for discovery sanctions is denied, and (iii) New Chapter's motion to reargue/renew (Mtn. Seq. No. 005) is denied.

The Relevant Facts and Circumstances

The facts of this matter are set forth in the court's prior decision dated January 14, 2020 (the **Prior Decision;** NYSCEF Doc. No. 92). Although the Prior Decision is dated January 14, 2020, it was issued on May 1, 2020. The date is a clerical error.

Briefly stated, New Chapter seeks to recover for an alleged breach of a Purchase and Sale Agreement (the **Original Agreement**), dated November 19, 2015, by and between Novitas US, Inc. (**Novitas**), its representatives, successors and assigns and Peter Kaplan, as amended by a certain Addendum dated June 7, 2016 (the **Addendum**) (the Original Agreement and the Addendum, together, the **Agreement**) pursuant to which Novitas purchased from Mr. Kaplan "the right to receive certain proceeds which may arise from the settlement or verdict" of his divorce action with Ms. Karambelas (Complaint, Ex. A, NYSCEF Doc. No. 1 at 2). Novitas is now known as plaintiff New Chapter (*id.*, ¶ 2).

As relevant, Paragraph 4 of the Original Agreement provided that:

> Seller understands that by entering into this Agreement, Seller is selling to Purchaser a portion of the potential Proceeds of the Claim. This is a non-recourse sale. **THIS IS NOT A LOAN.** ***In the event that Seller does not receive any award or settlement from the Claim, Seller will not owe any amounts to Purchaser, and Purchaser will receive nothing***.

(NYSCEF Doc. No. 1, Ex. A, ¶ 4 [emphasis added]).

Paragraph 12 of the Original Agreement provided as follows:

> **Death of Seller.** If Seller should die before receiving a recovery under his/her Claim and before Purchaser is paid the amounts due under this Agreement, then the right of Purchaser to receive the amounts due under this Agreement shall remain an obligation secured by any Proceeds and this Agreement shall be binding upon the Seller's estate.

(*id.*, ¶ 12).

On or about March 30, 2016, Novitas filed a UCC Financing Statement with the New York City Department of Finance against a property (the **Property**) located at 1021 Park Ave., Apt. 13D,

New York, NY (the **Lien**; NYSCEF Doc. No. 41). The Lien identified Peter Kaplan as the debtor (*id.*). Although New Chapter claims that the Property was jointly owned at the time that the Lien was filed by both Peter Kaplan and Ms. Karambelas, according to Ms. Karambelas, she was the owner, by tenancy of the entirety, of the Property at all relevant times hereto (NYSCEF Doc. No. 14, ¶ 11).

Mr. Kaplan died on August 1, 2018, while his divorce action against Ms. Karambelas was still ongoing, and he did not receive any award or settlement from the Claim (as defined in the Agreement) Following his death, the court (Katz, J.) entered an Order of Abatement, dated September 28, 2018, dismissing the divorce action and ordering "all claims for ancillary relief" to "be brought in the Surrogate's Court" (NYSCEF Doc. No. 42). By Certificate of Appointment of Administrators dated January 24, 2019, the Surrogate's Court appointed Ms. Karambelas and Wildon R. Kaplan to be the co-administrators of Peter Kaplan's estate (NYSCEF Doc. No. 6).

On July 11, 2019, New Chapter commenced this action for breach of the Agreement. On August 20, 2019, Wildon Kaplan filed a motion to dismiss the Complaint (Mtn. Seq. No. 001).

In its Prior Decision, the court granted Wildon Kaplan's motion to dismiss the Complaint pursuant to 3211(a)(1), holding that although Peter Kaplan's obligation survived death pursuant to Paragraph 12 of the Agreement, pursuant to Paragraph 4 of the Agreement because Peter Kaplan "[did not] ***receive any award or settlement from the Claim, [Peter Kaplan] will not owe any amounts to [New Chapter], and [New Chapter] will receive nothing"*** (NYSCEF Doc. No. 1, Ex. A).

The court explained:

> By its terms, paragraph 12 [of the Agreement] contemplates a situation where Peter [Kaplan] dies before he "***receiv[es]***" the amount due to him under his "Claim" and, thus, before New Chapter can be "paid" such funds and that obligation is then "secured" by the "Proceeds," i.e., his "total recovery from the Claim." In other words, paragraph 12 contemplates a situation where a judgment or settlement of divorce ***has been made*** but where Peter Kaplan has not received his award and dies before New Chapter can be paid therefrom. In that instance, the Original Agreement provides that Peter Kaplan's obligation would be binding on his estate. Paragraph 12 does not, however, address what happens if Peter [Kaplan] dies while his divorce is yet ongoing. Since the law provides that in such instance the divorce proceeding abates, there can be no "award or settlement from the Claim" and the plain terms of Paragraph 4 must apply: "In the event that Seller does not receive any award or settlement from the Claim, Seller will not owe any amounts to Purchaser, and Purchaser shall receive nothing."

