UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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In re:

CHAPTER 11
Case Nos. 03-11678 (ALG)
and 03-11679 (ALG)
(Jointly Administered)

AEROVIAS NACIONALES DE COLOMBIA, S.A. AVIANCA

-and-

AVIANCA, INC.

Debtors.

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OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

In a Memorandum Opinion dated May 6, 2005 (the "Decision"), the Court denied the claims of Ansett Worldwide Aviation, U.S.A., Ansett Worldwide Aviation Limited, AWMS I, and AWMS III (collectively, "Ansett") for rejection damages under certain modified, assumed leases. Ansett has timely moved for reconsideration.

Motions for reargument or reconsideration require the movant to show "that the Court overlooked controlling decisions or factual matters 'that might materially have influenced its earlier decision.'" *Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245, 254 (S.D.N.Y. 1997) (quoting *Anglo-American Ins. Group, P.L.C. v. CalFed Inc.*, 940 F. Supp. 554, 557 (S.D.N.Y. 1996)); *In re Jamesway Corp.*, 203 B.R. 543, 546 (Bankr. S.D.N.Y. 1996). In the alternative, the movant must "demonstrate the need to correct a clear error or prevent manifest injustice." *Sanofi-Synthelabo v. Apotex, Inc.*, 363 F. Supp. 2d 592, 594 (S.D.N.Y. 2005) (citing *Griffin Indus., Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)).

The rule permitting reargument is "narrowly construed and strictly applied in order to avoid repetitive arguments already considered by the Court." *Winkler v. Metropolitan Life Ins.*, 340 F. Supp. 2d 411, 413 (S.D.N.Y. 2004); *Griffin Indus., Inc.*, 72 F. Supp. 2d at 368; *In re Best Payphones, Inc.*, 2003 WL 1089525, at *2 (Bankr. S.D.N.Y. 2003). Movants are not permitted to present new theories or to advance new facts. *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998); *Griffin Indus., Inc.*, 72 F. Supp. 2d at 368. A motion for reconsideration is "limited to the record that was before the Court on the original motion." *Periera v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.)*, 216 B.R. 713, 716 (S.D.N.Y. 1997) (internal citations omitted).

In this case, Ansett seeks reconsideration of that portion of the Court's Decision that rejected the argument that Avianca is equitably estopped from denying lease rent differential damages in connection with the assumption of certain modified aircraft leases. (Mot. at ¶ 2.) Ansett claims that the Court erred in treating the pleadings as cross-motions for summary judgment and thereby denied Ansett the opportunity to conduct discovery. (Mot. at ¶¶ 3-4.) Equitable estoppel, Ansett argues, is a fact intensive inquiry "not susceptible to summary judgment," and it was an error of law for the Court to dispose of it summarily. (Mot. at ¶ 6.) Ansett further argues that the Court "applied the wrong standard for equitable estoppel," claiming that bad faith is not a required element of a claim for equitable estoppel under New York law. (Mot. at ¶ 5.) Finally, Ansett argues that the Decision contains a factual error, and that "there is evidence that tends to show that the Debtors reviewed [Ansett's] proofs of claim prior to entering into the lease amendments." (Mot. at ¶ 17.) For this, Ansett cites to the Third Application for

Interim Professional Compensation of Smith, Gambrell & Russell, LLP (the "Compensation Application"), counsel to Avianca. (Mot. at ¶ 7.)

The record establishes that Ansett could not make out a case of equitable estoppel on the facts of this matter. Equitable estoppel is an affirmative defense properly used where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct. *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996). As discussed at length in the Decision, the Court determined that Ansett had no rights to rejection damage claims under either contract or bankruptcy law, based upon Ansett's own agreement in the MOU. Ansett seems to argue that an estoppel was created by Avianca's subsequent silence, as Avianca allegedly knew that Ansett had filed a proof of claim seeking damages that were inconsistent with the MOU. Ansett cannot show that it was inequitable for Avianca to proceed to negotiate final lease amendments that were entirely consistent with the MOU, even if Avianca had complete knowledge that Ansett had asserted a different position in a proof of claim. *Cf. Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 957-58 (5th Cir. 1981) (en banc).

Ansett cites *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 594 (2d Cir. 1996), for the proposition that the party relying on the doctrine of equitable estoppel must show that the party sought to be estopped: (1) engaged in conduct that amounts to a false representation of material fact; (2) intended that the conduct would be acted upon by the other party; and (3) had knowledge of the real facts. (Mot. at ¶ 10.) However, Ansett omits the remainder of the test, which requires the party seeking equitable estoppel to show that it: (4) lacked knowledge and the means of acquiring knowledge of the real

facts; (5) relied on the conduct of the party to be estopped; and (6) prejudicially changed its position in such reliance. *Id.* at 594; *Babitt v. Vebeliunas (In re Vebeliunas)*, 332 F.3d 85, 93-94 (2d Cir. 2003). Additionally, when a party seeks to assert estoppel by silence, it must show that the opposing party had: (1) a duty to speak; (2) an opportunity to speak; and (3) caused injury by failing to speak. *Ellison Assocs. v. Eastwood Mgmt. Corp. (In re Ellison Assocs.)*, 63 B.R. 756, 765 (S.D.N.Y. 1993). The record is sufficient to demonstrate that Ansett cannot show that injury was caused or that it prejudicially changed its position when it entered into leases consistent with the MOU.

Ansett also argues that equitable estoppel cannot be disposed of on summary judgment. (Mot. at ¶¶ 13-15.) There is ample case law in the Second Circuit indicating that where the party asserting equitable estoppel fails to make out a colorable claim, summary dismissal is appropriate. *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 61 (2d Cir. 1986) (holding that the "proposition that summary judgment is inappropriate in an equitable estoppel case is misplaced in view of appellant's failure to present even colorable estoppel grounds and our clear precedents approving summary judgment in such cases."); *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 46, 50 (2d Cir. 1985) (affirming District Court's denial, on summary judgment, of appellant's defense of equitable estoppel, stating "[a]ccepting [appellant]'s allegations as true, the case does not present facts on which a jury could find that the . . . defendants were estopped . . ."); *O'Malley v. GTE Service Corp.*, 758 F.2d 818, 822 (2d Cir. 1985) (affirming District Court's denial, on summary judgment, of appellant's claim of equitable estoppel barring ex-employer's defense of tardy-filing). Accordingly, even if there were record evidence that Avianca did review Ansett's proof of claim prior to

entering into the lease amendments, and thereafter remained silent, it would not provide grounds for reconsideration.[1] Nor was this issue one that materially influenced the Court's decision, as Ansett implies. (Mot. at ¶ 17.); *Anglo-American Ins. Group, P.L.C.*, 940 F. Supp. at 557.

Similarly, Ansett claims the Court committed an error of law in applying a "bad faith" standard to Avianca's conduct to determine the applicability of equitable estoppel under New York law. (Mot. at ¶¶ 10-12.) While the Court did not find bad faith in Avianca's conduct, it did not base its decision on this issue; it was merely one factor by which the Court assessed the appropriateness of applying an equitable doctrine such as equitable estoppel.

For the reasons stated above, Ansett's motion is denied.

IT IS SO ORDERED.

Dated: New York, New York
July 18, 2005

/s/ Allan L. Gropper
UNITED STATES BANKRUPTCY JUDGE

[1] The Compensation Application demonstrates that counsel for Avianca reviewed proofs of claims but does not specifically refer to Ansett's proof of claim.