

on the merits in the prior decision (*see Baldasano v Bank of NY*, 199 AD2d 184, 185 [1st Dept 1993]).

Nevertheless, the motion court properly dismissed the statute of limitations defense. While the malpractice claim may have accrued in 2015, when defendant first began to advise plaintiff's regarding sales tax, defendant's subsequent defense of that advice in a New York Department of Taxation and Finance sales tax audit in 2020 tolled the statute under the continuous representation doctrine (*see Lemle v Regen, Benz & MacKenzie, C.P.A's, P.C.*, 165 AD3d 414, 415 [1st Dept 2018]).

However, the 12th affirmative defense ("failure to comply with condition precedents [sic] of Defendant's engagement letters") and 15th affirmative defense ("Plaintiff's alleged damages are limited by the terms of Defendant's engagement letters") should not have been dismissed. These defenses are based on certain terms of engagement letters executed by the parties with respect to services other than those at issue in this action.¹ Although no engagement letter was executed with respect to the services at issue in this action – defendant's advice to plaintiff concerning New York sales tax from 2015 to 2020 – a triable issue exists as to whether the parties' course of dealing with respect to other services gives rise to an inference that the parties intended the provision of the services at issue to be governed by the same terms set forth in their written agreements for other services (*see Jemzura v Jemzura*, 36 NY2d 496, 503-504 [1975] ["A contract implied in fact may result as an inference from the fact and circumstances of case, although not formally stated in words, and is derived from the

¹ The provision setting a condition precedent to litigation appears in engagement letters from December 2009 through February 2020; the provision limiting defendant's liability appears in engagement letters from November 2015 through February 2020.

presumed intentions of the parties as indicated by their conduct”] [internal quotation marks and citations omitted]; *Law Offs. of K.C. Okoli, P.C. v Maduegbuna*, 62 AD3d 477, 478 [1st Dept 2009], *lv dismissed* 13 NY3d 771 [2009] [the terms of an oral contract may be established by the parties’ course of dealing]; *Telecommunications Tech. Corp. v Deutsche Bank*, 235 AD2d 288, 288 [1st Dept 1997] [same]].

In view of the foregoing, it cannot be said, at this juncture, that it will be impossible for defendant to present evidence at trial sufficient to support a reasonable inference that the parties intended the provision of the services at issue to be governed by the condition-precedent and limitation-of-liability terms of the engagement letters. Accordingly, plaintiffs, in moving to dismiss the 12th and 15th affirmative defenses pursuant to CPLR 3211(b), failed to “bear[] the heavy burden of showing that the defense[s] [are] without merit as a matter of law” (*Emigrant Bank v Rosabianca*, 210 AD3d 527, 527 [1st Dept 2022] [internal quotation marks omitted]). On such a motion, “[t]he allegations in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (*id.* [internal quotation marks and citation omitted]; *see also Pugh v New York City Hous. Auth.*, 159 AD3d 643, 643 [1st Dept 2018]). “Further, the court should not dismiss a defense where there remain questions of fact requiring a trial” (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]). “The standards applicable to a CPLR 3211(b) motion to dismiss a defense are therefore akin to the rules of decision applicable to motions to dismiss a cause of action under CPLR 3211(a)(1), (5) and (7)” (John R.

Higgitt, Prac Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:35).

Accordingly, we modify to reinstate the 12th and 15th affirmative defenses.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 10, 2026

A handwritten signature in black ink, reading "Susanna Molina Rojas". The signature is written in a cursive, flowing style.

Susanna Molina Rojas
Clerk of the Court