22-1442

United States Court of Appeals

for the

Second Circuit

BRITTANY N. JONES, AKA BRITTANY N. FINCH,

Plaintiff-Appellant,

– v. –

CATTARAUGUS-LITTLE VALLEY CENTRAL SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK (BUFFALO)

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Cattaraugus-Little Valley Central School District is a governmental organization exempt from the Disclosure Statement requirements of Fed. R. App. P. 26.1.

Dated: April 25, 2023

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JURISDICTIONAL COUNTERSTATEMENT

Defendant-Appellee Cattaraugus-Little Valley Central School District (hereafter, the "District") concedes subject matter jurisdiction pursuant to 28 U.S.C. § 1332, and further concedes jurisdiction over Plaintiff's appeal from the District Court's summary judgment decision pursuant to 28 U.S.C. § 1291. Any remaining issues have been abandoned.

COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Were Plaintiff-Appellant Brittany Jones a/k/a Brittany Finch's (hereafter "Plaintiff") claims timely when she commenced this action?

Answer: No. Plaintiff's claims were time-barred before the passage of the Child Victim's Act (the "CVA").

2. Plaintiff commenced this action outside the claim revival window prescribed by the CVA, codified at CPLR § 214-g. Were Plaintiff's time-barred claims revived?

Answer: No. Plaintiff's arguments in this regard are unpreserved and should not be considered. Even if considered, the revival window prescribed by CPLR § 214-g is purposefully exclusive. It does not allow "discretionary" revival of time-barred claims for actions commenced outside the revival window.

3. Should the trial court have ignored the District's statute of limitations defense under equitable principles of waiver or estoppel?

Answer: No. The District pleaded its defense at the outset of this action, acted at all times in good faith, and had no obligation to act in accordance with Plaintiff's strategic interests. There is no basis to find that the District waived any defense, or that the District should be estopped from asserting any defense.

COUNTERSTATEMENT OF THE CASE

A. Material Substantive Facts

The following substantive facts material to this appeal are undisputed: Plaintiff was born in 1994, and reached the age of 18 in 2012. (A. 00048, 00095) Plaintiff alleges that non-party Timothy Retchless sexually abused her at various times from approximately 2008 to early 2011, while he was a teacher employed by the District. (A. 00049-51, 00096-98) Retchless resigned from his employment with the District no later than February 28, 2011. (A. 00051, A. 00098)[1]

[1] Plaintiff's brief recites the specifics of the alleged abuse, Retchless's criminal conviction, and Plaintiff's view that the District had actual or constructive notice of the abuse. Those allegations are irrelevant to the issues on appeal, and are not admitted.

B. Procedural History and Discovery

Plaintiff commenced this action on April 29, 2019. (A. 00049, 00096) Her Complaint contains a heading titled "Statute of Limitations," alleging that Plaintiff's claims are "permitted pursuant to New York CPLR § 213(c)" and "pursuant to New York State Senate Bill S2400, also known as the 'Child Victims Act' of 2019." (A. 00018) The District filed its Answer on May 31, 2019. (A. 00030) The District's Answer denied the allegations appearing under the "Statute of Limitations" heading in Plaintiff's Complaint, and included an affirmative defense stating that "Plaintiff's complaint is barred by the applicable statute of limitations." (A. 00036)

Thereafter, the parties engaged in discovery the full timeline of which is set forth at length in the Reply Declaration of Patrick J. Hines, dated March 11, 2022, submitted in support of the District's motion for summary judgment. (A. 000343-350; S.A. 32-82). For brevity, the facts will not be recited in detail. Key facts include the following:

- Following automatic referral to mediation as part of the District Court's mandatory ADR program, the parties met for mediation on October 9, 2019. (A. 000346) Contrary to the representation in Plaintiff's brief that the parties engaged in "multiple mediation attempts," this meeting was the parties' only mediation attempt.

- The parties voluntarily exchanged the documents identified in their Rule 26 initial disclosures in January 2020. (A. 000346) Around the same time, Plaintiff's counsel announced his intention to serve discovery. (A. 000344-345; S.A. 41-42)

- The District served its discovery demands in February 2020. Receiving no response, the District implored Plaintiff to move the case forward for months—repeatedly expressing concern that the parties were "wasting valuable time." (A. 000346-347)[2]

- Throughout discovery, the District was forced to file multiple requests for extension, some of which were joint requests, primarily based on Plaintiff's failure and/or refusal to provide routine disclosures. (A. 000346-000348)

- Plaintiff did not serve her first set of discovery demands until October 21, 2020—eighteen months after commencement and a year after her counsel declared his intention to serve discovery demands. (A. 000348; S.A. 44-59)

- The District responded on November 24, 2020 without delay or any request for extension. (A. 000345)[3] Plaintiff never

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[2] April 30, 2020: "Please advise as soon as possible, as I don't want to waste the extra time granted by the Court." (S.A. 62)

May 14, 2020: "Tony, I fear we are wasting valuable time. Please let me know when you will be able to move discovery forward in this case." (S.A. 61)

May 26, 2020: "We need to get the wheels back on this case quickly" (S.A. 61)

June 8, 2020: "While I fully understand your position, I must nonetheless insist that responses be provided this week." (S.A. 65)

[3] Plaintiff's brief suggests that the District "withheld" materials from a personnel file—which is both untrue and immaterial to the issues on appeal. In reality, the District produced those materials without delay or objection in response to Plaintiff's first set of document requests. (A. 000343-345)

identified any deficiency in the District's production of information.

