SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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TODD COURTNEY, 304 WEST 18, LLC,

Plaintiff,

- v -

JOHN MCDONALD, RICHARD SULES, STOCKSCHLAEDER, MCDONALD & SULES, P.C.

Defendant.

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INDEX NO. 157696/2017

MOTION DATE 11/08/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, plaintiffs move pursuant to CPLR 2221 (f) for leave to renew and reargue the decision and order of this Court dated May 9, 2019 (NYSCEF Doc. No. 75) that denied plaintiffs' motion to strike defendants' affirmative defenses.[1]

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" (McGill v Goldman, 261 AD2d 593, 594 [2d Dept 1999]). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; see Anthony J. Carter, DDS, P.C. v Carter, 81 AD3d 819, 820 [2d Dept 2011]). The Court finds that the issues identified by plaintiffs as overlooked or misapprehended by the Court were in fact properly addressed. Therefore, leave to reargue should be denied. Even if leave to reargue

[1] Defendants cross moved for discovery-related relief that was resolved by separate order.

was granted, the Court would adhere to its original determination for the reasons set forth in the May 9, 2019 decision and order. The Court only notes a few points here for clarification and to address the decision and order of the Appellate Division, First Department, which was issued on October 31, 2019.[2]

In their motion, plaintiffs continue to abide by their same arguments that the April 25, 2018 order of this Court (Cohen, J.) (NYSCEF Doc. No. 49) that denied defendants' motion to dismiss constitutes "law of the case" and necessarily means that certain affirmative defenses should be stricken from defendants' answer — namely the first and second: failure to state a claim and statute of limitations.[3] Plaintiffs additionally claim that this Court misapprehended the standard set forth in CPLR 3013, and that the decision and order of the Appellate Division[4] warrants striking defendants' affirmative defenses.

"[L]aw of the case is a judicially crafted policy that 'expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power'" (People v Evans, 94 NY2d 499, 503 [2000], quoting Messenger v Anderson, 225 US 436, 444 [1912]).

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[2] The Appellate Division, First Department issued a decision and order dated October 31, 2019, which modified the order of this Court (Cohen, J.) and granted defendants' motion to dismiss the complaint except for the first cause of action solely as it pertains to the underlying foreclosure action (NYSCEF Doc. No. 90) (hereinafter Appellate Division decision and/or order).

[3] This motion is also denied with respect to any affirmative defenses and/or arguments not specifically addressed herein. Most of the motion arguments appear to be a complete reiteration of plaintiffs' original motion, which are improper grounds for reargument (see Foley, 68 AD2d at 567).

[4] Plaintiffs appear to argue that the Appellate Division decision provides grounds for renewal but the Court finds otherwise, as discussed *infra*. Accordingly, its relevance is discussed in the reargument portion of the instant decision.

The Court also notes here that plaintiffs' memorandum of law in support of this motion defies the requirement of CPLR 2221 (f) that a combined motion for leave to renew and reargue "shall identify separately and support separately each item of relief sought." While the notice of motion makes clear that plaintiffs are moving for both renewal and reargument, their memorandum of law makes no such distinction and fails to separately identify the support for each branch.

"As such, law of the case is necessarily 'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority" (Evans, 94 NY2d at 503, citing *Arizona v California,* 460 US 605, 618 [1983]). Thus, plaintiffs' repeated arguments that law of the case mandates a particular outcome is on its face meritless as a court has discretion on how and when to apply the doctrine.

The appropriate vehicle that plaintiffs should have originally moved under is CPLR 3211 (b), which states a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Plaintiffs noticed their motion only under CPLR 3013, which, as this Court stated in its May 9, 2019 order, requires that a pleading be sufficiently particular to give the court and parties notice of the transaction or occurrence. If the pleading may be said to give notice, no matter what terminology it chooses, it satisfies this requirement (see Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964]).

These principles of law were accurately applied and are reflected in this Court's prior decision. Plaintiffs cite no support for the proposition that CPLR 3013 should somehow require the Court to look beyond the actual words stated in defendants' answer and consider the merits. While CPLR 3211 (b) may provide that mechanism,[5] plaintiffs' purported "law of the case" argument falls well short of the proof required to definitively dispose of a defense.

Plaintiffs' cite to a 1953 Supreme Court decision and argue that it is instructive on their motion. Such reliance on Charles v Murphy is misplaced insofar as plaintiff in that matter had actually moved for summary judgment,[6] and that branch of the motion to strike affirmative

[5] Plaintiffs' underlying motion appeared to only address whether the defenses are stated and not whether they are without merit, which could be supported by proof to definitively dispose of the defense (see McKinneys Cons Laws of NY, Book 7B, Practice Commentaries C3211:36 [discussing that proof may be submitted in support of an application to dismiss affirmative defenses if the "evidence demonstrates that the defense is without merit as a matter of law"]).