(NYSCEF Doc. No. 92 at 4-5 [emphasis in original]).

On August 10, 2020, New Chapter filed the instant motion to reargue the Decision (Mtn. Seq. No. 005). At the time the motion to reargue was made, Wildon Kaplan does not appear to have been represented by counsel as his counsel was relieved by decision and order dated February 24, 2020 and the Complaint as against Mr. Kaplan was then dismissed on May 1, 2020 (NYSCEF Doc. No. 73 [order granting counsel's motion to withdraw]; NYSCEF Doc. No. 92 [dismissing the Complaint]).

Ms. Karambalas did not join in Wildon Kaplan's motion to dismiss. Rather, on September 20, 2019, Ms. Karambelas filed an Answer and asserted a counterclaim against New Chapter and/or Novitas to extinguish the Lien and seeking monetary damages due to the improper filing of said Lien (NYSCEF Doc. No. 14). On January 7, 2020, Ms. Karambelas also filed the instant motion seeking to: (i) dismiss the Complaint, (ii) be added as a necessary party on the counterclaim, and (iii) obtain summary judgment on the counterclaim (Mtn. Seq. No. 003). On or about January

15, 2020, New Chapter filed a UCC Financing Statement Amendment to withdraw the Lien (NYSCEF Doc. No. 65).

Discussion

I. Mtn. Seq. 005 (New Chapter's Motion to Reargue/Renew)

A. Motion to Reargue

To succeed on a motion for reargument, a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

In seeking leave to reargue, New Chapter claims that the court misapprehended the relevant facts and law by overlooking the following: (i) that Paragraph 12 of the Agreement is the controlling provision because it provides for a specific outcome in contrast to Paragraph 4, (ii) that Paragraph 12 should be applied as a carve out to Paragraph 4, (iii) that the contract was jointly drafted by both parties, and (iv) that the Prior Decision denied New Chapter is due process rights. All of these arguments fail.

The court neither overlooked nor misapprehended the relevant facts or law. As discussed in the Prior Decision and above, the court determined that the Agreement was unambiguous and looked

to the plain meaning of Paragraphs 12 and 4, which provide that New Chapter does not recover if Peter Kaplan did not recover. Because he did not recover, New Chapter has no claim pursuant to the express terms of the Agreement.

To the extent that New Chapter claims that the court overlooked the fact that the Agreement is deemed to have been jointly drafted (NYSCEF Doc. No. 98, ¶ 28) and, therefore, should not be construed against New Chapter as the drafter, this fact does not impact the court's interpretation of the Agreement, which is unambiguous on its face.

In addition, inasmuch as the Prior Decision was misdated as discussed above, the record is clear that the Prior Decision was uploaded on May 1, 2020 and New Chapter was well aware that the Prior Decision was forthcoming as it concedes that it was notified of the same in late April of 2020 (NYSCEF Doc. No. 103, at 13). As a result, New Chapter simply cannot argue that it was prejudiced by the Prior Decision bearing the incorrect date and its motion for leave to reargue is denied.

B. Motion to Renew

Pursuant to CPLR § 2221, a motion for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but which were unknown to the party seeking leave to renew, and therefore, not made known to the court (*Foley*, 68 AD2d at 568). Although motions to renew are addressed to the court's sound discretion (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]), such motions should be "granted sparingly"

and are not a second chance for parties who have not exercised due diligence submitting facts in the prior motion (*Beiny v Wynyard (In re Beiny)*, 132 AD2d 190, 209-210 [1st Dept 1987]).

New Chapter does not offer any new facts on this motion that were not offered on the prior motion. Rather, New Chapter argues that the court failed to consider the affidavit of Nicole Noonan, dated February 20, 2020 (NYSCEF Doc. No. 66), because this document was not included in the pre-populated list of motion papers set forth at the beginning of the Prior Decision. For clarity, the list of motion papers on every decision is auto-generated does not constitute a definitive list of what the court considered. For the avoidance of doubt, the court considered all papers submitted in the NYSCEF docket as of May 1, 2020 when issuing the Prior Decision.

In any event, the "facts" set forth in Ms. Noonan's affidavit are hearsay (i.e., a conversation Ms. Noonan claims to have had with drafting counsel for Peter Kaplan about his alleged understanding of the provisions of the Agreement) and are not admissible, even aside from being hearsay, as parol evidence of an unambiguous contract (*R/S Assocs. v New York Job Dev. Auth.*, 98 NY2d 29 [2002]). In addition, and for completeness, the "new facts" sought to be introduced by Ms. Noonan in support of this motion by her second affidavit suffer from the same hearsay defects as what she alleged in her first affidavit and, in any event, were equally available to New Chapter on its prior motion and, thus, may not constitute a basis for renewal (*compare* NYSCEF Doc. No. 102 *with* NYSCEF Doc. No. 66).

