

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X  
MOUHLAS REALTY, LLC,

Plaintiff,

-against-

MARY KOUTELOS,

Defendant.  
-----X

Index No.: 5799/08  
Motion Date: 1/14/09  
Motion Cal. No.: 15  
Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion by plaintiff for an order, pursuant to CPLR § 3212, granting summary judgment to plaintiff on all its causes of action contained in the verified complaint; and dismissing defendant’s affirmative defenses and counterclaim.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Memorandum of Law.....	6 - 10
Reply Affirmation-Exhibits.....	11 - 12

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for, inter alia, breach of contract commenced by plaintiff Mouhlas Realty, LLC (“plaintiff”), a limited liability company which manages and rents commercial and residential realty that it owns, against defendant Mary Koutelos (“defendant”), a member of plaintiff who owns a 28.6 percent interest therein. On March 5, 2008, defendant, as the petitioner, commenced a dissolution proceeding under the instant index number for the dissolution of plaintiff, who was the respondent, to which counterclaims were asserted by plaintiff. By order of this Court dated August 4, 2008, the petition and plaintiff’s counterclaim for an equitable buy-out were dismissed, and the remaining counterclaims were severed and continued as this converted action, pursuant to CPLR § 407. Plaintiff was directed to file and serve a complaint asserting the counterclaims as causes of action within 20 days of service of a copy of that order with notice of entry, which such filing occurred on September 22, 2008. The verified complaint asserts three causes of action for breach of contract, breach of fiduciary duty and imposition of a judicial lien on defendant’s shares. In answering the complaint, defendant asserts two affirmative defenses upon the grounds that the complaint fails to state a cause of action and plaintiff lacks standing to assert claims against defendant. The answer also contains a counterclaim seeking a declaration that the resolutions

adopted by plaintiff in its business meeting of October 11, 2007, are void. In reply to the counterclaims, plaintiff asserts the following three affirmative defenses: (1) the Doctrine of the Law of the Case; (2) Procedural Defect as a Basis to Strike the Defendant's First Affirmative Defense; and (3) Procedural Defect as a Basis to Strike the Defendant's Second Affirmative Defense. It is upon the foregoing that plaintiff seeks summary judgment on its three causes of action, and dismissal of defendant's affirmative defenses and counterclaim.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1<sup>st</sup> Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2<sup>nd</sup> Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra. Moreover, a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rearmost vehicle and imposes a duty of explanation to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause. See Milskiy v Solanky, 8 A.D.3d 353 (2<sup>nd</sup> Dept.2004); Barile v. Lazzarini, 222 A.D.2d 635 (2<sup>nd</sup> Dept. 1995); see also McGregor v Manzo, 295 A.D.2d 487 (2<sup>nd</sup> Dept. 2002); Gambino v City of New York, 205 A.D.2d 583 (2<sup>nd</sup> Dept.1994); Power v. Hupart, 260 A.D.2d 458 (2<sup>nd</sup> Dept. 1999); see, also, Caputo v. Schaumeayer, 252 A.D.2d 512 (2<sup>nd</sup> Dept. 1998); Danza v. Longieliere, 256 A.D.2d 434 (2<sup>nd</sup> Dept. 1998).

In support of the motion, plaintiff contends that its first and second causes of action for breach of contract and fiduciary duty, respectively, "request a judgment of specific performance compelling defendant to make her required capital contributions in the sum of \$71,500.00, together with costs, disbursements and reasonable attorneys [fees] with interest from October 11, 2007." Plaintiff further contends that the third cause of action for the imposition of a judicial lien upon defendant's shares request, inter alia, that the lien placed on such shares be equal to the amount of capital contributions owed by defendant. Plaintiff asserts that it is entitled to summary judgment based upon this Court's previous findings in the underlying order dated August 4, 2008, which stated, in relevant part, the following:

The articles of organization for LLC, not included in petitioner's papers but provided by respondent, contain no provision relating to the operation of the business other than the paragraph stating that the limited liability company is to be managed by 1 or more members. Contrary to petitioner's assertion, this management scheme is permissible under the governing statute. (Limited Liability Company Law § 401.) The members of respondent LLC did not enter into a

written operating agreement. Certain sections in the Limited Liability Company Law set forth default provisions that are applicable in the event a company does not have an operating agreement. None of the assertions made by petitioner demonstrate that respondent LLC cannot be operated in conformity with those provisions. Pursuant to Limited Liability Company Law § 411, the managers have authority to fix the compensation of managers for services in any capacity, and under section 402(c)(2) a majority of the members may approve incurring indebtedness other than in the ordinary course of business. While there is no specific statutory basis to compel additional capital contributions from members, neither is there a statutory prohibition against the practice, and the payment of an additional capital contribution properly voted for by the members has been approved judicially. (See, e.g., Van Der Lande v Stout, 13 AD3d 261 [2004].)