- Plaintiff consciously awaited the depositions of District witnesses in a parallel insurance coverage action, and obtained the benefit of having those transcripts before conducting depositions in this matter. (A. 000348)

- The parties proceeded with depositions beginning on May 4, 2021 (after Plaintiff adjourned her deposition a month earlier). (A. 000348-349) Through the summer of 2021, the District produced seven witnesses sought by Plaintiff on the dates proposed by Plaintiff, without a single request for adjournment. (*Id.*)

C. Correcting Plaintiff's Embellishment

A misstatement of fact repeated throughout Plaintiff's brief, while ultimately immaterial, must be corrected. In opposition to the District's motion below, Plaintiff's counsel accused the District's counsel of saying he "did not think he would be filing a motion for summary judgment." (S.A. 20) Counsel for the District denied saying that. (A. 000350)

Plaintiff's brief on appeal repeatedly asserts that counsel said he "would not" file a motion for summary judgment. That embellishment—from "did not think he would file" to "would not file"—has no foundation in the record.

Plaintiff had the materials for eight months before depositions began, and used the documents at all depositions. (*Id.*) Those documents are immaterial to the District's statute of limitations defense.

There was no allegation below that the District's counsel said he "would not" file a motion for summary judgment.

D. The Decision Appealed From

On September 3, 2021, the District filed its motion for summary judgment pursuant to Fed. R. Civ. P. 56. (A. 000360) At that time, the deadline for dispositive motions was not until May 27, 2022. (A. 000360) In response, Plaintiff opposed the motion and separately filed a motion for sanctions against the District. (A. 000361) Plaintiff later added a motion for a hearing—concerning whether counsel for the District made the alleged statement referenced above. (*Id.*)

In a Decision and Order dated June 13, 2022, the District Court granted the District's motion and dismissed Plaintiff's claims. It also denied Plaintiffs' motions for sanctions and for a hearing. The Plaintiff appealed, but her appellate brief contains no argument concerning her affirmative motions for sanctions or for a hearing.

COUNTERSTATEMENT OF STANDARD OF REVIEW

Plaintiff's brief states the standard of review for a motion to dismiss under Fed. R. Civ. P. 12(b)(6), but the District's motion was made pursuant to Fed. R. Civ. P. 56.

On appeal from a Rule 56 motion, the appellate court's review is *de novo*. The appellate court is not required to "accept all factual allegations as true." It reviews the record in the light most favorable to the non-moving party, and gives the non-moving party the benefit of all reasonable inferences. *Buttry v. Gen. Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995).

SUMMARY OF ARGUMENT

Plaintiff's claims are untimely. That was undisputed below. For the first time on appeal, Plaintiff argues that CPLR § 214-g permits revival of otherwise-barred claims in actions commenced outside the revival window. Even if the Court were to consider this unpreserved argument, it would fail. The revival window is exclusive, and actions on barred claims may not be commenced outside it.

The balance of Plaintiff's argument is an attempt to escape the District's complete defense as a matter of equity. There is no equitable basis to ignore the District's defense here. From the outset, Plaintiff knew the CVA presented an unusual statute of limitations issue. Plaintiff's Complaint explicitly contemplated the statute of limitations under a standalone heading. By her counsel's admission, the sole reason Plaintiff failed to timely commence this action

was a misreading of the CVA. (A. 000103; S.A. 12-13) The District did nothing to cause Plaintiff's untimely filing.

Upon Plaintiff's untimely filing, the District explicitly pleaded that Plaintiff's claims were barred by the statute of limitations. Knowing the unusual statute of limitations issue at hand, if Plaintiff believed her action was timely, her remedy was a motion to strike the defense. Such a motion would have forced the District to point out Plaintiff's mistake, and allowed Plaintiff an opportunity to timely refile. Plaintiff had over two years to test the District's defense, and she failed to do so.

Plaintiff now faults the District for her counsel's mistakes. She argues the District should have moved for summary judgment while Plaintiff could still withdraw and recommence this action within the revival window—effectively waiving a complete defense. The District had no obligation to act against its own interests, or litigate this matter consistent with Plaintiff's strategic interests.

