Kasowitz Benson Torres LLP v Cabrera
2020 NY Slip Op 31318(U)
March 28, 2020
Supreme Court, New York County
Docket Number: 157367/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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KASOWITZ BENSON TORRES LLP,

Plaintiff,

-against-

UNITED STATE AMBASSADOR CESAR B. CABRERA RETIRED BARZA DEVELOPMENT CORP., and ZUMON CORPORATION,

Defendants.

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INDEX No.: 157367/2018

MOT. DATE: 11/25/2019

MOT. SEQ. No.: 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 80, 85, 86
were read on this motion to/for REARGUMENT/RECONSIDERATION

Defendants-counterclaimants United States Ambassador Cesar B. Cabrera Retired, Barza Development Corp., and Zumon Corporation (the "Barza Parties" or "defendants") submit this motion for leave to reargue motion sequence 002 pursuant to CPLR § 2221(d) (Def. Br. at 1 [NYSCEF Doc. No. 78]).

Defendants argue that the court's decision and order, dated September 17, 2019 [NYSCEF Doc. No. 67]), overlooked matters of law and fact which led to erroneous dismissal of the defendant's counterclaims and an award of summary judgment in favor of plaintiff Kasowitz Benson Torres LLP's ("Kasowitz") claim for fees (*id.*). In their Answer with Counterclaims (NYSCEF Doc. No. 16), defendants assert a malpractice claim against plaintiff Kasowitz for missing a one-year statute of limitations for bringing a claim against defendants' prior counsel, Meister Selig & Fein LLP ("Meister"), which had missed the statute of limitations with respect to a claim against non-party Caribbean Property Group ("CPG"). Defendants argue that the court conflated the respective statutes of limitation applicable to the latter two claims (*id.* at 2). Defendants argue that they alleged that the statute ran as against CPG on February 14, 2014 during Meister's watch and, had the statute not been allowed to run on Meister's watch, there would have been no malpractice claim to assert against Meister (*id.*; *see* Answer with

Counterclaims ¶ 77). Defendants argue that, in the Federal action brought against Meister, the Court found that the statute expired as against Meister no later than July 28, 2015, four months after Kasowitz was first contacted by defendants (*see* Memorandum and Order dated May 10, 2018, *Barza Dev. Corp. et al. v Meister Seelig & Fein LLP*, SD NY Case No 16-cv-7763 [NYSCEF Doc. No. 77]). Defendants argue that its claim here is that when first retained in June 2015, Kasowitz did not take steps necessary to ascertain when the statute of limitations on the claim against Meister would expire (Counterclaims ¶¶ 105–07).

In its Decision and Order, this court held that the claim should be dismissed because defendant Barza could not allege causation as the defendants alleged in both their complaint in the Meister action and in their counterclaims that any claims against CPG would have expired on February 14, 2014 (Decision and Order at 6 [NYSCEF Doc. No. 67]; Counterclaims ¶ 77). Defendants argue that the court conflated two different statutes of limitations: the one against CPG and the one against Meister. Defendants argue that the fact that the statute of limitations against CPG expired in February 2014 is not determinative of when the statute of limitations began to run against either Meister or Kasowitz (Def. Br. at 3). Defendants reiterate that even though the Federal District Court found that the statute against CPG ran in February 2014, it also found that the statute against Meister ran "no later than July 28, [2015]" (Storch Aff. Ex. B at 15–16 [NYSCEF Doc. No. 77]). Defendants argue that the court's implicit determination, that the statute against Meister began to run when the statute against CPG ran, is wrong because under the applicable Puerto Rican statute of limitations, the statute against Meister did not begin to run until the defendants discovered both the fact of harm and what caused it, here, Meister's missing the statute (*id.* at 8, 14–15). Defendants argue that, in the District Court, there was sufficient evidence to find that this date was as late as July 28, 2014, such that the statute of limitations did not expire against Meister before July 28, 2015 (*id.* at 14–15).

Defendants further argue that the court's award of summary judgment to Kasowitz overlooked a material fact (Def. Br. at 4). Although the court held that defendants did not state in any detail how plaintiff overbilled for its work thus failing to raise a triable issue of fact, if the claim against Meister had in fact run months before Kasowitz was engaged, then there is a material fact issue as to why Kasowitz is entitled to bill over three hundred thousand dollars in fees on an already barred claim (*id.*). Defendants further argue that if the claim had not expired

as defendants contended, then there is a material issue of fact as to whether the malpractice in failing to timely pursue Meister entitled Kasowitz to still collect fees.

Defendants argue that motions for reargument may be granted on a showing that the court overlooked or misapprehended facts or law or for some other reason mistakenly arrived at its earlier conclusion and that, here, defendants have met this burden (*id.* at 4–5; *Weiss v Bretton Woods Condominium II*, 151 AD3d 905 [2d Dept 2017]; *see also Beverage Marketing USA, Inc. v South Breach Beverage Co., Inc.*, 58 AD3d 657, 657 [2d Dept 2009]).

