

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MBIA INSURANCE CORPORATION,

Plaintiff,

09 Civ. 3255

-against-

OPINION

PATRIARCH PARTNERS VIII, LLC, a
Delaware limited liability company,
and LD INVESTMENTS, LLC, a
Delaware limited liability company,

Defendants.

-----X

A P P E A R A N C E S:

Attorneys for Plaintiff

BINGHAM MCCUTCHEM LLP
399 Park Avenue
New York, NY 10022-4689
By: Jeffrey Q. Smith, Esq.
Susan F. DiCicco, Esq.
Kevin J. Biron, Esq.

4-4-12

Attorneys for Defendants

BRUNE & RICHARD LLP
One Battery Park Plaza
New York, NY 10004
By: Charles A. Michael, Esq.
David Elbaum, Esq.
Hillary Richard, Esq.

Sweet, D.J.

Defendants Patriarch Partners VIII, LLC ("Patriarch") and LD Investments, LLC (collectively, the "Defendants") have moved for partial reconsideration of the Court's opinion dated February 6, 2012 (the "February 6 Opinion"). The Defendants request that the Court, upon reconsideration, grant summary judgment against plaintiff MBIA Insurance Corporation ("MBIA" or the "Plaintiff") with respect to two claims the Defendants contend went unaddressed in the February 6 Opinion. The Defendants' motion for reconsideration was filed on February 17, 2012, and it was considered fully submitted on March 14.

For the following reasons, the Defendants' motion for reconsideration is denied.

The Applicable Standard

The Plaintiff requests reconsideration of the February 6 Opinion pursuant to Local Civil Rule 6.3. The standards governing motions under Local Rule 6.3 along with Fed. R. Civ. P. 59 are the same, and a court may grant

reconsideration where the party moving for reconsideration demonstrates an "intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Henderson v. Metro. Bank & Trust Co., 502 F. Supp. 2d 372, 375-76 (S.D.N.Y. 2007) (quotation marks and citations omitted); Parrish v. Sollecito, 253 F. Supp. 2d 713, 715 (S.D.N.Y. 2003) ("Reconsideration may be granted to correct clear error, prevent manifest injustice or review the court's decision in light of the availability of new evidence.") (citing Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)); Catskill Dev., L.L.C. v. Park Place Entm't Corp., 154 F. Supp. 2d 696, 701-02 (S.D.N.Y. 2001) (granting reconsideration due to the court's erroneous application of a statute). The moving party must demonstrate controlling law or factual matters put before the court on the underlying motion that the movant believes the court overlooked and that might reasonably be expected to alter the court's decision. See Linden v. Dist. Council 1707-AFSCME, 415 Fed. Appx. 337, 338-39 (2d Cir. 2011) (affirming dismissal of reconsideration motion as movant did not identify any relevant facts or controlling authority that the lower court overlooked); Lichtenberg v. Besicorp Grp. Inc., 28 Fed. Appx. 73, 75 (2d Cir. 2002) (affirming dismissal of

reconsideration motion where movant "failed to demonstrate that the [lower] court overlooked any fact of consequence or controlling legal authority at the time the court decided [the case]").

The reason for the rule confining reconsideration to matters that were "overlooked" is to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Polsby v. St. Martin's Press, Inc., No. 97 Civ. 690 (MBM), 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation and quotation marks omitted). A court must narrowly construe and strictly apply Local Rule 6.3, so as to avoid duplicative rulings on previously considered issues, and to prevent the rule from being used as a substitute for appealing a final judgment. See In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig., 08 M.D.L. No. 1963, 2009 WL 2168767, at *1 (S.D.N.Y. Jul. 16, 2009) ("A motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved.") (quoting Davey v. Polan, 496 F. Supp. 2d 387, 389 (S.D.N.Y. 2007)); ResQNet.com v. Lansa, Inc., No. 01 Civ. 3578, 2008 WL 4376367,

at *2 (S.D.N.Y. Sept. 25, 2008) ("The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.") (citations and quotation marks omitted); Ballard v. Parkstone Energy, LLC, No. 06 Civ. 13099, 2008 WL 4298572, at *1 (S.D.N.Y. Sept. 19, 2008) ("Local Rule 6.3 is to be narrowly construed and strictly applied in order to avoid repetitive arguments on issues that the court has fully considered.") (quoting Abrahamson v. Bd. of Educ. of the Wappingers Cent. Sch. Dist., 237 F. Supp. 2d 507, 510 (S.D.N.Y. 2002)).