Plaintiff also cites various collateral issues to suggest inequity, none of which have merit. Plaintiff complains that the District had a "scheme" to "run out the clock." But the record demonstrates the District's timely pursuit of discovery, and Plaintiff's egregious delays. Mere participation in discovery is no basis to estop the District's defense.

Plaintiff's counsel also accused the District's counsel of saying he "did not think he would be filing a motion for summary judgment." (S.A. 20) The District's counsel denied that accusation. (A. 000350) But even if counsel said that, the alleged statement between attorneys was equivocal, it only concerned when defenses might be raised (not whether they would be raised), and it had nothing to do with waiver of any defense.

ARGUMENT

POINT I. PLAINTIFF'S CLAIMS ARE UNTIMELY AS A MATTER OF LAW, AND THE DISTRICT HAS A RIGHT TO DISMISSAL

A. Plaintiff's claims were barred by the applicable statute of limitations when she commenced this action.

"Under New York law, claims of negligence against a school district are governed by a one year and ninety day statute of limitations." *Niles v. Nelson*, 72 F. Supp. 2d 13, 20 (N.D.N.Y. 1999) (citing Gen. Mun. Law § 50-i(1)(c)).[4] Under former CPLR § 208—now CPLR § 208(a)—the statute of limitations is tolled for infant plaintiffs during the period of their disability for infancy. Therefore, when a plaintiff's claim against a school district accrues while he or she

[4] The CVA changed the applicability of Gen. Mun. Law § 50-i, and extended the statute of limitations for claims arising from certain sexual offenses. That extension is inapplicable to claims which were already time-barred as of the effective date.

is under the age of 18, CPLR § 208(a) effectively extends the limitations period to one year and 90 days after the plaintiff's 18th birthday.

Here, it is undisputed that Plaintiff's cause of action accrued no later than the end of Retchless's employment with the District on February 28, 2011. (A. 00051, 00098) Plaintiff was born in 1994, (A. 00048, 00095), and was an infant during the time in which her cause of action accrued. Under the toll provided by former CPLR § 208, the one year and 90 day limitations period did not begin to run until Plaintiff's 18th birthday in 2012. One year and 90 days from that date was in 2013, and Plaintiff's claims were time-barred after that date.

Plaintiff did not commence this action until April 29, 2019. (A. 00049, 00096) Therefore, Plaintiff's claims are time-barred unless some exception or other provision revives them. As discussed below, there are no such exceptions or other provisions which revive Plaintiff's claims. Her claims must be dismissed in their entirety.

B. Plaintiff did not commence this action within the CVA revival window, and therefore her claims are not revived.

On February 14, 2019, the Child Victims Act (S. 2440) became effective. *See* Child Victims Act, 2019 N.Y. Sess. Laws c. 11, as amended. Section 3 of the CVA, codified at CPLR § 214-g, revived previously time-barred

claims involving certain sexual offenses and allowed actions thereon—but only if those actions were commenced within a specific time period. In relevant part, the current version of CPLR § 214-g provides:

> Notwithstanding any provision of law which imposes a period of limitation to the contrary …, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, … which conduct was committed against a child less than eighteen years of age, which is barred as of the effective date of this section because the applicable period of limitation has expired …, is hereby revived, ***and action thereon may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section***. (emphasis added)

The original CVA revival window began six months after the effective date of the statute, and extended to one year and six months after the effective date. 2019 N.Y. Sess. Laws c. 11, § 3. Due to the COVID-19 pandemic, on August 3, 2020, the Legislature extended the window to two years and six months after the effective date. 2020 N.Y. Sess. Laws c. 130, § 1.

In sum, the CVA revived certain claims which were time-barred as of the effective date of the statute—February 14, 2019. But it limited that revival,

and required potential plaintiffs to commence their otherwise-late actions between August 14, 2019 and August 14, 2021. N.Y. C.P.L.R. § 214-g.

Plaintiff concedes that she commenced her action before the CVA revival window opened—on April 29, 2019. Thus, her action was untimely. Plaintiff's claims are time-barred in their entirety, and the District Court's decision to dismiss her claims with prejudice should be affirmed.

POINT II. PLAINTIFF'S ARGUMENTS CONCERNING STATUTORY INTERPRETATION AND LEGISLATIVE INTENT ARE UNPRESERVED, AND WITHOUT MERIT.

