Valle v Popular Community Bank
2017 NY Slip Op 30734(U)
April 13, 2017
Supreme Court, New York County
Docket Number: 653936/2012
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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JOSEFINA VALLE and WILFREDO VALLE, Individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

POPULAR COMMUNITY BANK, individually, f/k/a, BANCO POPULAR NORTH AMERICA, a/k/a BANCO POPULAR NORTH AMERICA,

Defendant.

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DECISION AND ORDER

Index No. 653936/2012

Mot. Seq. No. 008

HON. ANIL C. SINGH, J.:

Plaintiffs Josefina Valle and Wilfredo Valle, individually and on behalf of all others similarly situated ("Plaintiffs"), move to dismiss defendant Popular Community Bank's ("Defendant") first and second affirmative defenses pursuant to CPLR § 3211(b), on the ground that the defenses violate the law of the case doctrine.

By a decision and order dated February 18, 2016 (the "2016 Order"), this Court granted in part and denied in part Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC"), pursuant to CPLR § 3211(a).[1]

[1] Pursuant to the stipulation dated December 28, 2015, the sole remaining claim in the Second Amended Complaint is for Violations of the New York General Business Law §349 ("GBL §349).

In the 2016 Order, this court denied Defendant's motion to dismiss the Second Amended Complaint except as to portions of the Second Amended Complaint that sought recovery for overdraft charges resulting from false account balance information, incurred more than three years before September 10, 2014.

The Court held that "to the extent the [Second Amended Complaint's] GBL §349 claim is premised on [Defendant's] reordering practice and its failure to give prior notice of overdrafts, the original complaint gave defendant notice of the transactions or series of transactions to be proved pursuant to the [Second Amended Complaint], and the new claims are deemed to relate back to the original complaint, for purposes of the statute of limitations." (citations omitted). 2016 Order at 12. The Court also held that "the relation-back doctrine does not apply to the [Second Amended Complaint's] false balance allegations" as they were "entirely novel". Id. at 12-13.

On March 28, 2016, Defendant filed their Answer to the Second Amended Complaint ("Answer") (Docket No. 324). Plaintiffs are now seeking dismissal of Affirmative Defense No. 1 and Affirmative Defenses No. 2 (the "Affirmative Defenses"). The Affirmative Defenses states:

> **Affirmative Defense No. 1**: [Defendant] is entitled to judgment on Count II (the sole remaining Count in the SAC) for any fee allegedly imposed by [Defendant] before September 11, 2011 based on GBL § 349's three-year statute of limitations and
> **Affirmative Defense No. 2**: [Defendant] is entitled to judgment on Count II (the sole remaining Count in the SAC) for any fee allegedly

> imposed by defendant before December 10, 2010, the date that Plaintiffs alleges that [Defendant] began providing purportedly false balance information to its clients."

See, Answer at 43.

Plaintiffs argue that the Affirmative Defenses are contrary to the 2016 Order and the law of this case as they are based on statute of limitations claim running from September 11, 2011 or December 10, 2010. Defendant argues that the 2016 Order limited the Plaintiffs' claims to overdraft fees incurred after September 10, 2011.

Discussion

The law of the case doctrine prohibits a party from re-litigating pre-judgment rulings "made by courts of coordinate jurisdiction in a single litigation." People v. Evans, 727 N.E.2d 1232, 1235 (2000) (citing Martin v. Cohoes, 332 N.E.2d 867 (1975). "[A]pplication of [the law of the case doctrine] necessarily requires an identity of issues between the earlier determination and the matter sub judice." Brown v. Sears Roebuck & Co., 746 N.Y.S.2d 141, 146 (1st Dept 2008). The doctrine "contemplates that the parties had a full and fair opportunity to litigate when the initial determination was made." Chanice v. Fed. Express Corp., 989 N.Y.S.2d 468 (1st Dept 2014) (citing Evans, 727 N.E.2d at 1234). The "law of the case doctrine 'is not inflexible, and applies only to issues decided, directly or

by implication, at an earlier stage of the action.'" Matter of Brian L. v. Admin. for Children's Servs., 859 N.Y.S.2d 8, 13 (1st Dept 2008).

In Moran Enterprises, Inc. v. Hurst, 96 A.D.3d 914, 916 (2d Dept 2012), the court held that the law of the case barred the defendant from raising affirmative defenses of statute of limitations that were already asserted and denied in a pre-answer motion to dismiss the complaint. The application of the doctrine is a discretion left to the court. Cobalt Partners, L.P. v GSC Capital Corp., 944 N.Y.S.2d 30, 33 (1st Dept 2012) (citing Evans, 727 N.E.2d at 1235).

Here, this Court has decided in the 2016 Order that the statute of limitation for Plaintiffs' GBL §349 claims run from the following date:

- Claims for Re-ordering: November 14, 2009
- Claims for Failure to Provide Notice: November 14, 2009
- Claims for Providing False Balance Information: September 10, 2011.

Defendant's Affirmative Defenses are contrary to the 2016 Order in that they have asserted that the applicable statute of limitations for Plaintiff's GBL § 349's claims was either September 11, 2011 (Affirmative Defense No. 1) or December 10, 2010 (Affirmative Defense No. 2).

This Court ruled as a matter of law on the statute of limitations for Plaintiffs' GBL § 349's claims. The Court held that "to the extent the SAC's GBL §349 claim is premised on [Defendant's] reordering practice and its failure to give prior notice

of overdrafts,...,the new claims are deemed to relate back to the original complaint, for purposes of the statute of limitations." (citations omitted). Defendant's Affirmative Defense No. 1 claiming that it is entitled to judgment "for any fee allegedly imposed by [Defendant] before September 11, 2011" is contrary to the 2016 Order.

Moreover, with respect to overdraft charges resulting from false account balance information, the Court held that "plaintiffs do not allege that this practice caused them injury prior to [December 31, 2010]...the GBL § 349 claim is dismissed to that extent for failure to state a claim." 2016 Order at 13. Defendant's Affirmative Defense No. 2 claiming that it is entitled to judgment "for any fee allegedly imposed by [Defendant] before December 10, 2010[2]" is also contrary to this Court's 2016 Order that the statute of limitation on false account balances would run from September 10, 2011. Defendant's Affirmative Defense No. 2 suggests that there is a single GBL § 349 claim governed by a single statute of limitations. However, the court held in the 2016 Order that Plaintiffs' claims were based on three distinct violations of GBL § 349, each governed by their respective statute of limitations.

Defendant's argument that Plaintiff only pleads a GBL § 349 claim when their high-to-low ordering is "combined with the purported provision of false

[2] In its opposition brief, Defendant states that this date was stated in error and was intended to be December 31, 2010.

balance information" is unavailing. This has been an issue considered by – and denied by - the Court in the 2016 Order.

Moreover, absent a stay, a pending appeal has no effect on the enforceability of this Court's Order. See e.g., Da Silva v. Musso, 76 N.Y.2d 436, 440 (1990) (where the court held that "while an appeal from a final judgment or order may leave an inchoate shadow on the rights defined therein, those rights are nonetheless fully enforceable in the absence of a judicially issued stay pending disposition of the appeal"); Matter of Neville v. Martin, 38 A.D.3d 386, 387 (1st Dept 2007) ("It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal").

Accordingly, it is

ORDERED that Plaintiffs' motion to dismiss Defendant's Affirmative Defense No 1 and Affirmative Defense No. 2 is granted, without leave to replead.

Date: April 13, 2017
New York, New York

Anil C. Singh