Motions for reconsideration "are not vehicles for taking a second bite at the apple, . . . and [the court] [should] not consider facts not in the record to be facts that the court overlooked." Rafter v. Liddle, 288 Fed. Appx. 768, 769 (2d Cir. 2008) (citation and quotation marks omitted).

Prior Proceedings

The facts of the case are described in detail in the February 6 Opinion, and familiarity with those facts is assumed.

MBIA filed its complaint on April 3, 2009, alleging breach of contract, anticipatory repudiation, breach of the implied duty of good faith and promissory estoppel, along with a request for the Court to issue a declaratory judgment concerning both the enforceability of an agreement between the two parties (the "Master Agreement") and the scope of Patriarch's obligations under that agreement. Following discovery, the Defendants moved, pursuant to Fed. R. Civ. P. 56, for summary judgment dismissing MBIA's complaint. MBIA moved, pursuant to the same rule, for partial summary judgment dismissing the Defendants' affirmative defenses of unclean hands and equitable estoppel. In addition, both parties filed motions in limine to exclude certain testimony and exhibits submitted by the opposing party.

In the February 6 Opinion, the Defendants' motion for summary judgment dismissing the complaint was granted in part and denied in part, and the Plaintiff's motion for partial summary judgment to dismiss the Defendants'

affirmative defenses of unclean hands and equitable estoppel was granted. Specifically, the February 6 Opinion found that a triable issue of fact existed with respect to the terms of the Master Agreement, specifically the provisions requiring Patriarch to use "commercially reasonable efforts" as soon as "reasonably practicable" to seek ratings on the Class B Notes, and that neither the limitation of liability provision in the Master Agreement, nor the doctrine of election of remedies served to preclude MBIA's contract claims. The Court denied the Defendants' summary judgment motion with respect to MBIA's claims for a declaratory judgment, breach of the implied covenant of good faith and fair dealing and promissory estoppel. With respect to MBIA's motion for partial summary judgment, the February 6 Opinion held that the Defendants' affirmative defenses of unclean hands and equitable estoppel both failed. The parties' motions to preclude evidence were both denied, with the Court holding that "[f]actual issues are presented by the experts' testimony, and their resolution is not appropriate in the context of the present motions."

In their present motion for reconsideration, the Defendants contend that there are two issues that were briefed but not addressed in the February 6 Opinion, namely

Patriarch's request for dismissal of MBIA's claim relating to the Class C Notes and the controlling law from the New York Court of Appeals that requires dismissal of MBIA's claim for anticipatory repudiation.

The Defendants' Motion For Reconsideration Is Denied

According to the Defendants, it is undisputed that the Class C Notes could not satisfy the applicable debt-for-tax condition in the Master Agreement, and MBIA did not oppose Patriarch's motion for summary judgment on this point. Additionally, the Defendants contend that under controlling case law from the New York Court of Appeals, MBIA cannot sustain its claim for anticipatory repudiation because MBIA claims that it fully performed its obligations under the Master Agreement. Because the Defendants have failed to raise any factual or legal issues that the Court overlooked in its February 6 Opinion, the Defendants' motion for reconsideration is denied.