Based upon the aforementioned language set forth in the underlying order, plaintiff asserts that this Court has made a judicial determination in this litigation “that the business resolutions which plaintiff’s members adopted in their [business] meeting on October 11, 2007 are valid, and this Court further held that plaintiff is entitled to capital contributions in the sum of \$71,500.00 from [defendant], as approved by the members in that business meeting[.]” Thus, plaintiff asserts that it is entitled to judgment as a matter of law on the three causes of actions asserted in the complaint, as well as dismissal of the counterclaim seeking a declaratory judgment declaring void the resolutions adopted by plaintiff in the October 11, 2007 meeting, based upon the law of the case.

“The law of the case doctrine is part of a larger family of kindred concepts, which includes *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a “full and fair” opportunity to litigate the initial determination (citations omitted).” People v. Evans, 94 N.Y.2d 499, 503 (2000); see, Doscher v. Doscher, 54 A.D.3d 890 (2<sup>nd</sup> Dept. 2008). The doctrine ““is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of coordinate jurisdiction are concerned”(citations omitted).” Oyster Bay Associates Ltd. Partnership v. Town Bd. of Town of Oyster Bay, 21 A.D.3d 964, 966 (2<sup>nd</sup> Dept. 2005); see, Mosher-Simons v. County of Allegany, 99 N.Y.2d 214 (2002); Hampton Valley Farms, Inc. v. Flower & Medalie, 40 A.D.3d 699 (2<sup>nd</sup> Dept. 2007); Fellin v. Sahgal, 35 A.D.3d 800 (2<sup>nd</sup> Dept. 2006); Meekins v. Town of Riverhead, 20 A.D.3d 399 (2<sup>nd</sup> Dept. 2005). Indeed, it is fundamental that one Judge may not review or overrule an order of another Judge of coordinate jurisdiction, and the decision of the Judge who first rules in a case binds all courts of coordinate jurisdiction as the law of the case, regardless of whether a formal order was entered. See, Messinger v. Messinger, 16 A.D.3d 562 (2<sup>nd</sup> Dept. 2005).

Here, although plaintiff essentially argues that it is entitled to summary judgment based upon the elimination of all factual issues from this case by virtue of this Court’s purported finding in its

August 4, 2008 order, that the business resolutions adopted in the October 11, 2007 are valid, and plaintiff is entitled to capital contributions in the sum of \$71,500.00 from defendant, such argument is wholly misplaced. Indeed, despite the claims by plaintiff that this Court made the former determinations, the underlying order, which only made findings with regard to the appropriateness of a judicial dissolution, and the equitable buy-out of plaintiff, the only issues properly before the Court, stated, in relevant part, the following:

In this case, the allegations in the petition of overreaching and breach of fiduciary duty by two of the other three members of respondent LLC do not plead the requisite grounds for dissolution of a limited liability company. (Limited Liability Company Law § 702; see, Widewaters Herkimer Co., LLC v Aiello, 28 AD3d 1107 [2006]; Artigas v Renewal Arts Realty Corp., 22 AD3d 327 [2005]; Schindler v Niche Media Holdings, LLC, 1 Misc 3d 713, 716-717 [2003].) Petitioner has failed to state any facts showing that LLC is unable to function in accordance with its articles of organization or operating agreement, or that the business is failing financially. (See, Klein v 599 Eleventh Ave. Co. LLC, 14 Misc 3d 1211[A], 2006 NY Slip Op 52486U [2006]; Schindler, 1 Misc 3d at 716 [2003].)

