SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LORRAINE BORDEN, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

400 EAST 55th STREET ASSOCIATES L.P.,

Defendant.

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Index No. 650361-2009

DECISION/ORDER

Motion Sequence 010

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmation in Support & Collective Exhibits Annexed, Memorandum of Law	1, 2, 3, 4
Answering Affirmation & Collective Exhibits	5, 6
Reply Memorandum of Law	7

By order dated February 20, 2014 this court denied plaintiff Lorraine Borden's (plaintiff) motion to compel defendant 400 East 55th Street Associates, L.P (defendant) to respond to a notice to produce and plaintiff's motion to vacate a stipulation dated September 20, 2012. The stipulation states, in pertinent part,:

> Defendant shall provide a proposed discovery non-disclosure agreement by 10/17/12. Plaintiff shall have ten days (10/29) to review and comment. The parties shall attempt to enter into a non-disclosure agreement on or before 11/2/12. If an agreement is reached, defendant will produce documents on or before 11/12/12. If no agreement is reached the parties shall address this disclosure dispute by a formal motion with the Court on or before 11/8/12.

The court denied plaintiff's motion to compel as untimely on the ground that plaintiff did not make the motion on or before November 8, 2012, as required by the September 12, 2012 so-ordered stipulation. The court denied plaintiff's motion to vacate the stipulation on the ground

that plaintiff had not established that the stipulation was the product of mutual mistake by the parties. Plaintiff now moves for leave to renew and reargue both motions. Defendant opposes.

A motion for leave to reargue shall be (1) identified specifically as such; (2) based upon matters of fact or law allegedly overlooked or misapprehended by court in determining prior motion but shall not include any matters of fact not offered in prior motion; (3) made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry (CPLR § 2221 [d] [1], [2], [3]). A motion for leave to renew shall be (1) identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the determination or shall demonstrate that there has been a change in the law that would change the prior determination; (3) contain a reasonable justification for failure to present such facts on prior motion (CPLR § 2221 [e] [1], [2], [3]).

The branch of plaintiff's motion seeking leave to reargue is denied. The February 20, 2014 order with notice of entry was served on plaintiff on February 21, 2014 and as plaintiff readily concedes, her motion to reargue was not served within 30 days from that date. While it is true that every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of an action (*Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 496 NE2d 851, 505 NYS2d 831 [1986]), even if the court were to consider plaintiff's untimely motion to reargue, it would nevertheless be denied because the court did not misapprehend or overlook any matters of law and or fact in interpreting the September 12, 2012 stipulation, in finding that plaintiff had not established any grounds to vacate the stipulation and in holding that plaintiff's motion to compel was untimely. It is apparent that the term "this disclosure dispute" in the September 14, 2012 stipulation does not refer to a dispute regarding the non-disclosure agreement but a dispute between the parties over the notice to produce. The terms of the stipulation fully address what would happened in the event the parties did or did not reach a non-disclosure agreement. If an agreement was reached, defendant would produce certain documents. If an agreement was not reached, the court would address plaintiff's entitlement to discovery via a formal motion. Plaintiff's claim that the phrase "this disclosure dispute" refers to a dispute between the parties over the non-disclosure agreement and that plaintiff had until November 8, 2012 to make a motion regarding the dispute over the non-disclosure agreement is not supported by any reasonable interpretation of the stipulation. By its plain terms, the stipulation provided a date certain by which plaintiff was to make a motion to resolve the dispute over her notice to produce. Plaintiff did not move within that time frame and her motion to compel was properly denied as untimely. The court also properly denied plaintiff's motion to vacate the stipulation as plaintiff failed to establish that the stipulation was the product of fraud, collusion, mutual mistake or accident. Accordingly, plaintiff's motion to reargue is denied.