[6] Motions for summary judgment, of course, typically assume a full record.

defenses for lack of sufficiency was sought as an alternative to summary judgment (125 NYS2d 914, 918 [Sup Ct Kings County 1953], mod 284 AD 987 [2d Dept 1954]). More importantly, the cited portion of the Charles decision in plaintiffs' memorandum specifically states that the decision was made based on "law of the case" because the prior "application was made on the pleading and *affidavits* and the Court *weighed the proof submitted*" (Charles, 125 NYS2d at 918 [emphasis added]). CPLR 3013 is irrelevant to this discussion and provides no mechanism to dismiss a defense on permissible proof. It requires only that the pleading give notice. To the extent plaintiffs should have moved under CPLR 3211 (b), plaintiffs submitted no proof to conclusively establish that any defense should be stricken. A prior decision could hardly be considered as conclusive proof of anything in and of itself. In any event, the weight of such decision would be left to the trial court to be reopened or reexamined under the law of the case doctrine, if it had even been necessarily "decided" in the first place (see People v Evans, 94 NY2d at 503).

Plaintiffs take issue with the fact that defendants' failure to state a claim defense still stands even though their complaint has not been dismissed, and argues that, pursuant to the orders denying defendants' motion to dismiss, the defendants could "never win on [the failure to state a claim] defense in this suit" (NYSCEF Doc. No. 119 at 4). However, that is incorrect and the same is true for the statute of limitations defense.

As noted by this Court in its decision and order, a court's prior denial of a motion to dismiss does not constitute law of the case when there is a difference in "procedural posture" (Bodtman v Living Manor Love, Inc., 105 AD3d 434, 434 [1st Dept 2013]). Thus, if/when a motion for summary judgment is made at a later date, the defendants could move on any of the affirmative defenses with proof to support their application.

Moreover, contrary to what plaintiffs suggest, it is permissible for a defendant to submit proof in support of a motion to dismiss for failure to state a claim, provided that it will "establish conclusively that plaintiff has no cause of action" (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 636 [1976]). Although the success of such a motion is rare (see Lawrence v Miller, 11 NY3d 588, 595 [2008] [evidence like "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that plaintiff has no cause of action'"] quoting Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 636 [1976] [alterations omitted]; McKinneys Cons Laws of NY, Book 7B, Practice Commentaries C3211:23, C3211:21).

Therefore, it cannot be said that the defendants' defenses of failure to state a cause of action or expiration of statute of limitations must be dismissed because defendants would not be prohibited from moving again with proof sufficient to meet their burden and conclusively establish that the complaint fails to state a cause of action as a matter of law, or that it is barred by the statute of limitations.

Further, as it concerns the statute of limitations defense in particular, plaintiffs argue that "[t]he Appellate Division held -- on the merits -- that defendants' defense fails" (NYSCEF Doc. No. 119 at 3). Plaintiffs' also claimed that "the relevant decisions" held "on the merits,[7] that the complaint states a cause of action and that the statute of limitations defense fails" (NYSCEF Doc. No. 119 at 5). It is clear from the order that the Appellate Division held that the complaint states a cause of action; it did not, however, ultimately conclude that the statute of limitations defense fails. This Court's interpretation of the holding is that defendants failed "to demonstrate

[7] Curiously plaintiffs also argue that there is no need to address the "merits" (NYSCEF Doc No. 119 at 4) when arguing that this Court's decision and order inappropriately referred to the well-settled principle that a decision on a motion to dismiss for sufficiency of the pleading is not on the merits and does not constitute law of the case.

that the attorney-client relationship ceased to exist within three years of August 28, 2017" (NYSCEF Doc. No. 90 at 2) with the proof they submitted on their original motion to dismiss. While the appellate court was examining the sufficiency of plaintiffs' pleadings, and not the defendants' defenses, it can hardly be said that the defendants' failure to meet its burden on the statute of limitations defense in that motion necessarily means (affirmatively, conclusively, and as a matter of law) that the instant action was timely commenced. Indeed, plaintiffs failed to offer any arguments or proof in support of that assertion.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). The only "new" facts or law that could conceivably be argued to support this branch of the motion is the Appellate Division decision and order as referenced in plaintiffs' papers. However, as aptly noted by defendants, the issuance of this order does nothing to change the law or the facts with respect to remaining active claim — plaintiffs' cause of action for legal malpractice related to the underlying foreclosure action — and the parties' pleadings related thereto have not changed since the Court issued its decision and order on May 9, 2019.

The Appellate Division decision also does not constitute a "change in the law" in this instance, as the holding concerned the sufficiency of the plaintiffs' pleading and whether defendants' met their burden on their motion to dismiss, which is irrelevant to the plaintiffs' motion to strike affirmative defenses. "Because the law in this Department remains what it was when the original order was issued, the predicate for a motion to renew is lacking, and the motion is one to reargue" (D'Alessandro v Carro, 123 AD3d 1, 3 [1st Dept 2014]). Therefore,

leave to renew is denied as the Appellate Division decision and order does not constitute new law or fact that would "change the prior determination" (*see* CPLR 2221 [e]).

Accordingly, it is hereby ORDERED that the plaintiffs' motion for leave to renew and reargue is denied in its entirety; and it is further

ORDERED that the defendants' discovery-related cross-motion is resolved in accordance with the so-ordered stipulation dated October 14, 2020 (NYSCEF Doc. No. 154).

This constitutes the decision and order of the Court.

1/15/2021
DATE

ALEXANDER M. TISCH, J.S.C.

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