With regard to the portions of the order which plaintiff inappropriately relies upon as this Court's determination on the ultimate issues of this action, and the law of the case, this Court determined that there was neither a statutory compulsion nor prohibition for additional capital contributions from members where such action was properly voted for by the members. However, this Court made no determinations with regard to either the validity of the subject resolutions allegedly adopted at the October 11, 2007 meeting, or propriety of the additional capital contributions alleged to be owed by defendant, as argued by plaintiff. In short, the record before this Court, contrary to plaintiff's contention, demonstrates that "[these issues were] not resolved on the merits in the prior determination (citation omitted), nor did defendant have a 'full and fair' opportunity to litigate the issue[s] (citation omitted)." Cohen v. Ho, 38 A.D.3d 705, 706 (2<sup>nd</sup> Dept. 2007); Shatzkin v. Village of Croton-on-Hudson, 51 A.D.3d 903 (2<sup>nd</sup> Dept. 2008). Thus, the law of the case is inapplicable, and cannot serve as a basis for either summary judgment in plaintiff's favor, or dismissal of defendant's counterclaim. Consequently, those branches of the motion seeking summary judgment on plaintiff's causes of action, and dismissal of defendant's counterclaim, based upon the law of the case, are denied.

Likewise denied is that branch of the motion seeking dismissal of defendant's first affirmative defense asserting that the complaint fails to state a cause of action. In support of that branch of the motion, plaintiff contends that such defense cannot be interposed in an answer, and relies upon the Appellate Division, Second Department case of Platt v. Portnoy, 220 A.D.2d 652 (2<sup>nd</sup> Dept. 1995), which held, "[i]n this judicial department, a defense that a complaint does not state a valid cause of action cannot be interposed in an answer, but must be raised by appropriate motion pursuant to CPLR 3211(a)(7)." Id. at 653. Notwithstanding this holding, plaintiff has again

misplaced its reliance, as Platt has been abrogated by Butler v. Catinella, 58 A.D.3d 145 (2<sup>nd</sup> Dept. 2008), and should no longer be followed. In Butler, the Appellate Division, Second Department, stated, in pertinent part, the following [58 A.D.3d 145]:

A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit (CPLR 3211 [b]). [] In granting that branch of the motion, in effect, pursuant to CPLR 3211(b), which was to dismiss the first defense, namely, that the verified complaint failed to state a cause of action, the Supreme Court relied upon certain cases wherein this Court stated that "[i]n this judicial department, a defense that a complaint does not state a valid cause of action cannot be interposed in an answer, but must be raised by appropriate motion pursuant to CPLR 3211(a)(7)" (Propoco, Inc. v. Birnbaum, 157 A.D.2d 774, 775, 550 N.Y.S.2d 901; see Plemmenou v. Arvanitakis, 39 A.D.3d 612, 613, 833 N.Y.S.2d 596; Jacobowitz v. Leak, 19 A.D.3d 453, 455, 798 N.Y.S.2d 67; Citibank, N.A. v. Walker, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48; Petracca v. Petracca, 305 A.D.2d 566, 567, 760 N.Y.S.2d 513; Staten Is.-Arlington, Inc., v. Wilpon, 251 A.D.2d 650, 676 N.Y.S.2d 469; Sagevick v. Sanchez, 228 A.D.2d 488, 489, 644 N.Y.S.2d 318; Guglielmo v. Roosevelt Hosp. Staff Hous. Co., 222 A.D.2d 403, 404, 635 N.Y.S.2d 42; **Platt v. Portnoy**, **220 A.D.2d 652, 653, 632 N.Y.S.2d 659** (*emphasis added*); Bentivegna v. Meenan Oil Co., 126 A.D.2d 506, 507-508, 510 N.Y.S.2d 626; Bazinet v. Lorenz, 70 A.D.2d 582, 416 N.Y.S.2d 55; Glenesk v. Guidance Realty Corp., 36 A.D.2d 852, 853, 321 N.Y.S.2d 685).

CPLR 3211(e) provides, in relevant part, that "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted." Significantly, since the initial enactment of the CPLR, and continuing to the present version, CPLR 3211(e) provides that a "motion based upon a ground specified" in CPLR 3211(a)(7), namely, that "the pleading fails to state a cause of action" may be made at any subsequent time "or [raised] in a later pleading, if one is permitted." Accordingly, this Court's pronouncement that "a defense that a complaint does not state a cause of action cannot be interposed in an answer but must be raised by appropriate motion pursuant to CPLR 3211(a)(7)" runs afoul of the clear language of CPLR 3211(e). That section expressly permits a defendant to assert or raise, in a "pleading," the defense that a complaint does not state a cause of action.

