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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SOLOMON CAPITAL, LLC, SOLOMON CAPITAL 401(K) TRUST, SOLOMON SHARBAT and SHELHAV RAFF,

Plaintiffs,

-against-

LION BIOTECHNOLOGIES, INC., formerly known as Genesis Biopharma, Inc.,

Defendant.

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INDEX No.: 651881/2016

MOT. DATE: 2/24/2020

MOT. SEQ. No.: 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166 were read on this motion to/for DISMISSAL FOR LACK OF PROSECUTION

Plaintiffs move to reargue or, in the alternative, renew in response to the court's decision and order on motion sequence 007 granting defendant's motion to dismiss for want of prosecution. For the following reasons, plaintiffs' motion is granted.

I. BACKGROUND

Plaintiffs are two individuals, Sharbat and Raff, and two entities, Solomon LLC and Solomon Capital 401(k) Trust (the "Trust"), of which Sharbat is the principal (Def. Aff., Ex. 1 ¶¶ 1–4 [NYSCEF Doc. No. 117] [hereinafter "Compl."]). Defendant Lion is a publicly traded biotechnology company focused on cancer treatment (Compl. ¶¶ 6, 9). Plaintiffs allege they invested $223,908 in Lion in three different instances. In return, plaintiffs allege they were promised: (i) a promissory note in Lion in the amount of the investments, (ii) one-half a common share of each dollar invested (the "Share Award"), and (iii) the right to convert the note into shares on the same terms offered to other investors in the company's next financing (*id.* ¶¶ 21, 40, 47). In July 2020, this court dismissed this case for want of prosecution under motion sequence 006, finding that defendant had met its burden of showing the issue had been joined and a note of issue had not been filed within 90-days of a demand for such (Decision and Order,

at 4 [Doc. No. 139]). Although plaintiffs argued that law office failure in this matter provided a reasonable excuse under CPLR 3216(e), the court ruled that this excuse was insufficient without counsel providing the requisite affidavit of merit from someone with personal knowledge (*id.* at 5).

Plaintiffs, now represented by new counsel, bring this action to reargue or renew on the basis that the verified complaint incorporated in plaintiff's affirmation in support should have satisfied the merit showing requirement and that new facts should change the court's prior ruling.

II. ARGUMENTS

A. Plaintiffs' Memorandum in Support

Plaintiffs begin by arguing that, while granting judicial discretion to dismiss, CPLR 3216 is forgiving of delay and never requires the court to dismiss a plaintiff's action based on plaintiff's neglect to proceed (Pl. Br. at 5 [Doc. No. 163]; *Cadichon v Facelle*, 18 NY3d 230, 240 [2011]; *Davis v Goodsell*, 6 AD3d 382, 383 [2d Dept 2004]). Plaintiffs argue that the court overlooked certain law and facts relating to plaintiffs' opposition in motion sequence 006. In particular, plaintiffs highlight that the affirmation of then-counsel Jonathan Sack included plaintiffs' verified complaint which New York courts have held satisfies the standard to demonstrate a meritorious cause of action in opposition to a CPLR 3216 motion to dismiss (Pl. Br. at 6-8; *Salch v Paratore*, 60 NY2d 851, 852-853 [1983] ["complaint, verified by plaintiff on the basis of personal knowledge, . . . was a sufficient affidavit of merits"]; *Leonardelli v Presbyterian Hosp. in City of New York*, 288 AD2d 105, 106 [1st Dept 2001] [regarding CPLR 3404]). Plaintiffs further argue that defendant admitting plaintiffs' allegations to be true in their Answer and moving for only partial summary judgment, are proper for judicial notice of the merits (Pl. Br. at 8). Plaintiffs next argue that their submission of two new affirmations of plaintiff Solomon Sharbat and Shelhav Raff further demonstrate plaintiffs have a meritorious case (Pl. Br. at 9-10; Raff Aff. [Doc. No. 145]; Sharbat Aff. [Doc. No. 149] [these affirmations confirm that, in 2012, plaintiffs spoke with the CFO of defendant's predecessor who discussed plaintiffs' contributions to meet defendant's capital needs]). Plaintiffs finally argue that it was not their responsibility, but their prior counsel's, to understand and comply with the requirements of CPLR 3216 and, consequently, prior counsel's inaction constitutes the reasonable justification of law office failure sufficient to excuse plaintiffs' prior failure and overturn motion sequence

006 (Pl. Br. at 10-11; *DiSimone v Good Samaritan Hosp.*, 100 NY2d 632 [2003]; *Calle v Zimmerman*, 133 AD3d 809 [2d Dept 2015]).