A. The Defendants' Motion For Reconsideration With Respect To MBIA's Claim Relating To The Class C Note Is Denied

According to the Defendants, although the February 6 Opinion focused on the only claim alleged in MBIA's complaint, namely whether Patriarch breached its obligation to transfer the Class B Notes, during expert discovery, MBIA asserted that only a portion of the Class B Notes could have been rated investment grade by Moody's and S&P. As a result, MBIA alleged that, pursuant to Section 7.13(b)(4) of the Indenture, the unrated portion of the Class B Notes should have been converted into newly-issued Class C Notes, and Patriarch breached its obligation to transfer a portion of these Notes.

The Defendants contend that they are entitled to summary judgment on this claim because, pursuant to the Master Agreement, Patriarch's obligation to transfer the Class C Notes is still "subject to the same conditions" as the Class B Notes "except the condition relating to the rating of the Class B Notes." Because Patriarch's obligation to transfer the Class C Notes is subject to the same conditions pertaining to Patriarch's obligation to transfer the Class B Notes, the Defendants note that the Master Agreement only obligated Patriarch to transfer the Class C Notes if they "constitute debt for United States federal income tax purposes as evidence by an opinion of a nationally-recognized tax counsel." The

Defendants contend that their summary judgment motion papers established that it is undisputed that the Class C Notes could not have satisfied the debt for tax purposes condition at any time. In support of this contention, the Defendants cite the testimony of their tax expert, who opined that the Class C Notes "would remain equity for tax purposes," and note that MBIA's tax expert testified that he "wasn't asked to address the class C notes at all." According to the Defendants, MBIA did not oppose the motion for summary judgment with respect to this claim.

The thrust of the Defendants' argument with respect to their motion for reconsideration of the Class C Notes issue is that the Court overlooked the fact that MBIA's expert failed to opine regarding the tax status of the Class C Notes, while Patriarch's expert rendered an opinion that the Class C Notes "would remain equity for tax purposes," thereby making it impossible for the Class C Notes to satisfy the debt-for-tax condition. Although the Defendants are correct that the Court did not directly address claims concerning the Class C Notes, the Court did note that "[f]actual issues are presented by the experts' testimony, and their resolution is not appropriate in the context of the present motions." The

question concerning the Class C Notes and the debt-for-tax condition represents one such factual issue, as the Defendants' arguments were based on the substance of the experts' testimony. Because the Defendants cannot "point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court," ResQNet.com, 2008 WL 4376367, at *2, the Defendants' motion to reconsider the Class C Notes issue is denied.

B. The Defendants' Motion For Reconsideration With Respect To MBIA's Anticipatory Repudiation Claim Is Denied

In its opposition to the Defendants' motion for summary judgment, MBIA stated that "[a]s of early 2004, MBIA had fully performed under the Master Agreement." According to the Defendants, the February 6 Opinion overlooked the fact that this concession on the part of MBIA precludes any claim for anticipatory repudiation under the New York Court of Appeals case Long Island R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 463-64, 393 N.Y.S.2d 925, 362 N.E.2d 558, 563 (1977). In Northville Industries, the Court of Appeals held that "a party who has fully performed cannot invoke the

doctrine [of anticipatory repudiation] even though the other party has repudiated." Id. The Court of Appeals specified that this limitation on the doctrine of anticipatory repudiation exists "even in the instance of 'a contract originally bilateral that has become unilateral by full performance by one party.'" Id. (quoting Restatement, Contracts § 318). This legal principle has been followed by the federal courts. See Lucente v. Int'l Bus. Mach. Corp., 310 F.3d 243, 259 n.5 (2d Cir. 2002) ("New York courts have generally limited the doctrine of anticipatory breach to bilateral contracts requiring mutual and interdependent obligations."); see also Reprosystem, B.V. v. SCM Corp., 630 F. Supp. 1099, 1101 (S.D.N.Y. 1986) ("In New York, the doctrine of anticipatory breach is only available as a defense to continued performance by the injured party and therefore is not appropriate if the party invoking the doctrine has fully performed.").