A. Plaintiff's arguments concerning the interpretation or intent of CPLR § 214-g are unpreserved.

The District Court correctly summarized Plaintiff's contentions below as follows:

> Plaintiff concedes that she commenced her action prematurely, but argues that this Court should find that the District is estopped from asserting this defense, excuse her mistake, and find that the District would suffer no prejudice if her claim were permitted to proceed despite its premature filing. (A. 000362)

Plaintiff's brief on appeal argues for the first time that CPLR § 214-g is ambiguous—in that it uses the term "may" instead of "shall." (Appellant's Br. at pp. 14-15) Based on that alleged ambiguity, Plaintiff argues that the Court has "discretion" to allow her untimely claim. (*Id.* at p. 15) Plaintiff further argues that

the legislative intent of the statute was to benefit claimants, and therefore she should be allowed to file her claim early. (*Id.* at pp. 15-18)

Below, Plaintiff conceded that her claims were untimely. She did not argue, and the District Court did not consider, that there was any ambiguity in the statute providing courts with "discretion" to permit actions commenced outside the CVA revival window. Similarly, Plaintiff did not argue that the language of the statute should be ignored if the Court feels it would "remedy the injustices of child sexual abuse survivors' time-barred claims."[5] (*Id.* at p. 16)

This Court should not consider Plaintiff's argument raised for the first time on appeal. *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (quotation omitted). While this Court has reviewed unpreserved arguments to avoid manifest injustice, "the circumstances normally 'do not militate in favor of an exercise of discretion to address [] new arguments on appeal' where those arguments were 'available to the

[5] Plaintiff's argument below was that barring an allegedly meritorious claim pursuant to the statute of limitations would constitute an injustice or "absurd result." (A. 000115-119)

[parties] below' and they 'proffer no reason for their failure to raise the arguments below.'" *Id.* (quoting *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005)).

Here, Plaintiff could have raised her legal argument below, and she provided no justification for her failure to do so. There is no reason to review Plaintiff's new argument in the exercise of discretion. In any event, even if this Court were to consider Plaintiff's new argument, it is without merit.

B. The text of CPLR § 214-g unambiguously established an exclusive revival window.

In *Regina Metropolitan Co., LLC v. NYSDHCR*, 35 N.Y.3d 332, 371 (2020), the New York Court of Appeals acknowledged that "[t]he Legislature has historically acted with deliberation and clarity when upsetting the strong public policy favoring finality, predictability, fairness and repose served by statutes of limitation." *Regina*, 35 N.Y.3d at 372. And given the Legislature's preference to explicitly revive claims when revival is intended, *Regina* reiterated that "the presumption against claim revival effect may only be overcome by the Legislature's unequivocal textual expression that the statute was intended not only to apply to past conduct, but specifically to revive time-barred claims[.]" *Id.* at 373 (citing *35 Park Ave. Corp. v. Campagna*, 48 N.Y.2d 813, 815 (1979)).

Here, as the District Court noted, the CVA revival window "is an extraordinary use of the legislature's power." (A. 000365) "Special laws, such as CPLR 214-g, that revive causes of action are extreme examples of legislative power and are narrowly construed." *S.H. v. Diocese of Brooklyn*, 205 A.D.3d 180, 188 (2d Dep't 2022) (internal quotations and citation omitted).

There is no ambiguity in the language of CPLR § 214-g. It provides an exclusive window for actions on revived claims. Such actions "may be commenced not earlier than" a specific date, and "not later than" a specific date. There is no discretion expressed or implied in the text.

Plaintiff's own authorities support reading CPLR § 214-g as an exclusive revival window. Plaintiff cites an excerpt of Black's Law Dictionary, which counsels that "the context in which the word appears must be controlling." *May*, *Black's Law Dictionary* (5th ed. 1979). Here, there is no "discretion or choice between two or more alternatives" in the statute. *Id.* The phrasing—"may be commenced not earlier than" and "not later than"—necessarily means that actions may not be commenced outside the window.[6] The revival window is exclusive.

[6] Plaintiff's citation to *XY Planning Network, LLC v. United States Securities and Exchange Commission*, 963 F.3d 244, 253 (2d Cir. 2020), is inapposite.

Plaintiff's proposed reading—that the revival window is not exclusive—would mean that Courts have discretion to allow claims filed before ***or after*** the CVA revival window. This reading would entirely defeat the purpose of creating a revival window at all. The text of the statute does not contemplate any permissive commencement outside the CVA revival window.

Beyond the statutory text, the exclusivity of the revival window is explicitly stated in the legislative history. In the bill sponsor's memo submitted with the CVA, the summary of proposed CPLR § 214-g states that "[s]uch revival ***can only take place*** within a one year window which commences six months from the effective date of the act." (A. 00078) (emphasis added). Both the text and the legislative history support the conclusion that the revival window is intended to be exclusive.

