UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUILDING SERVICE 32BJ HEALTH FUND; BUILDING SERVICE 32BJ PENSION FUND; BUILDING SERVICE 32BJ SUPPLEMENTAL RETIREMENT & SAVINGS FUND; BUILDING SERVICE 32 BJ LEGAL SERVICES FUND; and THOMAS SHORTMAN TRAINING & SCHOLARSHIP FUND,	15 Civ. 6114 (PAE)
Plaintiffs / Counterclaim Defendants,	OPINION & ORDER
-v-	
GCA SERVICES GROUP, INC.,	
Defendant / Counterclaim Plaintiff.	

PAUL A. ENGELMAYER, District Judge:

On February 3, 2017, the Court issued an Opinion and Order granting in part, and denying in part, the parties' cross-motions for summary judgment. Dkt. 54 ("Opinion"). In sum, the Court (1) granted plaintiffs' motion to the effect that certain delinquent benefits contributions were owed to plaintiffs by defendant GCA Services Group, Inc. ("GCA") under a multi-employer employee benefit plan; but (2) denied plaintiffs' motion, and granted defendant's motion, with respect to plaintiffs' claims for contributions due between January 1, 2009 and August 3, 2009, which claims the Court held untimely. On February 27, 2017, plaintiffs filed a motion for reconsideration of the part of the Court's decision that held those claims untimely, Dkt. 55 ("Motion"), along with a memorandum of law in support, Dkt. 56 ("Reconsideration

Br."). On March 13, 2017, defendant filed a memorandum of law in opposition. Dkt. 59 ("Reconsideration Opp.").

For the following reasons, the motion for reconsideration is denied.

I. Legal Standards

The standard governing motions for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted); *see also* S.D.N.Y. Local Rule 6.3 (requiring the movant to "set[ ] forth concisely the matters or controlling decisions which counsel believes the court has overlooked"). Such a motion "is neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have been previously advanced." *Associated Press v. U.S. Dep't of Def.*, 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005); *see also Goonan v. Fed. Reserve Bank of N.Y.*, No. 12 Civ. 3859 (JPO), 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5, 2013) ("Simply put, courts do not tolerate such efforts to obtain a second bite at the apple."). Rather, reconsideration is appropriate "only when the [moving party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted).

Litigants are generally barred from introducing new facts in a motion to reconsider. *See Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690 (MBM), 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation omitted). A party seeking reconsideration "is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings." *De Los Santos v. Fingerson*, No. 97 Civ. 3972 (MBM), 1998 WL 788781, at *1 (S.D.N.Y. Nov. 12,

1998). The purpose of Rule 6.3 is to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Naiman v. N.Y. Univ. Hosps. Ctr.*, No. 95 Civ. 6469 (RPP), 2005 WL 926904, at *1 (S.D.N.Y. Apr. 21, 2005) (quoting *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)).

II. Discussion

The Court assumes familiarity with the facts and procedural history of this case, as reviewed in the Court's prior Opinion. The Court here relates only those facts necessary to resolve this motion.

Plaintiffs argue that the Court erred in granting summary judgment in defendant's favor on the issue of whether plaintiffs' claims as to contributions due before August 4, 2009 were time-barred. The Court had held that those claims accrued when the contributions became delinquent. Thus, the Court held, with this lawsuit having been filed on August 4, 2015, claims as to contributions due before August 4, 2009 fell outside of the six-year statute of limitations governing civil enforcement actions under 29 U.S.C. § 1132. Opinion at 11–12. Plaintiffs now ask the Court to reconsider this finding, and to hold that such claims accrued in 2014, when plaintiffs discovered GCA's delinquent contributions in the course of a payroll audit. On this reasoning, such claims would be timely.

The Court declines to revise its prior holding, for two independent reasons.

First, plaintiffs' motion for reconsideration is itself untimely. Under Local Rule 6.3, a motion for reconsideration must be filed within 14 days after entry of the Court's determination of the original motion. The Court issued its Opinion on the cross-motions for summary judgment on February 3, 2017. Plaintiffs' deadline to move for reconsideration was February 17, 2017. Plaintiffs' motion therefore is untimely, by some 10 days. That alone warrants denial

of the motion. *See, e.g.*, *Scarsdale Cent. Serv. v. Cumberland Farms, Inc.*, No. 13 Civ. 8730 (NSR), 2014 U.S. Dist. LEXIS 86552, *8–9 (S.D.N.Y. June 24, 2014) (denying as untimely a motion for reconsideration); *Luv n' Care, Ltd. v. Regent Baby Prods. Corp.*, No. 10 Civ. 9492, 986 F. Supp. 2d 400, 2014 U.S. Dist. LEXIS 8441, *1–2 (S.D.N.Y. Jan. 23, 2014) (same); *Intellectual Prop. Watch v. U.S. Trade Representative*, No. 13 Civ. 8955 (ER), 2014 U.S. Dist. LEXIS 12958, *2–3 (S.D.N.Y. Jan. 31, 2014) (same).

