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# New York Supreme Court

## Appellate Division—Second Department

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JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE  
AND MASON SUPPLY, INC.,

**Docket No.:**  
**2018-12622**

*Plaintiffs-Appellants,*

– against –

JOSEPH M. TROFFA, LAURA J. TROFFA, JOS. M. TROFFA MATERIALS  
CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT  
ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE  
AND MASON SUPPLY, INC.,

*Defendants-Respondents.*

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### REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## PRELIMINARY STATEMENT

Plaintiff-Appellant Jonathan Troffa (“Jonathan”), suing derivatively<sup>1</sup> as a shareholder on behalf of Jos. M. Troffa Landscape & Mason Supplies, Inc. (the “Corporation”), respectfully submits this Reply Brief in further support of Jonathan’s appeal of the Short Form Order of the Honorable Jerry Garguilo dated September 25, 2018 (the “Appealed Order”).

While it may be arguable that Jonathan brought youth and vigor to his father’s basically stagnant business, and that Jonathan was responsible for the Corporation’s diversification and growth over the decades, such issues, to which Respondents devote so much attention, are entirely irrelevant to the present appeal.

**Point 1. The proper statute of limitations applicable to a shareholder’s derivative lawsuit is six years under CPLR § 213(7).**

No matter how many pages of text Respondents devote to arguing that a three-year statute of limitation applies to breach of fiduciary duty claims seeking monetary relief, the controlling statutory and abundant black-letter case law holds that derivative claims have a six-year statute of limitations. The issue on appeal turns on whether the Supreme Court incorrectly precluded claims as time barred by applying the wrong statute of limitations to the Derivative Claims. Respondents

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<sup>1</sup> The claims asserted in the Fourth Cause of Action of the Amended Complaint are referred to herein as the “Derivative Claims.”

have not actually argued, nor could they argue, that the six-year statute under CPLR § 213(7) is not applicable to Jonathan's Derivative Claims.

The Supreme Court erred in quashing the subpoenas in question by applying the wrong statute of limitations. Notwithstanding a motion court's broad discretion in discovery matters, such discretion does not extend to perpetuation of errors of law. The Appealed Order cannot be reconciled with applicable law and must be reversed.

**Point 2. Law of the case principles argued below do not apply to the Appellate Division in the present appeal.**

Law of the case principles provide that once a court determines an issue in a matter, that determination becomes the "law of the case" and is controlling of the issue if presented again. *Werthner v. Olenin*, 186 Misc. 829, 831 (Sup. Ct. N.Y. County 1945), *aff'd*, 272 A.D. 798 (1st Dept. 1947).

The doctrine, however, is limited to courts of coordinate jurisdiction. The Appellate Division is not bound by law of the case principles applied in a lower court, as this Court held: "[T]he appellant's argument concerning a violation of the law of the case doctrine is unavailing in this court, which is not a court of coordinate jurisdiction." *Obrycki v. Elliott*, 130 A.D.2d 563 (2d Dept. 1987). *See Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975)(opining that law of the case principles have no "binding force on appeal since the appellate court is not a coordinate, but a higher tribunal.").

**Point 3. Respondents have candidly admitted that prior to the Appealed Order, the statute of limitations applicable to the Derivative Claims had never been adjudicated, confirming that their law of the case argument is meritless.**

We showed in our Appellant's Brief that the Supreme Court explicitly refused to dismiss the shareholder's Derivative Claims. Regardless of how many times the Supreme Court may have ruled on other causes of action, it never altered that decision.

The Appealed Order did not include any law of the case rationale for its decision, and for good reason. The Supreme Court had explicitly denied Respondents' motion to dismiss the Fourth Cause of Action, the Derivative Claims, stating: "That branch of defendants' motion to dismiss the fourth cause of action which alleges a derivative cause of action is denied, inasmuch as shareholders are entitled to sue only derivatively, not individually." A-42.

To be considered law of the case, a determination must be on the merits. For example, the law of the case doctrine is not applicable to a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action. *See Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, Inc.*, 128 A.D.2d 467, 469 (1st Dept. 1987). Indeed, it is well-settled that law of the case doctrine "applies only to legal determinations that were necessarily resolved on the merits in the prior decision." *Gilligan v. Reers*, 255 A.D.2d 486, 487 (2d Dept. 1998). There is no prior order

which determined, on the merits, the statute of limitations applicable to Jonathan's Derivative Claims.

In fact, prior to the motion leading to the Appealed Order, counsel for Respondents candidly conceded that "the Court never adjudicated the statute of limitations applicable to Jonathan's Fourth Cause of Action labeled as a 'Derivative Action.'" A-48. In light of this stunning admission, there can be no bona fide law of the case argument. Respondents' appellate argument is entirely bereft of merit.