Commentary further notes that the purpose of the waiting period between the effective date of the statute (February 14, 2019) and the beginning of the CVA revival window (August 14, 2019) "was to give victims and their attorneys an opportunity to begin preparing their cases before the clock started

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The statute at issue involved a grant of discretionary rulemaking authority to SEC. *Id.* ("Congress stated that the SEC 'may commence a rulemaking, as necessary or appropriate in the public interest[.]") (emphasis omitted).

ticking on the one-year revival period, ***and … to enable the court system to meet the special issues that the ensuing litigation was likely to generate***." Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of New York Annotated, C.P.L.R. 214-g, 2019 (emphasis added).[7] Plaintiff argues that she was entitled to jump ahead of other claimants regardless of the court system's preparedness, if she was so inclined. Her proposed interpretation would defeat the latter purpose of CPLR § 214-g.[8]

At least one other court has recognized that actions on otherwise-barred claims commenced before the CVA revival window are not timely, and are subject to dismissal. In *Geiss v. Weinstein Company Holdings LLC*, 383 F. Supp. 3d 156, 176 (S.D.N.Y. 2019), the plaintiff alleged that she was sexually assaulted in 2002 when she was 16 years old. The relevant plaintiff's claims were otherwise

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[7] *See also* Michael Mroziak, *Seven WNY judges among 45 statewide to hear thousands of expected Child Victims Act cases*, WBFO.ORG (Aug. 14, 2019, 4:27 AM), https://www.wbfo.org/local/2019-08-14/seven-wny-judges-among-45-statewide-to-hear-thousands-of-expected-child-victims-act-cases (reporting on efforts of the local judiciary in the Western District of New York to prepare for hundreds of new CVA cases).

[8] Plaintiff also contradicts herself when she claims that she filed prematurely because she "did not need the extra window of time granted by the CVA to prepare her case." (Appellant's Br. at 17) She did not raise that argument below, and her counsel conceded that the sole reason Plaintiff commenced prematurely was counsel's misreading of the statute. (A. 000103-105)

time-barred, and she commenced the action before the statutory revival window opened.[9] The court dismissed her claims without prejudice to recommence on those claims "when they become timely under section 214-g." *Id.* In other words, the Court recognized that actions on time-barred claims commenced before the window opened are untimely.

Even if the Court considers Plaintiff's unpreserved statutory interpretation argument, the Court should construe the legislature's "extraordinary" use of power narrowly. *S.H.*, *supra*, 205 A.D.3d at 188. The plain text of the statute and the legislative intent demonstrate that the CVA revival window is exclusive.

C. Disallowing premature actions does not frustrate the CVA's legislative purpose.

"Civil liability is always bounded by the public policy of repose embodied in statutes of limitations." *Regina*, 35 N.Y.3d at 360.

Plaintiff argues that, regardless of the statutory text, the Court should ignore the District's defense because the CVA was intended to benefit victims of

[9] The Jane Doe plaintiff addressed by the relevant portion of the opinion in *Geiss* was added to the case in the First Amended Complaint, filed October 31, 2018. *See Geiss v. Weinstein Co. Holdings LLC*, No. 17-cv-09554-AKH, Dkt. 140 (S.D.N.Y. Oct. 31, 2018).

child abuse. The District concedes that the CVA gave claimants an extraordinary one-time opportunity to revive time-barred claims. The legislature created CPLR § 214-g to provide a limited revival window—which it extended by an additional year during the pendency of this action. L. 2020 N.Y. Sess. Laws c. 130, § 1. Thousands of claimants availed themselves of that opportunity. Finding that the individual claimant in this case failed to avail herself of the opportunity provided by CPLR § 214-g does not frustrate the legislative purpose of the CVA, or deny relief to claimants who timely commenced their actions.

Plaintiff's analogy to the decision in *Doe v. City of Los Angeles*, 169 P.3d 559, 566-67 (Cal. 2007) is inapt, and the holding in that case is inapposite. *Doe* involved the meaning of vague terms, and the proper pleading standard concerning a statute which extended the limitations period for certain sexual abuse claims. *Id.* *Doe* did not concern the calculation of deadlines in the context of a claim revival statute. Nor does the case at bar involve pleading standards, or interpretation of undefined terms. Moreover, while the *Doe* court concluded that the legislature intended the particular statute at issue to be construed broadly, *id.* at 561-62, it noted the caveat that "we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does." *Id.* at 567 (citation omitted).

Here, Plaintiff is not arguing for an expansive interpretation of vague phrasing. She is asking the Court to ignore the plain text of the statute and adopt a reading that would defeat its purpose entirely. If the legislature intended to revive all time-barred claims, regardless of when actions thereon were commenced, it would have done so. The remedial purpose of the CVA does not require or allow the Court to ignore the legislature's purposeful prescription of an exclusive revival window with a specific start and end date.

POINT III. THERE IS NO EQUITABLE BASIS TO IGNORE THE DISTRICT'S DISPOSITIVE STATUTE OF LIMITATIONS DEFENSE

"[I]t would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 111 (1945) (citation omitted).

The central thrust of Plaintiff's argument is a request for this Court to ignore the operation of the CVA for equitable reasons. Equity does not support such a drastic deprivation of the District's rights. Plaintiff's remedy lies against her attorney—who failed to comply with the mandate of CPLR § 214-g, and failed to test the District's defense for more than two years while his mistake was fixable.

