

**Arbor Secured Funding, Inc. v Just Assets N.Y. 1**

2008 NY Slip Op 33254(U)

November 19, 2008

Supreme Court, Nassau County

Docket Number: 012550/2004

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 10**

ARBOR SECURED FUNDING, INC. and  
ARBOR MANAGEMENT, LLC,

Plaintiffs,

INDEX NO.: 012550/2004  
MOTION DATE: 10/17/2008  
MOTION SEQUENCE: 003

-against-

JUST ASSETS NY 1, JUST ASSETS NY 1, LLC,  
WATER WORKS REALTY CORP., WATER WORKS  
REALTY, LLC, JUST YOUR WAY, INC., WILLIAM Q.  
BROTHERS III, ARCHITECT, P.C., INCORPORATED  
VILLAGE OF FREEPORT, METROPOLITAN TRANSPORT  
AUTHORITY, THE COUNTY OF NASSAU, THE NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

JUST ASSETS NY 1, JUST ASSETS NY 1, LLC,

Third-Party Plaintiffs,

- against -

KEITH SERNICK, ESQ. and DAVIDOFF MALITO &  
HUTCHER, LLP,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed .....	1
Just Assets NY 1 and Just Assets NY 1, LLC's Memorandum of Law in Opposition to Motion to Amend Answer with Cross-Claims and Counterclaims .....	2
Affidavit of Stephen Wagner in Opposition & Exhibits Annexed .....	3
Affirmation in Opposition of Peter R. Chatzinoff .....	4
Memorandum of Law in Opposition to Water Works Realty Corp.'s Motion for Leave to Amend .....	5
Affirmation in Opposition of Nicholas P. Sarandis & Exhibits Annexed .....	6
Reply Affirmation in Further Support of Motion to Amend of Ronald J. Rosenberg & Exhibits Annexed .....	7
Memorandum of Law in Further Support of Water Works' Motion to Amend and in Reply to the Opposing Papers .....	8
Sur-Reply Affirmation of Nicholas P. Sarandis & Exhibit Annexed .....	9

Motion pursuant to CPLR 3025[b] by the defendant Water Works Realty Corp., for an order, *inter alia*, authorizing it to: (1) amend its verified answer so as to add new claims and parties; (2) serve a second, amended verified answer with cross claims and counter claims; and (3) delete from the caption, the names of certain parties whose claims have been previously adjudicated or already dismissed from the action.

In September 2004, the plaintiffs Arbor Secured Funding, Inc. and Arbor Management, LLC ["Arbor"], as mortgagees, originally commenced the within action to set aside certain tax deeds issued by the Nassau County Treasurer with respect to two commercially zoned, Freeport, New York properties owned by the movant, Water Works Realty Corp ["Waterworks"].

The Nassau County Treasurer had issued the subject deeds in July of 2004 to the defendants herein, Just Assets NY 1 and Just Assets NY 1, LLC [collectively "Just Assets"], the entities which had previously acquired the corresponding tax liens upon Water Works' failure to pay certain outstanding taxes. Immediately prior to its acquisition of the tax deeds, Just Assets prepared and served notices to redeem upon interested parties, including Water Works advising, *inter alia*, that if the outstanding taxes were not paid within a stated time period, those parties could lose their interest in the property.

Water Works failed to remit payment during the specified period, and Just Assets later obtained the subject deeds from the County Treasurer.

After the deeds were issued to Just Assets, Arbor commenced the within action to set them aside arguing, among other things, that the notices to redeem were defective.

By decision and order dated January 26, 2006, this Court set aside the deeds, concluding in sum, that Just Assets had failed to provide proper redemption notices to Water Works in accord with the dictates of the Nassau County Code and applicable case law (Order of Warshawsky J., at 7-11).

A key portion of the Court's holding was predicated on the fact that the Just Assets' then-counsel, Davidoff Malito & Hatcher, LLP ["D.H."] and its current employee, former Deputy County Treasurer, Keith Sernick, had utilized the wrong Nassau County notice of redemption form in attempting to provide notice to Water Works (Order at 3-4; 8-10).

In brief, the Court observed that the notices actually provided, misleadingly omitted reference to a simplified methodology by which a tax lien purchaser could acquire title to the property, *i.e.*, by merely applying to the County Treasurer for the deeds after the applicable redemption period expired – the method actually employed by Just Assets at bar.

After setting aside the deeds, this Court also denied that branch of Just Assets' cross motion which was for dismissal of Water Works' cross claims sounding in slander of title and violation RPAPL § 853, and permitted Water Works to interpose a first amended answer containing, among others, factually amplified versions of the above-referenced cross claims (Rosenberg Aff., Exh., "E").

Additional and extensive discovery has since been conducted with respect to the foregoing claims (Prop. Ans., ¶ 155). Further, a third-party action has been commenced by Just Assets against third-party defendants Keith Sernick and D.H., in which claims of attorney malpractice arising out of the tax lien transaction have been interposed (Rosenberg Aff., Exh., "F").

