SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

CHARLES E. RAMOS

PRESENT: _____ PART 53
Justice

Hennebery

-v-

Lem Baer Borstein

INDEX NO. 600357/10

MOTION DATE _____

MOTION SEQ. NO. 03

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/9/13

_____, J.S.C.

CHARLES E. RAMOS

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

----------X

VIRGINIA M. HENNEBERRY,

Plaintiff,

Index No.
600357/10

- against -

LEON B. BORSTEIN, JAMES B. SHEINBAUM, and BORSTEIN & SHEINBAUM, A/K/A THE LAW FIRM OF BORSTEIN & SHEINBAUM,

Defendants.

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Charles E. Ramos, J.S.C.:

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

Defendants Leon B. Borstein, James B. Sheinbaum, and Borstein & Sheinbaum (hereafter, the law firm) move by way of order to show cause to dismiss this action pursuant to CPLR 3211 (a) (1), (5), and (7) and staying all other actions and proceedings pending the determination of this application (motion sequence number 003).

Sheinbaum and the law firm (motion sequence number 004), and Borstein (motion sequence number 005) move to dismiss this action pursuant to CPLR 3211 (a) (1), (5), and (7) and CPLR 3016 (b).

Background

A full recitation of the factual background in this action is set forth in the decision of the First Department, *Henneberry v Borstein* (91 AD3d 493 [1st Dept 2012]).

Plaintiff Virginia Henneberry and defendant Borstein are

divorced from one another. Prior to divorcing, plaintiff commenced an arbitration against her former employer. Defendants, including Borstein, represented plaintiff in the arbitration proceeding. Plaintiff commenced this action against defendants alleging legal malpractice and breach of fiduciary duty pertaining to the adverse result of the arbitration.

Plaintiff commenced three separate actions concerning defendants' alleged failures to fulfill their professional duties to her in the arbitration, in 2007, in 2009, and in 2010. Justice Tingling dismissed the 2007 action for lack of personal jurisdiction, based on improper service, and granted plaintiff's cross motion for an extension of time to effect service pursuant to CPLR 306-b, provided she commence a new action, which she did. The new action was the 2010 action. Justice Tingling also dismissed the 2009 action. That part of the judge's decision is not at issue here and has no effect on these motions.

Defendants moved to dismiss the 2010 complaint, advancing arguments based on defective service of process, collateral estoppel (based on the arbitrator's ruling), failure to state a claim under section (a) (7) of CPLR 3211, CPLR 3016, and the statute of limitations. This Court held oral argument on September 27, 2010. Most of the discussion centered on service of process, CPLR 306-b, and statute of limitations. This Court granted defendants' motions and dismissed the 2010 complaint on

the ground that the action was time-barred by the applicable statute of limitations. The First Department reversed this Court's decision, deeming the complaint in the 2010 action to be an amendment of the complaint in the 2007 action, and modifying Justice Tingling's decision to the extent that the 2007 action was not dismissed. Justice Tingling's decision was otherwise affirmed.

In opposition to the motions to dismiss presently before the Court, plaintiff invokes the one motion rule and the doctrine of the law of the case. Defendants contend that the doctrine does not apply, because the First Department did not specifically address any of the arguments raised on the instant motions, including the statute of limitations. Defendants contend that the First Department did not necessarily resolve the merits of the arguments in the instant motions.

The doctrine of the law of the case precludes the parties in a case from relitigating an issue in the same case already determined by a court (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). The doctrine "generally operates to preclude successive motions by the same party upon the same proof" (*Ruiz v Anderson*, 96 AD3d 691, 692 [1st Dept 2012]). For the duration of the case, the determination of the issue is binding on the parties (*id.*), provided that they had a full and fair opportunity to litigate the issue (*People v Evans*, 94 NY2d 499, 502 [2000]). If the

issue was not fully litigated, meaning that it was not necessarily resolved on the merits in the prior decision, it is not binding as law of the case (*McCoy v Metropolitan Transp. Auth.*, 53 AD3d 457, 458 [1st Dept 2008]; *Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]).

In its decision, the First Department stated that plaintiff "commenced the 2007 Action by filing a summons with notice on November 19, 2007, just under a month before the expiration of the applicable three-year statute of limitations (*see* CPLR 214 [6])" (*Henneberry*, 91 AD3d at 494). In the last paragraph, the First Department deemed the 2010 complaint to be an amendment of the 2007 complaint (*id.* at 497). This is an explicit statement that plaintiff's action was not time-barred. Thus, notwithstanding the First Department's election not to discuss the issue of statute of limitations in depth, the issue was necessarily resolved.