A. The District had no obligation to file its summary judgment motion at the time most beneficial to Plaintiff's strategic interests.

Rule 8(c) of the Federal Rules of Civil Procedure requires defendants to affirmatively plead certain defenses, including the statute of limitations. *See* Fed. R. Civ. P. 8(c)(1). "Rule 8(c) … serves the purpose of giving the opposing party notice of the defenses that are being put in issue and preserves the defendant's opportunity to argue why the claim for relief should [] be barred completely." 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1270 (4th ed. 2022).

Here, the District affirmatively pleaded a statute of limitations defense in its very first filing—on May 31, 2019. (A. 00036) Given the Complaint's explicit discussion of the unusual statute of limitations issue at hand, (A. 00018), Plaintiff and her counsel were on notice of the need to closely examine the District's defense. If Plaintiff believed her claims were timely, her remedy was a motion to strike the defense under Fed. R. Civ. P. 12(f). Had Plaintiff timely filed such a motion, the District would have been obliged to explain its statute of limitations defense, and Plaintiff could have corrected her mistake by withdrawing and recommencing while the CVA window remained open. The District cannot be deprived of its defense simply because Plaintiff did not timely examine it.

Plaintiff faults the District for waiting to file its motion until immediately after the CVA revival window closed. In other words, Plaintiff claims the District was obliged to file its motion at a time that was the most strategically beneficial to her. Fed. R. Civ. P. 56(b) provides that a summary judgment motion can be made "at any time until 30 days after the close of discovery," unless a different time is set by local rule. Plaintiff cites no law, rule, or other authority which required the District to take on the role of Plaintiff's counsel, act against its own interests, and effectively waive a complete defense.

In *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 124 (2d Cir. 1991), the defendant pleaded a statute of limitations defense, and then waited until after the plaintiff rested at trial to seek a directed verdict on that ground. *Id.* at 124. The trial court held that the defendant had waited too long to assert the defense. But this Court reversed, holding that there was no basis for estoppel because the defendant adequately pleaded the defense. *Id.* at 125. The Court's decision implies that the plaintiff must examine the defenses asserted in the answer, and the defendant does not waive its defense by waiting to assert it—even until after the plaintiff rests at trial.

Plaintiff cites *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999), which concerned forfeiture of a jurisdictional defense by failure to raise it

despite multiple opportunities over four years. *Id.* This Court noted at least four opportunities to raise a jurisdictional challenge as the case was transferred to MDL and returned to the District Court, and held that the defendant forfeited its defense. *Id.* at 61-62. Similarly, in *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 135-36 (2d Cir. 2011), the defendants initially litigated a jurisdictional defense, and later announced to the court that they intended to "cease defending" despite the potential for a default. *Id.* at 135. In those circumstances, the Court held that the defendants had waived their personal jurisdiction defense. *Id.* at 135-36.

Here, the District reasonably chose not file its summary judgment motion at a time that would have caused a de facto nullification of an otherwise complete defense. The District filed its motion immediately after the CVA revival window closed and long before the deadline for dispositive motions—thereby saving the parties from further expense as soon as practical. (*See* A. 000360) Thus, the District was far more expeditious in litigating the defense than the defendant in *Kulzer*—who waited until the plaintiff rested at trial, and was still allowed to assert its statute of limitations defense.

The District's course of action is distinguishable from the personal jurisdiction defenses asserted in *Hamilton* and *Mickalis*. There, the defendants

continued to appear and defend the action despite having no reason to sit on their defense. And in the latter case, the defendant affirmatively told the court that it intended to abandon its appearance despite the consequences. In this case, the District moved on its defense at the earliest time warranted. The District was entitled to adopt that course of action.

The remaining cases Plaintiff cited are inapposite:

- *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) is a case from 84 years ago concerning the concept of personal jurisdiction.
- In *S.E.C. v. Amerindo Inv. Advisors*, 639 F. App'x 752, 754 (2d Cir. 2016), the defendants waived their statute of limitations defense by operation of Rule 8(c) when they failed to raise it in their motion to dismiss. That Rule is not at issue here.
- *Doe v. Constant*, 354 F. App'x 543, 545 (2d Cir. 2009) merely notes that the statute of limitations is an affirmative defense.
- *Schreiber v. Friedman*, No. 15-cv-6861, 2017 WL 5564114 (E.D.N.Y. Mar. 31, 2017) involved a party who initially refused to arbitrate and later sought to compel arbitration after an action was filed.
- *Apple & Eve, LLC v. Yantai N. Andre Juice Co., Ltd.*, 610 F. Supp. 2d 226, 231 (E.D.N.Y. 2009) involved a party who sought to invalidate an arbitration clause, and was held to have thereby waived its right to compel arbitration.
- *Carlson v. Northwell Health Inc.*, No. 20-CV-09852, 2022 WL 1304453 (S.D.N.Y. May 2, 2022) involved a party who moved on its statute of limitations defense for the first time in an

eleventh-hour motion *in limine*, with no explanation for its delay.