Our sister tribunals in the Appellate Division, First Department, and Appellate Division, Third Department, have previously held that pleading the defense of failure to state a cause of action is unnecessary, constitutes "harmless surplusage," and that a motion by the plaintiff to strike the same should be denied (*Citibank [S.D.] v. Coughlin*, 274 A.D.2d 658, 659-660, 710 N.Y.S.2d 705; see *Dubois v. Vanderwalker*, 245 A.D.2d 758, 760, 665 N.Y.S.2d 460; *D'Agostino v. Harding*, 217 A.D.2d 835, 836, 629 N.Y.S.2d 524; *Schmidt's Wholesale v. Miller & Lehman Constr.*, 173 A.D.2d 1004, 1005, 569 N.Y.S.2d 836; *Pump v. Anchor Motor Frgt.*, 138 A.D.2d 849, 850-851, 525 N.Y.S.2d 959; *Riland v. Todman & Co.*, 56 A.D.2d 350, 393 N.Y.S.2d 4). In this regard, the Appellate Division, First Department, and the Appellate Division, Third Department, opine that no motion by the plaintiff lies under CPLR 3211(b) to strike the defense, as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim (see *Riland v. Todman & Co.*, 56 A.D.2d 350, 393 N.Y.S.2d 4). The positions taken by those Courts are well-grounded and sound. Accordingly, we concur with that rationale and adopt it as this Court's rule of law. To the extent that prior cases from this Court hold differently, henceforth they should no longer be followed.

The defense of failure to state a cause of action, when asserted in a responsive pleading (i.e., the answer) is "one of those objections not subject to the rigid time limits that CPLR 3211(e) otherwise imposes on CPLR 3211(a) objections, so it remains viable whether included in the answer or not" (*Siegel*, N.Y. Prac. § 269, at 450 [4th ed.] ). However, a party who asserts the defense of failure to state a cause of action in a pleading will not achieve the intended purpose of dismissal, unless and until he or she makes an appropriate motion.

In sum, the appellant herein had several options available to her: (1) she could have made a pre-answer motion to dismiss the complaint based upon the ground that the complaint failed to state a cause of action; (2) in the absence of a pre-answer motion, she could have asserted (as, in fact, she did), the defense of failure to state a cause of action in the answer; or (3) she could have opted to make a post-answer motion on this ground, irrespective of whether she had made a pre-answer motion or asserted the defense in the answer, because the motion to dismiss based upon a ground that the complaint failed to state a cause of action can be made at any time.

In light of this, plaintiff is not entitled to dismissal of the first affirmative defense of failure to state a cause of action. However, the branch of the motion seeking to dismiss defendant's second affirmative defense alleging that plaintiff lacks standing to assert claims against defendant, stands on a different footing.

Plaintiff seeks dismissal of the second affirmative defense on the ground that defendant failed to plead any factual allegations in support of the defense, and relies upon the Appellate Division, Second Department case of Bentivegna v. Meenan Oil Co., Inc., 126 A.D.2d 506 (2<sup>nd</sup> Dept. 1987), which held that affirmative defenses "totally bereft of factual data [] are fatally deficient." Id. at 507.<sup>1</sup> Here, the second affirmative defense alleging that plaintiff lacks standing to maintain this action, "which merely plead conclusions of law without any supporting facts" [Fireman's Fund Ins. Co. v. Farrell, 57 A.D.3d 721, 723 (2<sup>nd</sup> Dept. 2008)], is deficient, and plaintiff is entitled to dismissal on this ground. Further, as defendant does not interpose opposition with regard to such dismissal, that branch of the motion for dismissal of the second affirmative defense for lack of standing, is granted.

Accordingly, denied are those branches of the motion by plaintiff for an order, pursuant to CPLR § 3212, granting summary judgment to plaintiff on all its causes of action contained in the verified complaint, and dismissing defendant's first affirmative defense asserting failure to state a cause of action, and the counterclaim seeking a declaratory judgment declaring void the resolutions adopted by plaintiff in the October 11, 2007 meeting. That branch of the motion for dismissal of the second affirmative defense is granted and the second affirmative defense for lack of standing hereby is stricken from defendant's answer.

Dated: April 7, 2009

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J.S.C.

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<sup>1</sup> This case was also abrogated by Butler v. Catinella, 58 A.D.3d 145 (2<sup>nd</sup> Dept. 2008), with regard to the portion of the holding asserting that a defense based upon failure to state a valid cause of action cannot be interposed in an answer. The case remains viable with regard to the instant point of law.