Finally, inasmuch as New Chapter claims that it was deprived of its due process rights because the Prior Decision was inadvertently dated January 14, 2020 when it was actually issued on May 1, 2020, this typographical error did not deprive New Chapter of any rights. The court previously adjourned the motion to dismiss and then issued its decision on May 1, 2020. New Chapter was not deprived of any rights, nor does it identify how it could have been deprived of any rights. Accordingly, New Chapter's motion for leave to renew is denied.

II. Mtn. Seq. 003 (Ms. Karambelas' Motion to Dismiss)

A. Ms. Karambelas' Motion to Dismiss the Complaint

Ms. Karambelas' motion to dismiss the Complaint as against her is granted for all the same reasons set forth in Wildon Kaplan's prior motion to dismiss (Mtn. Seq. No. 001) and New Chapter's instant motion to reargue/renew, *supra* (Mtn. Seq. No. 005).

B. Adding Ms. Karambelas as a Necessary Party

Ms. Karambelas also argues that she should be added to this litigation in her individual capacity in order to assert her individual counterclaim against New Chapter. In the absence of joinder, Ms. Karambelas asserts that there would be no complete relief and that she would be inequitably affected as an heir to Peter Kaplan's estate and the real party in interest. In their opposition papers, New Chapter argues that Ms. Karambelas is not a necessary party because her counterclaim concerns the Lien, which is unrelated to the substance of the now dismissed Complaint – i.e. the alleged breach of the Agreement. The court agrees.

Pursuant to CPLR § 1001(a), entitled Necessary Joinder of Parties, an individual may be added as a necessary party to an action for the purpose of according complete relief or if such individual might be inequitably affected by a judgment in the action. In other words, mandatory joinder facilitates due process and the opportunity to be heard before one's rights or interests are adversely affected (*Martin v Ronan*, 47 NY2d 486, 490 [1979]).

Ms. Karambelas is not a necessary party to the instant action. To the extent that she is the beneficiary of Peter Kaplan's Estate, the action against the Estate is now dismissed. Inasmuch as Ms. Karambelas' ownership of the jointly owned Property passed to her by operation of law upon Peter Kaplan's death, the Property also falls outside of the purview of any determinations made here pursuant to the Agreement. Furthermore, and significantly, New Chapter has withdrawn the Lien so the counterclaim to extinguish the Lien is now moot and there is no longer any connection between the Lien and the relief sought by New Chapter pursuant to the Agreement, and the personal interests of Ms. Karambelas will not be affected by any relief afforded to New Chapter in this action.

Nor is there any basis for permissive joinder under CPLR § 1002 as the counterclaim does not arise out of the same transaction or occurrence as the claim asserted in the complaint.

Accordingly, the branch of Ms. Karambelas' motion to be added as a necessary party is denied.

C. Ms. Karambelas's Motion for Summary Judgment

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Ms. Karamberlas' motion to extinguish the Lien has been mooted by New Chapter's voluntary removal of same. Inasmuch as the counterclaim also sought damages incurred by Ms. Karambalas, individually, in connection with the placement of said Lien, if Ms. Karambelas wishes to pursue said damages, it should be by way of a separate action as the court is denying her motion to be added as a necessary party herein and she has no standing to pursue such counterclaim on behalf of the Estate nor does her counterclaim appear to assert the counterclaim on behalf of the Estate.

D. New Chapter's Cross-Motion

Finally, New Chapter also cross-moves to for penalties on Ms. Karambelas due to her failure to comply with a demand for a bill of particulars, which was served on December 20, 2019 (NYSCEF Doc. No. 69). Pursuant to CPLR § 3042, a party may serve a written demand for a bill of particulars to which a response should be provided within thirty days thereafter. Despite Ms. Karambelas' refusal to respond to the bill of particulars, New Chapter failed to meet and

confer with Ms. Karambelas to resolve the issue and did not request permission to make its discovery motion, as required by the individual part rules of this court. Accordingly, New Chapter's cross-motion for discovery sanctions is denied.

Accordingly, it is

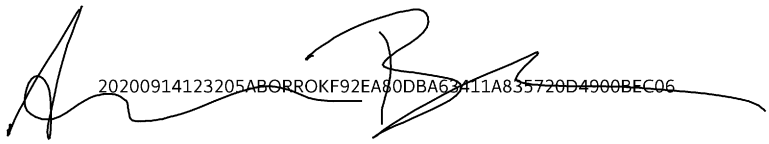
ORDERED that the branch of the motion (seq. no. 003) to dismiss the complaint as against Andrew Karambelas as Temporary Co-Administrator of the Estate of Peter M. Kaplan is granted and the complaint is dismissed against said defendant in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion (seq. no. 003) seeking to join Andrea Karambelas, individually, as a party to this action is denied; and it is further

ORDERED that the branch of Andrea Karambelas' motion (seq. no. 003) for summary judgment on the counterclaim is denied as moot, and it is further

ORDERED that New Chapter's cross-motion (seq. no. 003) for discovery sanctions is denied; and it is further

ORDERED that the motion for leave to reargue (seq. no. 005) is denied.



9/14/2020
DATE

ANDREW BORROK, J.S.C.

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