In support of the branch of the motion that seeks leave to renew, plaintiff argues that there has been a change in the law that would change the court's February 20, 2014 determination. The change, according to plaintiff, is the Court of Appeals decision in *Borden v 400 East 55th Street Associates, L.P.*, 24 NY3d 382, 23 NE2d 997, 998 NYS2d 729 [2014], in which the Court of Appeals held that CPLR § 901 [b] permitted otherwise qualified plaintiffs to utilize the class action mechanism to recover compensatory overcharges even though the Rent Stabilization Law does not specifically authorize class action recovery and imposes treble damages upon a finding of willful violation (*id*). The Court of Appeals decision affirmed a unanimous Appellate

Division, First Department order affirming the Supreme Court's grant of plaintiff's motion for class certification. Contrary to plaintiff's argument, the Court of Appeals decision is not a change in the law that would cause this court to change its prior determination. When the September 12, 2012 stipulation was drafted, Judge Gische had already granted plaintiff's motion for class certification.[1] Therefore, this case was proceeding as class action when the parties agreed that a formal motion to compel a response by defendant to plaintiff' first notice to produce would have to be made on or before November 8, 2012. The case was also proceeding as a class action, and this court was fully aware of the case's status as a class action, when it issued its February 20, 2014 order. Therefore, the fact that the Court of Appeals has now held that the Supreme Court properly granted plaintiff's motion for class certification and that the Appellate Division properly affirmed is not a change in the law within the meaning of CPLR § 2221 and does not in any way require this court to change its prior determination.

Plaintiff also argues that renewal is appropriate because there new facts which would change that determination. Specifically, plaintiff contends that in December 2013 defendant corresponded in writing with class members regarding rental overcharges and offered those class members refunds without disclosing the existence of the class action or that the class members are represented by counsel. Plaintiff was aware of these letters as of December 26, 2013 when she moved by order to show to enjoin defendant from, *inter alia*, communicating with her or any other class members regarding the subject matter of the class action. Defendant's attorney admitted that defendant had forwarded class members refunds for rental overcharges in an affirmation dated January 10, 2014 submitted in opposition to plaintiff's order to show cause.

It is a well established rule that parties "may to a large extent chart their own procedural course through the courts" (*Stevenson v News Syndicate Co.*, 302 NY 81, 87, 96 NE2d 187 [1950]) and "courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes" (*Mitchell v New York Hosp.*, 61 NY2d 208, 461 NE2d 285, 473 NYS2d 148 [1984]). The written stipulation entered into by the parties' attorneys is "binding" on the parties (CPLR § 2104), and such stipulations concerning the conduct of the litigation are generally enforced by the courts (*Toos v Leggiadro Intl., Inc.*, 114 AD3d 559 [1st Dept 2014]). A party will only be relieved from the consequences of a stipulation made during litigation when there is sufficient cause to invalidate a contract, such as fraud, collusion, or mistake (*see Hallock v State of New York*, 64 NY2d 224, 230, 474 NE2d 1178, 485 NYS2d 510 [1984]). The December 2013 letters from defendant to various class members offering the class members a refund for rent overcharges do not constitute new evidence within the meaning of CPLR § 2221 because the letters were drafted after the underlying motions were orally argued and fully submitted and, therefore, were not in existence but unknown to plaintiff at the time the original motion was made (*see Yerushalmi v Abed Realty Corp.*, 58 AD3d 491 [1st Dept 2009]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001] [a motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant).

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[1] The order granting the motion for class certification was dated April 11, 2012. That order was affirmed by the Appellate Division on April 25, 2013.

In any event, even if the December 2013 refunds letters did constitute new evidence, the letters do not provide a basis for the court to change its prior determination since they do not establish that the stipulation was the product of fraud, collusion, mistake or accident when it was entered into more than a year earlier (*Hallock*, NY2d at 230).

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion seeking leave to reargue and renew is denied; and it is further

ORDERED that the parties are to appear for a status conference on September 29, 2015 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that defendant is to serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

George J. Silver, J.S.C.

Dated: 7/28/15

New York County

GEORGE J. SILVER