- *Reddy v. CFTC*, 191 F.3d 109, 120 (2d Cir. 1999) involved a speedy trial defense, which defense was rejected.

- In *Endemann v. Liberty Ins. Corp.*, No. 18-cv-00701, 2020 WL 5027241 (N.D.N.Y. Aug. 25, 2020) the Court acknowledged the principles of estoppel and waiver in the context of a contractual limitations period, but did not identify any specific conduct by the defendant which created a question of fact regarding estoppel.

- In *Plon Realty Corp. v. Travelers Ins. Co.*, 533 F. Supp. 2d 391, 394-95 (S.D.N.Y. 2008) the court found no waiver of a contractual limitations period absent "a clear manifestation of intent" to relinquish that protection.

The District met its Rule 8(c) obligation to affirmatively plead its statute of limitations defense, and thereby afforded Plaintiff over two years to correct her premature filing. Plaintiff has not cited any authority which holds that the District was required to comport its dispositive motions with Plaintiff's strategic best interests. The court below properly allowed the District to assert its defense.

B. There is no basis for equitable estoppel because the District did nothing to cause Plaintiff's untimely filing.

i. The District did not cause Plaintiff to commence her action early.

Equitable estoppel is an extraordinary remedy that is to be "invoked sparingly and only under exceptional circumstances." *Roeder v. J.P. Morgan Chase & Co.*, 523 F. Supp. 3d 601, 616 (S.D.N.Y. 2021) (citation omitted). "[E]quitable estoppel ... preclude[s] a defendant from using the statute of limitations as a defense where it is the defendant's affirmative wrongdoing [] which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *Putter v. N. Shore Univ. Hosp.*, 7 N.Y.3d 548, 552 (2006) (internal quotations and citation omitted).

To invoke equitable estoppel, claimants must establish that "specific actions by defendants somehow kept them from timely bringing suit." *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006) (citation omitted). Those actions must be by "fraud, misrepresentations, or deception" and "must be affirmative and specifically directed at preventing the plaintiff from bringing suit[.]" *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014), *aff'd* 579 F. App'x 7 (2d Cir. 2014). The defendant is not required to make a public confession to obtain the benefit of the statute of limitations. In *Zumpano*, the defendants' silence was insufficient to

invoke the doctrine of equitable estoppel, because the plaintiffs were aware of the alleged sexual abuse and had sufficient knowledge to assert their claims. *Id*. at 774. Moreover, even when concealment is established, courts recognize a distinction between concealment of a cause of action, and mere concealment of helpful facts. Alleged "[c]oncealment of facts that would enhance the plaintiff's ability to prevail is not sufficient to invoke equitable estoppel." *Roeder*, 523 F. Supp. 3d at 617 (citing *Pearl v. City of Long Beach*, 296 F.3d 76, 84 (2d Cir. 2002)).

In addition to "fraud, misrepresentations or deception" directed to prevent timely commencement, "the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations." *Zumpano*, 6 N.Y.3d at 674 (citing *Simcuski v. Saeli*, 44 N.Y.2d 442, 449 (1978)).

Here, Plaintiff does not allege that the District caused her to commence this action outside the CVA revival window. She admits that her untimely commencement was entirely due to a mistake of law. (A. 000103-105) Plaintiff was aware of the alleged abuse and when it took place, she had counsel when she commenced this action, and her counsel was aware of the CVA. The Complaint specifically cites the CVA under a separate "Statute of Limitations" heading. (A. 00018) The District did not 'conceal' any of that information. Like

the plaintiffs in *Zumpano*, Plaintiff was aware of all information necessary to timely commence an action. She did not timely commence an action.

ii. The alleged statement by the District's counsel did not occur, nor did it operate to deceive Plaintiff or waive any defense.

Plaintiff accused the District's counsel of stating that he "did not think" the District would file a motion for summary judgment. (S.A. 20) Counsel for the District denied making that statement. (A. 000350, 000356)

In addition to being false, the accusation is immaterial. Under *Zumpano*, equitable estoppel requires (1) "fraud, misrepresentations or deception" by the defendant specifically designed to prevent Plaintiff from timely commencing an action, and (2) reasonable reliance by Plaintiff. *Zumpano*, 6 N.Y.3d at 674. The alleged statement, even if made, does not satisfy either element.

The alleged statement did not concern waiver of any defense. It concerned a procedural question whether the District would file a pre-trial dispositive motion, or wait until trial to raise applicable defenses. In other words, the statement only concerned when defenses might be raised—not whether they would be raised. Plaintiff cannot claim to be misled or deceived about the waiver

of any defense. The alleged statement did not speak to waiver, and was not deceptive.