In further support of their motion for reconsideration, the Defendants note that, in its briefing opposing the Defendants' election of remedies defense, MBIA asserted in a bold and capitalized section that "MBIA Had No Remaining Performance Obligations Under the Master Agreement

After Defendants' Breaches." At another point in the summary judgment briefing, MBIA represented that it "had fully performed under the Master Agreement by transferring the management of Amara-1, Amara-2 and Oasis to Defendants and entering into certain premium assignment agreements with the Defendants." According to the Defendants, although MBIA stated that it had a "remaining obligation . . . to consent to the ultimate contribution of the B Notes," its brief made clear that this was neither an obligation owed to Patriarch nor in any way interdependent with Patriarch's obligations. The Defendants contend that because MBIA conceded that it had fully performed all of its obligations to Patriarch under the Master Agreement more than three years before the alleged repudiation, the Plaintiff's anticipatory repudiation claim fails as a matter of law and summary judgment should be granted in the Defendants' favor.

The Defendants' citations to the Plaintiff's summary judgment briefing fail to establish an issue the Court overlooked in the February 6 Opinion. Although the Defendants' cite language from the Plaintiff's opposition brief suggesting that the Plaintiff believed its obligations were complete, the pleadings before the Court demonstrated

that MBIA did not consider its obligations under the Master Agreement to be fulfilled. For example, MBIA's complaint stated, "MBIA has performed its obligations to date under the Master Agreement and is ready, willing and able to perform its remaining obligations under the Master Agreement, including its obligation to assist Patriarch in causing the occurrence of certain of the Contribution Terms." Compl. ¶ 56. MBIA's brief in opposition to the Defendants' motion for summary judgment cited the Master Agreement and noted that "MBIA and Patriarch also agreed 'to cooperate and use commercially reasonable efforts to procure as soon as reasonably practicable' the satisfaction of the rating and debt-for-tax Conditions" and "[o]nce MBIA [appointed Patriarch affiliates to manage Amara-1, Amara-2 and Oasis], the parties owed no further performance under the Master Agreement, except for the obligation to cause the satisfaction of the Conditions and Defendants' obligation to cause the contribution of the B Notes (and C Notes) to the Identified CDOs." (emphasis in the original). These passages, which describe MBIA's "remaining obligations under the Master Agreement," stand contrary to the suggestion that the Plaintiff perceived its obligations under the Master Agreement to be fulfilled.

Furthermore, although the Defendants quote a passage from the Plaintiff's summary judgment briefing and conclude that MBIA conceded that it had fully performed under the Master Agreement, a more complete reading of the passage the Defendants cite illustrates MBIA's understanding that its performance under the Master Agreement was not yet complete:

As of early 2004, MBIA had fully performed under the Master Agreement by transferring the management of Amara-1, Amara-2 and Oasis to Defendants and entering into certain premium assignment agreements with Defendants. MBIA's only remaining obligation was to consent to the ultimate contribution of the B Notes (and the C Notes, if applicable). [FN 40: MBIA was never called upon to perform this obligation because Patriarch did not use commercially reasonable efforts to satisfy the Conditions.] Thus, after learning of Defendants' breach in November 2007, MBIA did not take any action to perform under the Master Agreement.

Pl.'s Opp. at 29 (citation omitted). Thus, notwithstanding the Defendants' selected quotations from the Plaintiff's summary judgment briefing, the materials before the Court when it issued the February 6 Opinion included numerous references to the fact that MBIA remained obligated to perform under the Master Agreement. As such, the Court did not overlook evidence conclusively establishing MBIA to have completed its performance under the Master Agreement, and it would have been

inappropriate to grant summary judgment to the Defendants on the basis of the Court of Appeals' Northville Industries decision. Accordingly, the Defendants' motion for reconsideration with respect to MBIA's anticipatory repudiation claim is denied.

Conclusion

Based on the conclusions set forth above, the Defendants' motion for reconsideration is denied.

It is so ordered.

New York, NY
April 3, 2012

A handwritten signature in cursive script, reading "Sweet", written in black ink. The signature is positioned above a horizontal line.

ROBERT W. SWEET
U.S.D.J.