

Jacoby & Meyers, LLP v Flomenhaft

2014 NY Slip Op 30642(U)

March 13, 2014

Sup Ct, NY County

Docket Number: 403550/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JACOBY & MEYERS, LLP and FINKELSTEIN &
PARTNERS, LLP,

Index No. 403550/10

Plaintiffs,

Mot. seq. no. 006

- against -

DECISION AND ORDER

MICHAEL FLOMENHAFT, FLOMENHAFT &
CANNATA, LLP, and THE FLOMENHAFT LAW FIRM,
PLLC,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiffs:

Katie M. Lachter, Esq.
Richard Supple, Esq.
Hinshaw & Culbertson LLP
800 Third Ave., 13th fl.
New York, NY 10022
212-471-6200

For defendants:

Stephen D. Chawkin, Jr., Esq.
The Flomenhaft Law Firm, PLLC
90 Broad St., Ste. 1901
New York, NY 10004
646-747-0315

Defendants move pursuant to CPLR 3212 for an order granting them summary judgment dismissing the third count of plaintiffs' third amended complaint. Plaintiffs oppose.

I. BACKGROUND

On or about April 2009, defendant Michael Flomenhaft, an attorney, closed his practice at defendant Flomenhaft & Cannata, LLP (F&C), and began working for plaintiff law firm Jacoby & Meyers, LLP (J&M). Plaintiffs allege in their complaint that in order to finance the move, J&M loaned defendants a total of \$492,999.63. On December 28, 2009, Flomenhaft resigned from J&M. (NYSCEF 121).

In or about February 2010, J&M and its affiliate, plaintiff Finkelstein and Partners LLP, filed 1099-MISC information returns with the Internal Revenue Service indicating that

Flomenhaft ad received from plaintiffs \$481,305.59 in “nonemployee compensation” in 2009. (NYSCEF 126).

In or about March 2010, J&M commenced this action in Orange County (index No. 269/2010) for breach of contract, breach of fiduciary duty, and an accounting, alleging, among other things, that it had loaned \$492,999.63 to Flomenhaft and F&C in 2009, which they agreed to repay from future fees, and that the loans became due upon Flomenhaft’s resignation. (NYSCEF 121, 128).

Defendants thereafter moved for summary dismissal of the action, arguing, among other things, that J&M was estopped from claiming that the payments constituted loans, as it was contrary to the representation set forth in its Form 1099-MISC. (NYSCEF 164). J&M opposed the motion, submitting affidavits from Andrew Finkelstein and Michael Caputo, respectively, plaintiffs’ managing partner and chief financial officer. Caputo stated that plaintiffs’ accountant had advised filing a Form 1099 as the debt was likely uncollectible, and that if plaintiffs considered the payments employment compensation, they would have included them in Flomenhaft’s W-2 form. (NYSCEF 151). Finkelstein maintained that plaintiffs will amend their filings if and when the debt is paid. (NYSCEF 148).

By decision and order dated November 12, 2010, the Orange County justice denied summary judgment, stating, without explanation, that J&M had raised triable issues of fact. (NYSCEF 131). The case was thereafter transferred to New York County. (NYSCEF 1). By decision and order dated April 17, 2012, the Appellate Division, Second Department, affirmed the denial of summary judgment, finding, without mentioning the tax filing, that J&M had raised triable issues. (*Jacoby & Meyers, LLP v Flomenhaft*, 94 AD3d 948 [2d Dept 2012]).

At examinations before trial (EBTs) held in July and August 2012, Finkelstein and Caputo testified that the filings were not issued in error. (NYSCEF 132, 133).

II. CONTENTIONS

Defendants argue that plaintiffs' tax filing estop their claim of a loan, and that, in any event, the payments to Flomenhaft and F&C lack any indicia of a loan. (NYSCEF 118, 120). Plaintiffs contend that defendants' estoppel defense, which was leveled against J&M in the prior motion, is barred by the law of the case and the prohibition against successive motions, that their filing, in any event, does not estop them from recovery under the loan, and that the evidence is sufficient to establish that the payments were made pursuant to the alleged loan. (NYSCEF 145, 146).

In reply, defendants deny that their motion is successive as the newly obtained Finkelstein and Caputo testimony conclusively shows that the filing was deliberate. (NYSCEF 174).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

When parties have had a full and fair opportunity to litigate, a legal determination resolved on the merits in a prior order in the same action constitutes the law of the case. (*People v Evans*, 94 NY2d 499, 502 [2000]; *Antonetti v City of New York*, 111 AD3d 558 [1st Dept 2013]; *Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]). Thus, once a court judicially determines an issue, another court of coordinate jurisdiction should not revisit it. (*Gliklad v Cherney*, 113 AD3d 505 [1st Dept 2014]; *Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385 [1st Dept 1983]).

Successive motions for summary judgment are generally disfavored. They are not prohibited, however, when new evidence is produced that was not available at the time of the prior motion. (*Sansol Indus. v 345 E. 56th St. Owners, Inc.*, 276 AD2d 370, 371 [1st Dept 2000]). While deposition testimony that was not elicited until after the original summary judgment motion was decided may constitute new evidence, it must be used to establish facts that were not available to the movant earlier and which could not have been established through alternative evidentiary means. (*Vinar v Litman*, 110 AD3d 867 [2d Dept 2013]).

Here, it is undisputed that defendants argued before the Orange County motion court and the Appellate Division that J&M's filing of the Form 1099-MISC mandated dismissal of the complaint. While neither court specified the issues raised, the denial of the motion, even without explanation, evidences the rejection of defendants' argument. Consequently, defendants' motion, which relies in large part on the same tax filing, is barred by the law of the case. (*See Bd. of Managers of 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135 [1st Dept 2013] [appellate court's resolution of issue on prior appeal constitutes law of case, and is binding on supreme court, as well as appellate court]; *Czernicki v Lawniczak*, 103 AD3d 769, 770 [2d Dept

2013], *lv denied*, 21 NY3d 929 [arguments raised or that could have been raised in prior appeal are either barred under law of case or waived]; *Stokes v Suffolk County*, 63 AD2d 645 [2d Dept 1978] [when issue referenced in litigant's brief on prior appeal, its consideration on merits in later appeal precluded under law of case]).

Finkelstein's and Caputo's depositions reiterate the allegations set forth in their affidavits, namely, that plaintiffs earnestly filed their Form 1099-MISC. Thus, there is no new evidence justifying the instant successive summary judgment motion. (*See Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526 [1st Dept 2013] [although defendant's deposition testimony was not available at time of first motion, it did not yield new evidence warranting consideration of second motion]; *Matter of Bronsky-Graff Orthodontics, P.C.*, 37 AD3d 946 [3d Dept 2007] [new deposition transcripts did not yield sufficiently new materials or previously unavailable information]; *R.F. Schiffmann Assoc., Inc. v Baker & Daniels LLP*, 41 Misc 3d 1235(A), 2013 NY Slip Op 51986[U] [Sup Ct NY County, 2013, Jaffe, J.] [new deposition testimony did not differ substantially from evidence submitted on prior motion; motion denied as successive]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied in its entirety.

ENTER:



Barbara Jaffe, JSC

DATED: March 13, 2014
 New York, New York