Second, even if the Court were to reach the merits, the doctrine on which plaintiffs rely does not avail plaintiffs. Plaintiffs are correct that courts—including those in the Second Circuit—often apply a "discovery rule" in cases involving delinquent benefit contributions, such that an action accrues when a plaintiff "discovered or with due diligence should have discovered, the injury that is the basis of the litigation." *Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir. 2007). And in support of their motion for reconsideration, plaintiffs again point, as before, to two cases that applied that rule and held that the statute of limitation began to run when plaintiffs actually discovered the deficiency in benefit contributions. *See Gesualdi v. Juda Constr., Ltd.*, 2011 U.S. Dist. LEXIS 124349 (S.D.N.Y. Oct. 25, 2011) ("*Gesualdi*"), and *U.S.W.U. Local 74 Welfare Fund v. Monticello Central Sch. Dist.*, No. 13 Civ. No. 1779 (ENV) (MDG), 2014 U.S. Dist. LEXIS 72785 (E.D.N.Y. May 18, 2014) ("*U.S.W.U. Local 74 Welfare Fund*"); *see* Opinion at 12. On this basis, plaintiffs ask the Court to hold timely their claims as to GCA's pre-August 4, 2009 contribution obligations. *See* Reconsideration Br. at 3–4.

The Court, however, has already held *Gesualdi* and *U.S.W.U. Local 74 Welfare Fund* inapposite. Opinion at 12. As the Court explained, in *Gesualdi*, there was unrebutted testimony that the plaintiffs lacked the records necessary to alert them to the deficient contributions, such that a routine compliance audit would have not revealed the existence of plaintiffs' claims

against defendant, *see id.* (citing *Gesualdi* at *10). Plaintiffs have not pointed to any such evidence in this case. And in *U.S.W.U. Local 74 Welfare Fund*, the parties agreed that plaintiffs' claims accrued within the limitations period. *See U.S.W.U. Local 74 Welfare Fund.* In contrast, here, the parties stipulated that the delinquent payments that formed the entire basis for plaintiffs' claims accrued "between January 1, 2009 and December 31, 2012," not in 2014, when the audit uncovered them.[1] *See* Opinion at 12.

In support of reconsideration, plaintiffs also cite *Building Service 32BJ Health Fund v. Nutrition Management Services Company*, No. 15 Civ. 3598 (S.D.N.Y. Feb. 10, 2017) ("*Nutrition Management*"), a decision in a deficient-contributions case issued a week after the Court's Opinion in this case. There, Judge Forrest held that the statute of limitations began to run only upon the benefits funds' discovery of the delinquency. *See Nutrition Management* at 6. But the decision there emphasized the lack of "evidence that the [delinquent payments] rose to a level that should have awakened an inquiry by the Fund." *Id.* at 5–6 (internal citations omitted). Here, in contrast, plaintiffs have stipulated that they had a fiduciary duty to conduct payroll compliance audits, of the type that would have been able to—and indeed, ultimately did—uncover GCA's contribution deficiencies. Joint Stipulated Facts ("JSF") ¶ 18.[2] This case thus

[1] Plaintiffs argue that the parties' stipulation as to the "accrual" date was not meant to relate to the statute of limitations, but merely to refer to the due date of the contributions. *See* Reconsideration Br. at 3–4. However, the stipulation uses the term "accrual" without any such qualification. For avoidance of doubt, however, even if the Court accepted plaintiffs' re-casting of the stipulation, the Court would still find—for the reasons that follow—that plaintiffs should have discovered GCA's delinquency in a timely fashion via the compliance audits that plaintiffs had a duty to conduct.

[2] Plaintiffs note they were obliged only to "review[] and monitor[] [defendant's] contributions by conducting compliance audits," not to "perform audits on every one of [plaintiffs'] thousands of contributing employers every time they make their contributions," Reconsideration Br. at 4–5. But this is not a case where deficient contributions were limited to a single contribution obligation. The deficiencies here were systematic and covered many years. It is undisputed that a routine compliance audit—if conducted—would have uncovered such deficiencies for the

aligns more closely with those holding, on the facts at hand, that the claims for delinquent contributions accrued on the commencement date of the delinquent contributions. Opinion at 11; *see also, e.g.*, *Rumore v. Multigas Distribs., Ltd.*, 90 Civ. 2489 (SWK), 1992 U.S. Dist. LEXIS 3533, at *5 (S.D.N.Y. Mar. 23, 1992). Put differently, even under the discovery rule, plaintiffs should have "with due diligence . . . discovered, the injury that is the basis of the litigation." *Guilbert*, 480 F.3d at 149.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reconsideration is denied. The Clerk of Court is respectfully directed to close the motions pending at docket 55.

SO ORDERED.

Paul A. Engelmayer

PAUL A. ENGELMAYER
United States District Judge

Dated: April 5, 2017
New York, New York

audited period. And discovery of such shortfalls presumably would then have prompted a broadened compliance audit.