B. Defendant's Memorandum in Opposition

Defendant argues that plaintiffs have not established grounds to reargue the motion because the court's prior decision correctly found plaintiffs had not justified their failure to comply (Def. Br. at 7-12 [Doc. No. 164]). Drawing on this court's prior decision, defendant argues that plaintiffs' invocation of law office failure does not exempt a party from its litigation obligations, even when, unlike here, an affidavit of merit is provided (*id.* at 9; *Michaels v Sunrise Bldg. & Remodeling, Inc.*, 65 AD3d 1012, 1023 [2d Dept 2009]; *Lugauer v Forest City Ratner Co.*, 44 AD3d 829, 830 [2d Dept 2007]; *see also Martinez v Belanger*, 186 AD2d 40, 40 [1st Dept 1992]). Defendant argues that plaintiffs have never adequately explained their default, especially given that a second large law firm, Proskauer Rose, was representing plaintiffs throughout their missed deadlines and had received the note of issue demand (Def. Br. at 10-12; *Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904-905 [2d Dept 2008]; *see also Perez v Long Island Jewish-Hillside Med. Ctr.*, 173 AD2d 530, 530-531 [2d Dept 1991]). Defendant adds that the court properly determined that plaintiffs failed to demonstrate the merits of their claim as it was plaintiffs' burden to provide proof of such, not defendant's or the court's (Def. Br. at 12-14; *Jones v Maphey*, 50 NY2d 971, 973 [1980]; *Rowley v Carl Zeiss, Inc.*, 70 AD2d 835, 835 [4th Dept 2000]). Plaintiffs' attachment of their verified complaint to their affirmation in motion sequence 006 was not sufficient to show the merits of their case as the burden was not on the court to independently assume the complaint was substituting as an affidavit of merit and determine the case is meritorious (Def. Br. at 14-15; *Pub. Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308 [1st Dept 1996] ["counsel's affirmation, merely incorporating the complaint by reference, is insufficient as a demonstration of merit to the claim"]).

Defendant argues that plaintiffs have not shown grounds to renew their opposition as neither plaintiffs' affidavits nor the memorandum include facts explaining and justifying the default outside of former counsel's neglect (Def. Br. at 16-17; *Cole-Hatchard v Grand Union*, 270 AD2d 447, 447 ["mere neglect is not accepted as a reasonable excuse"]). Defendant argues that plaintiffs cite no authority justifying renewal of a motion simply because counsel did not adequately understand the law, and entry of new counsel into this matter does not support renewal (Def. Br. at 17; *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632 [2003]; *Andrea v*

E.I. Du Pont Nemours & Co., 289 AD2d 1039, 1041 [4th Dept 2001]; *see also Wechsler v First Unum Life Ins. Co.*, 295 AD2d 340, 342 [2d Dept 2002]). Finally, defendant argues that plaintiffs' "new facts" do not warrant denial of motion sequence 006 as the new information provided by the affirmations do not explain plaintiffs' prior failure to provide the Note of Issue or an affidavit of merit (Def. Br. at 18).

III. DISCUSSION

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, plaintiffs have successfully argued that leave for reargument must be granted. The reason for plaintiffs' success comes down to a detail overlooked by the court in its original decision; plaintiffs provided a verified complaint as an exhibit in opposition of motion sequence 006 which courts and the CPLR recognize as a substitute for a sufficient affidavit of merits (CPLR § 105[u]; *Salch v Paratore*, 60 NY2d 851, 852-853 [1983]). In its July 2, 2020 Decision and Order, this court relied on the decision in *Public Serv. Mut. Ins. Co. v Zucker* which held that "failure to offer a proper affidavit of merit on a CPLR 3216 motion may deprive the court of discretion to overlook instances of law office failure which contributed to the delay" (225 AD2d 308, 309 [1st Dept 1996]). Defendant further notes, correctly, that the court maintained this dismissal despite counsel's affirmation incorporating the complaint by reference (*id.* at 309).

However, the key distinction here lies in the fact that plaintiffs' complaint in *Zucker* was not verified, whereas the complaint here was *verified* by plaintiffs Solomon Sharbat and Shelhav Raff (Doc. No. 150). This distinction, though not argued, was overlooked by the court in its prior decision. Consequently, plaintiffs' motion for reargument is **GRANTED.** It is hereby

ORDERED that the motion to reargue is GRANTED and the Decision and Order filed on July 2, 2020 (NYSCEF Doc. No. 139) is hereby VACATED.

12/24/2020
DATE

O. PETER SHERWOOD, J.S.C.

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