Moreover, Plaintiff did not argue that she acted or refrained from acting in reliance on the District's alleged statement. The alleged informal statement between attorneys was equivocal about what the District would do. Plaintiff cannot claim to have been misled or deceived by a non-committal statement allegedly made to her lawyer, in an informal context, long before the summary judgment deadline. As the court noted below, "Plaintiff does not explain how she relied on this statement, or how she would have acted differently absent such a statement." (A. 000368) Plaintiff—advised by counsel—could not reasonably rely on an equivocal informal comment about motion practice to believe that any defense had been conclusively waived. Her attorney would have (or should have) known that the District's alleged statement did not waive any defenses or otherwise bind the District to any course of action.

C. None of the other alleged conduct by the District provides an equitable basis to ignore the District's defense.

Plaintiff mischaracterizes the record to suggest that the District engaged in a "scheme to lull plaintiff into believing that her claims were timely filed and to run out the clock so she would be prevented from refiling before the

window closed." (Appellant's Br. pp. 21-22) In reality, the District diligently pressed discovery forward while Plaintiff repeatedly delayed.

During the first several months of discovery, the District repeatedly implored Plaintiff to respond to its discovery demands. (S.A. 27-28, 61-75) After Plaintiff waited over a year to issue her first set of discovery demands, the District timely and completely responded to those demands with no request for an extension. (S.A. 19, 26) Importantly, Plaintiff knowingly waited for depositions of District witnesses in a parallel insurance coverage action pending in state court, and obtained those transcripts before proceeding with depositions in this action. (S.A. 29) Thus, Plaintiff purposefully delayed, and materially benefited from that delay.

When Plaintiff was ready (*i.e.*, six months after the District responded to Plaintiff's demands), the District produced over a half dozen witnesses on the dates requested by Plaintiff without any objection or request for adjournment—all before the CVA revival window closed. (S.A. 29-30) Throughout the discovery period, Plaintiff joined multiple requests for extension of discovery deadlines, and repeatedly resisted responding to the District's routine demands—causing further delay. (*See generally* S.A. 24-82)

Any delays in discovery were caused entirely by Plaintiff's deliberate conduct. Plaintiff cannot now accuse the District of any "scheme" to "run out the clock."

D. Granting equitable relief would prejudice the District, and any absence of prejudice is not a sufficient basis for equitable relief.

The District concedes that it was able to conduct discovery in this action, albeit subject to Plaintiff's unfounded objections. But the ability to conduct discovery is not a talisman against all forms of prejudice that would arise from ignoring the District's complete defense. As the court below noted, baselessly depriving the District of a defense to a $25 million claim would be inherently unfair and therefore prejudicial to the District—and to the taxpayers who would ultimately bear the burden of paying any judgment in this matter. (A. 000370-371)

Even if prejudice were absent, the absence of prejudice is not the standard which governs the applicability of the statute of limitations. Countless claimants or would-be claimants have been disappointed by the operation of statutes of limitations as a bar to otherwise-meritorious claims.

E. Plaintiff is not without a remedy for her attorney's mistakes.

The court below noted this Court's prior decisions holding that "normal errors by attorneys" do not warrant equitable relief. (A. 000369-370)

(citing *Rein v. McCarthy*, 803 F. App'x 477, 480 (2d Cir. 2020)); *see also Dillon v. Conway*, 642 F.3d 358, 364 (2d Cir. 2011) ("[M]iscalculating a deadline is the sort of garden variety attorney error that cannot on its own rise to the level of extraordinary circumstances.") (emphasis omitted). Here, Plaintiff's counsel misread the statute. (A. 000370) Plaintiff's remedy for this "garden variety attorney error" is not equitable relief from the operation of CPLR § 214-g. Plaintiff's remedy is against her attorney.

POINT IV. PLAINTIFF HAS ABANDONED HER APPEAL FROM THE ORDER DENYING HER AFFIRMATIVE MOTIONS

In addition to opposing the District's motion below, the Plaintiff filed separate motions for sanctions, and for a hearing. The court below denied those motions. (A. 000372-75) Assuming that decision is appealable to this Court, Plaintiff's brief on appeal makes no mention of her separate motions, and her appeal from those aspects of the Court's decision must be deemed abandoned. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief.")

CONCLUSION

For all of the reasons above, the judgment of the District Court should be affirmed. This Court should also award such other and further relief as it deems just and proper.

Dated: April 25, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28(b) and 32(g), I hereby certify that this document complies with the type-volume limitations required by the Court's rules and the Federal Rules of Appellate Procedure. The number of words in this brief, before excluding the items set forth in Fed. R. App. P. 32(f), is 8,000.

Dated: April 25, 2023

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