In opposition, plaintiff Kasowitz argues that the court's determinations were unquestionably correct (Pl. Br. at 1 [NYSCEF Doc. No. 85]). Reargument on defendants' counterclaim for malpractice can only be granted where matters of fact or law were "overlooked or misapprehended by the court in determining the prior motion" (CPLR § 2221 (d) (2); *300 West Realty Co. v City of New York*, 99 AD2d 708, 709 [1st Dept 1984]; *see also Setters v AI Properties & Developments (USA) Corp.*, 139 AD3d 492, 493 [1st Dept 2016]). Defendants fail to identify a single fact overlooked or misapprehended Instead they rehash arguments that were rejected and ignore the findings of both this court and the Federal District Court (Pl. Br. at 3; *300 West Realty*, 99 AD2d at 709). In the federal suit against Meister, Judge Castel determined that there was no evidence that defendants exercised diligence to investigate or pursue their claims and dismissed claim against Meister (see *Barza Dev. Corp. v Meister Seelig & Fein LLP*, No. 16-cv-7763 (PKC), 2018 WL 2356664, at *1 [SD NY 2018]). In this action, the court correctly applied collateral estoppel to Judge Castel's holding that it was "defendants' own failure to exercise minimum diligence" that precluded their claim against Meister. Accordingly, defendants could not establish that Kasowitz caused them any injury (Decision and Order, at 6). In short, defendants allowed its claims against CPG to expire due to their lack of diligence, not due to Meister's conduct, never had an actionable claim against Meister and, consequently, cannot claim against Kasowitz either (Pl. Br. at 3–4). Plaintiff argues that defendants' "conflation of statutes of limitations" argument makes no sense as this court properly determined that defendants never had a claim against Meister in the first place (*id.* at 4).

Plaintiff next argues that defendants are not entitled to reargument of the court's summary judgment ruling (Pl. Br. at 4–5). Defendants' contention that there is a material fact issue as to why Kasowitz was entitled to bill on an expired claim, fails because (i) this court found, as did Judge Castel, that defendants' claims against Meister were untimely due to

defendants, failure to exercise minimum diligence (Decision and Order at 6), (ii) defendants failed to state in detail how Kasowitz overbilled for its work and, further, defendants have not suffered damages arising from the failure to provide monthly invoices (*id.* at 11), and (iii) defendants' theory that Kasowitz was not entitled to charge for work in connection with claims that had expired is a novel one, first raised in this motion, and thus not a basis for reargument (see *Onglingswan v Chase Home Fin., LLC*, 104 AD3d 543, 544 [1st Dept 2013]; *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005]).

In reply, defendants argue that there is nothing novel about the assertion that Kasowitz was not entitled to charge for work in connection with expired claims because defendants did in fact make the argument in their opposition to Kasowitz's motion for summary judgment (Reply Br. at 1; Def. Br. on motion sequence 002 at 2 [NYSCEF Doc. No. 58]). Even if the malpractice claim against Kasowitz fails because of lack of causation, that does not address whether Kasowitz earned its fees (Def. Reply at 2). Defendants further argue that the Morale Affidavit, submitted in connection with the motion for summary judgment, provided evidentiary support that Guillermo Morales had been told by Kasowitz that the claim was timely and that defendant Barza had fully complied with Kasowitz's requests for information, thereby raising a disputed issue of material fact as to whether fees charged for a barred claim were appropriate (*id.*; Morales Aff. ¶¶ 9, 14 [NYSCEF Doc. No. 39]). Kasowitz cannot shift the burden onto defendants by demanding itemized objections to a belated invoice. If Kasowitz were billing for a claim it knew to be meritless, defendant is entitled to prove there should not have been any billing at all (Def. Reply at 2; *Johnson v Labode*, 23 Misc3d 1122[A], 1122[A], 2009 NY Slip Op 50893[U], at *2 [Sup Ct Kings County 2009]). This is particularly true where the record shows it was Kasowitz which precipitated the withdrawal (Counterclaims ¶¶ 97, 98; Morales Aff. ¶ 16; *see Davidoff Hutcher & Citron LLP v Smirnov*, 2014 NY Slip Op 31795[U], at *12 [Sup Ct New York County 2014\; *Jeffrey L. Rosenberg & Assoc., LLC v Candid Litho Print., Ltd.*, 76 AD3d 510, 510 [2d Dept 2010]; *Collier, Cohen, Crystal & Bock v MacNamara*, 237 AD2d 152, 152 [1st Dept 1997]).

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22,

27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group,* 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola,* 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

Here, neither argument advanced by defendants is successful. First, the court did not conflate the two statutes of limitations. It applied a collateral estoppel analysis to defendants' legal malpractice claim, finding that defendants had already litigated this issue in the Meister action and the court found that the defendants failed to exercise minimum diligence to preserve their claims against CPG (Decision and Order on Motion Sequence 002 at 6 [NYSCEF Doc. No. 67, 76]. Defendants' summary judgment argument, that there are material issues of fact precluding summary judgment also fails as defendants' motion, similarly to its counterclaims, fail to state in detail how plaintiff overbilled defendants. Further, contrary to defendants' assertion that the court's decision contains an internal contradiction as to how plaintiff could bill defendants if no sufficient claim existed against Meister, no such contradiction exists as defendants' retention of plaintiff Kasowitz was not for its potential non-claim against Meister but for its original claim against CPG. Consequently, defendants' motion for reargument is **DENIED**.

This shall constitute the decision and order of the Court.

3/28/2020
DATE

O. PETER SHERWOOD, J.S.C.

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