According to Water Works' newly retained counsel, discovery has now uncovered significant new claims as against various named parties, as well as other persons not currently parties to the action, including, *inter alia*: the Incorporated Village of Freeport ["the Village"];

the Village Mayor; the Village Attorney; and the Village Board of Trustees. Moreover, Water Works' application also seeks permission to add, among others, former County Treasurer Henry Dachowitz; former Nassau County Deputy Treasurer and current DMH employee, Keith Sernick; DMH; DMH paralegal, Stacy Clark; and Just Assets' principals, Matthew Kantor and George Brock.

The factual theory now advanced by Water Works and its owner Gary Melius, asserts in sum that the above-mentioned municipal defendants (and others) conspired and schemed with Just Assets' principals, Brock and Kantor, to wrest the property from Water Works and political "outsider" Gary Melius by, *inter alia*, other things, altering the subject redemption notices so as to mislead and deceive Water Works (Prop. Ans., ¶¶ 54, 72-114).

More particularly, Water Works claims that the defendants' fraudulent scheme, which allegedly featured kick backs and payoffs to certain Village officers, was intended to deprive Water Works of its lawful ownership rights in the property by manipulating the tax lien redemption process so that Water Works would fail to timely exercise its right of redemption. The ultimate objective of the purported scheme was to place title to the property – and the highly valuable opportunity to develop it – in the hands of Just Assets' "hand picked," politically favored principals who, it is further alleged, had corruptly acquired the tax liens from the Village itself as part of the purported conspiracy (Rosenberg Aff., ¶¶ 8-10; Brief at 22-23; Prop. Ans., ¶¶ 53, 55, 56-71).

Based upon the foregoing theory, Water Works has submitted a proposed, 308 paragraph "second amended verified answer" containing 12 cross claims and/or counter claims alleging: (1) fraud and aiding and abetting fraud; (2) fifth amendment "taking" theories under the New York State and Federal Constitutions for temporary loss of the property from July of 2004 to February of 2006; (3) substantive/procedural due process violations and conspiracy pursuant to 42 U.S.C. § 1983; (4) negligence as against Nassau County; and (5) RICO violations under 19 U.S.C. § 1961, *et seq.* (Prop. Ans., Rosenberg Aff., Exh., "A").

The County defendants have opposed the application by relying solely upon a "Limited Release" executed by Gary Melius in April of 2005, which instrument releases the County and its employees from, *inter alia*, "all actions \* \* \* claims and demands \* \* \* for \* \* \* any matter

cause of thing whatsoever concerning the issuance of the two Treasurer's deeds to Just Assets \* \* \* including, as limited herein, all claims or causes of action which were raised or could have been raised \* \* \* in the within action "to the date of this RELEASE" (Strands Aff., Exh., "1").

Just Assets, as well as D.H., Sernick, and Clark [the "D.H. defendants"], alternatively oppose the motion by arguing, *inter alia*, that the proposed amendment is procedurally defective; belatedly asserted; and prejudicial in that it radically reworks and alters the factual direction of the action and proposes claims and theories which are time-barred and thereby fatally deficient. The motion should be granted to the extent indicated below.

It is settled that permission to amend pleadings should be "freely given" in accord with the dictates of CPLR 3025[b], and that "[mere lateness is not a barrier to amendment]" (*Edendale Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]; *Murray v. City of New York*, 43 NY2d 400, 404-05 [1977]; *Long Island Title Agency, Inc. v. Fris.*, 45 AD3d 649; *Gross v. Bezel*, 39 AD3d 1234, 1236).

More specifically, "[in the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is 'palpably insufficient' to state a cause of action or is patently devoid of merit]" (*GO. Alan Assoc., Inc. v. Laser*, 44 AD3d 95, 98, *AFF*, 10 NY3d 941 [2008] *see, Barnes Coy Architects, P.C. v. Chemin*, 53 AD3d 466; *Smith-Hot v. AMC Property Evaluations, Inc.*, 52 AD3d 809; *Lucid v. Mancuso*, 49 AD3d 220; *RCA, LLC v. 50-09 Realty, LLC*, 48 AD3d 538, 539). "It is likewise true that the merits of a proposed amendment will not be examined on the motion to amend-unless the insufficiency or lack of merit is clear and free from doubt" (*Norman v. Ferrari*, 107 AD2d 739, 740 *accord, Lucid v. Mancuso, supra*, at 226-227).

"To establish prejudice, which must be significant \* \* \* there must be some indication that the opposing party" "has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (*Whaled v. Kawasaki Motors Corp.*, 92 NY2d 288, 293 [1998]; *Spitzes v. Schuster*, 48 AD3d 233 *see also, Loomis v Calvatia Cairina Constr. Corp.*, 54 NY2d 18 [1981]; *RCA, LLC v. 50-09 Realty, LLC, supra*, 48 AD3d at 539; *Pansini Stone Setting, Inc. v. Crow and*

*Sutton Associates, Inc.*, 46 AD3d 784, 786).