In connection with ruling that Justice Tingling should not have dismissed the 2007 action, the First Department stated that "[t]he court should have limited its ruling in the first order on appeal to granting plaintiff's cross motion for an extension of time to effect service pursuant to CPLR 306-b" (*id.* at 495). The First Department discussed the CPLR 306-b standards for extending the time to serve, either for good cause or in the interests of justice, and determined that plaintiff's case met the latter

standard (*id.* at 495 - 496).

> "Under this prong of CPLR 306-b, the Court of Appeals has instructed that a court 'may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor . . ., including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant'"

(*id.* at 496 [internal citations omitted]).

In deciding that the 2007 case met the "in the interest of justice" standard for extending time to serve, the First Department noted plaintiff's diligent attempts to effect service of the 2007 complaint, the fact that the statute of limitations had expired by the time that Justice Tingling issued his decision, and defendants' awareness of the 2007 action. "Finally, construing the pleading in the light most favorable to plaintiff, as is required on consideration of a CPLR 3211 motion to dismiss, we find that it asserts actions and omissions by defendants that support viable claims for recovery" (*id.*). The last paragraph states that "[g]ranting plaintiff the opportunity to pursue this action is not only consistent with the 'interest of justice' exception set forth in CPLR 306-b, but also with our strong interest in deciding cases on the merits where possible" (*id.* at 497).

These strong statements demonstrate that the First Department both addressed and ultimately rejected defendants' grounds for dismissal under the CPLR 3211 standard. Defendants

do not claim any circumstances warranting a departure from the doctrine, such as new evidence or a change in law or error (*see Miller v Schreyer*, 257 AD2d 358, 361 [1st Dept 1999]; *Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 101 AD3d 1034, 1036 [2d Dept 2012]). Defendants may not now argue that plaintiffs' claims are deficient according to CPLR 3211 and 3016.

The instant motions must also be denied pursuant to the one motion rule. CPLR 3211 (e) provides that only one CPLR 3211 motion may be filed (with some exceptions) (*see Lemberg v John Blair Communications*, 258 AD2d 291, 292 [1st Dept 1999]; *Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 88 [1st Dept 1993]). This rule exists to promote efficiency in litigation by encouraging the parties to bring before the court, as soon as possible, all available bases for dismissal (*Nassau Roofing & Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679, 680 [3d Dept 1980]; *see generally* Siegel, NY Prac § 273 [5th ed]).

A second motion cannot seek dismissal of the same claim on the same grounds raised during a prior motion (*Schwartzman v Weintraub*, 56 AD2d 517, 517 [1st Dept 1977]; *B.S.L. One Owners Corp. v Key Intl. Mfg.*, 225 AD2d 643, 644 [2d Dept 1996]). Furthermore, the failure to raise in a pre-answer motion a possible basis for dismissal constitutes a waiver of the opportunity to raise that argument in another pre-answer motion (*McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]; *Ramos v City of*

New York, 51 AD3d 753, 754 [2d Dept 2008]). This rule applies to arguments based on res judicata (*Paterno v Carroll*, 75 AD3d 625, 628 [2d Dept 2010]).

The instant motions raise the same bases for dismissal as defendants' previous motions, except for the argument based on res judicata which was not raised before. In the divorce action, plaintiff asserted a malpractice claim against Borstein. Her present complaint alleges malpractice against Borstein based on much the same misconduct alleged in the divorce. During an October 5, 2006 conference in the divorce proceedings, plaintiff's attorney orally withdrew the malpractice claim, and the trial judge ordered the parties to reduce their agreement concerning the malpractice claim into a stipulation. The parties never entered into a stipulation.

Plaintiff argues that the malpractice claim cannot form the basis of res judicata, because it was withdrawn and never litigated. Defendant argues that malpractice could have been litigated and, therefore, res judicata applies.

As plaintiff correctly notes, defendants could have moved on the basis of res judicata when they made the previous motions that were reversed/modified by the First Department. By not doing so, they waived the opportunity to raise res judicata in these motions. Exceptions to the one motion rule may arise under certain circumstances (*Lemberg*, 258 AD2d at 292, *Ultramar*, 191

AD2d at 88; *Nassau Roofing*, 74 AD2d at 680). None of these circumstances are claimed. Whether res judicata affects plaintiff's malpractice claim against Borstein will not be determined on these motions.

Defendants' request for a stay was deemed to be moot during the June 4, 2012 oral argument on these motions.

In conclusion, it is

ORDERED that motion sequence numbers 003, 004, and 005 are denied; and it is further

ORDERED that defendants shall serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: April 9, 2013

ENTER:

J.S.C.

CHARLES E. RAMOS