**Point 4. Law of the case principles do not even compel a court of coordinate jurisdiction to adhere to an erroneous decision.**

Law of the case principles comprise a discretionary rule of practice which, although generally adhered to, does not necessarily extinguish the power of a second judge of coordinate jurisdiction to make a determination at odds with the earlier decision. *See Messenger v. Anderson*, 225 U.S. 436 (1912); *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131 (2d Cir. 1956). It is a practice not a limitation. *See People v. Evans*, 94 N.Y.2d 499, 503 (2000). As Justice Holmes observed in *Messenger v. Anderson*, (*supra*), law of the case expresses the general practice of courts to decline reopening that which has been decided. Indeed, application of the law of the case is discretionary. *See e.g. Brentwood Pain & Rehab. Serv. v. Allstate*, 508 F. Supp.2d 278, 288 (S.D.N.Y. 2007).

Thus, law of the case principles may be ignored in circumstances vitiating their effectiveness. *See Foley v. Roche*, 86 A.D.2d 887 (2d Dept. 1982); *Matter of Rose*, 109 Misc. 2d 960 (Sup. Ct. Kings County 1981). The principle is directed to a court's discretion and does not restrict the court's authority. *See Cohen v. Crown Point Cent. Sch. Dist.*, 306 A.D.2d 732, 734 (3d Dept. 2003).

Law of the case principles permit a reasoned exercise of a certain degree of discretion in its application. It should not be utilized to accomplish an obvious injustice, or applied where a prior decision is clearly erroneous or unjust. Thus, in a case where the law of the case was clearly erroneous, such as where the court is made aware of contrary authority emanating from the Court of Appeals, whose rulings are controlling, the doctrine must bend. *See In re LaDelfa*, 107 A.D.3d 1562, 1563-64 (4th Dept. 2013).

In the presence of a cogent or compelling reason, a court need not continue to adhere to previously made erroneous decisions in the same case. *See U.S. v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991). Compelling or cogent reasons include the "need to correct a clear error or prevent manifest injustice." *DiLaura v. Power Authority of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992). *See Collins v. Indart-Etienne*, 59 Misc. 3d 1026, 1043-44 (Sup. Ct. Kings County 2018).

"The doctrine does not limit a court's power to reconsider its own decisions prior to final judgment." *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d at 76.

Any holding that a three-year statute of limitations would apply to Jonathan's Derivative Claims would have been clearly erroneous as a matter of law.

Accordingly, law of the case principles would have compelled the Supreme Court to vacate its own erroneous application of a three-year statute to Jonathan's Derivative Claims.

**Point 5. The Derivative Cause of Action was mandated by law and was not an effort to dress up a direct claim for monetary damages.**

The Fourth Cause of Action was the only modality for Jonathan to recover on behalf of the Corporation. Where there are only two stockholders, each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another. The proper remedy is a stockholder's derivative action. *See* Appellant's Brief at 5. The assertion of the Derivative claims was mandated, and was not an effort to circumvent any shorter statute of limitations.

**Point 6. The timely withdrawal of notices of appeal and the decision not to appeal decisions affecting only the direct claims have no bearing on this appeal.**

Notices of Appeal of prior orders in this case, where filed, were timely withdrawn, a fact not disputed by Respondents. Other orders cited by Respondents were not noticed for appeal at all. Therefore, all of the prior decisions and orders of the Supreme Court cited by Respondents in their brief and appendix are subject to appeal under CPLR § 5701(a)(1). The decision to defer such appeals was based on the fact that the Derivative Claims, going back six years, had not been affected,

and therefore the claim relative to the Compost Yard, remained viable. Appealing those decisions would have afforded Jonathan little or no cognizable benefit, but would have caused him to incur substantial costs and unnecessarily burden the courts' resources. The decision to reserve appellate practice on prior decisions has no bearing on the merits of this appeal.

**Point 7. The Supplemental Appendix was unnecessary and Jonathan should not be burdened with the cost of producing it.**

In view of the admitted fact that there was no prior adjudication of the statute of limitations applicable to a derivative lawsuit, there was no bona fide argument for application of law of the case principles in this appeal. Accordingly, there was no reason to include the materials submitted in the Supplemental Appendix or to impose such costs on Appellant. Moreover, even had the Supreme Court applied law of the case principles (which it did not) in deciding the Appealed Order, law of the case is not binding at an appellate level, so Respondents' entire argument is specious. We ask this Court to deny Respondents' request. We also respectfully ask that Appellant be awarded costs relative to this appeal.

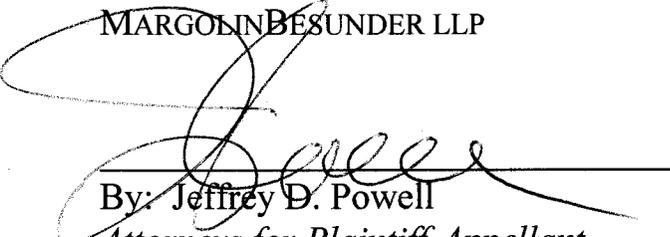
## CONCLUSION

For the reasons aforesaid, the Appealed Order erred in applying a three-year statute of limitations to the instant shareholder's Derivative Claims. Accordingly, the Appealed Order should be reversed and the motion to quash the subpoenas and for protective order must be denied.

Dated: Islandia, New York  
March 6, 2019

Respectfully submitted,

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