The party opposing the application bears the burden of establishing prejudice and surprise flowing from the proposed amendment (*Mackenzie v. Crocea*, 54 AD3d 825, 827; *Lucid v. Mancuso*, *supra*, at 232; *Tilde Development Corp. v. Nicad*, 49 AD3d 629; *Hunt v. Pierce Manufacturing, Inc.*, 298 AD2d 430, 431).

Whether to grant leave to amend a pleading rests within the court's discretion (*Murray v. City of New York*, *supra*, at 404-405; *Pergamino v. Roach*, 41 AD3d 569, 572).

Preliminarily, and contrary to the defendants' contentions, the Appellate Division has recently clarified existing case law by holding that the proponent of a motion to amend is not obligated to affirmatively establish the underlying merit of the proposed claims in the first instance (*Lucid v. Mancuso*, *supra*, at 227 *see*, *Benyo v. Sikorjak*, 50 AD3d 1074).

As to the substance of the motion, the Court in its discretion concludes that the opposing parties have failed to establish that significant prejudice would result if Water Works' application were to be granted (*Whaled v. Kawasaki Motors Corp.*, *supra*; generally, *Tilde Development Corp. v. Nicad*, *supra*, 49 AD3d 629 *RCA, LLC v. 50-09 Realty, LLC*, *supra*, 48 AD3d at 539).

Specifically, the record indicates that, *inter alia*: (1) the instant matter has not, as yet, been certified as trial ready (*Cutwright v. Central Brooklyn Urban Development Corp.*, 127 AD2d 731 *cf.*, *Morris v. Queens Long Island Medical Group, P.C.*, 49 AD3d 827, 828); (2) discovery subsequent to the Court's January, 2006 order has proceeded in a reasonably orderly and diligent fashion; (3) certain of the foundational allegations relative to the underlying transaction – including claims that notices were intentionally altered – have already been referenced in the action; (4) the proposed amended pleading is intensely fact-specific and particularized in detailing the alleged conspiracy and wrongful conduct supposedly perpetrated by the currently named and newly proposed parties; and (5) considering both the complexity of the alleged scheme and the covert manner in which it was supposedly perpetrated (Prop. Ans., ¶ 156-157), it has not been shown that Water Works became fully aware of, and conversant with, the nature of newly proposed theories for any significant or prejudice-inducing period of time before the subject application was made.

Nor have the defendants meaningfully demonstrated that they would incur “some change in position or hindrance in the preparation” of their defense “which could have been avoided had the original pleading contained the proposed amendment” (*Whaled v. Kawasaki Motors Corp., supra*).

It also bears noting that neither mere exposure to greater liability, nor an alleged need for additional discovery, will in general constitute prejudice precluding an application to amend (*Loomis v. Calvatia Cairina Const. Corp., supra*, 54 NY2d at 23-24; *RCA, LLC v. 50-09 Realty, LLC, supra see also, McFarland v. Michel*, 2 AD3d 1297, 1300; *Rutz v. Kellum*, 144 AD2d 1017, 1018).

The opposing parties further contend that Water Works’ claims are untimely – in particular, the claims alleging in claims under 42 U.S.C. § 1983 and RICO.

It is settled that a proposed claim that is time-barred lacks palpable merit for the purposes of a motion to amend (*Kuslansky v. Kuslansky, Robbins, Stechel and Cunningham, LLP*, 50 AD3d 1101; *Shefa Unlimited, Inc. v. Amsterdam & Lewinter*, 49 AD3d 521). In general, the defendant bears the “initial burden of establishing *prima facie* that the time in which to sue has expired,” and must submit proof demonstrating “when the \* \* \* causes of action accrued” (*In re Schwartz*, 44 AD3d 779 *see, Island ADC, Inc. v. Baldassano Architectural Group, P.C.*, 49 AD3d 815).

The limitations period for claims brought in New York State Courts pursuant to 42 U.S.C. § 1983 is three years (*see, Dinerman v. City of New York Admin. for Children's Services*, 50 AD3d 1087, 1088; *Rapoli v. Village of Red Hook*, 41 AD3d 456, 457 *see also, Jacobs v. Mostow*, 271 Fed.Appx. 85, 88, 2008 WL 834128 [2<sup>nd</sup> Cir. 2008]; *Owens v. Okure*, 488 U.S. 235, 250 [1989]; *Reid v. City of New York*, 212 Fed.Appx. 10, 11, 2006 WL 3826616 [2<sup>nd</sup> Cir. 2006]), while RICO claims are governed by a four-year statute of limitations (*Kenny v. RBC Royal Bank*, 22 AD3d 385, 396; *Burrowes v. Combs*, 124 Fed. Appx. 70, 71, 2005 WL 670644 [2<sup>nd</sup> Cir. 2005]; *World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.*, 530 F.Supp.2d 486, 534 [S.D.N.Y. 2007] *see also, Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 [1987]).

Notably, “[a] section 1983 cause of action accrues ‘when the plaintiff knows or has

reason to know' ” “of the constitutional injury that is the basis for \* \* \* [the] action” “and its alleged cause” (*Reid v. City of New York, supra*, 212 Fed.Appx. at, 11, *quoting from, Pearl v. City of Long Beach*, 296 F.3d 76, 80 [2<sup>nd</sup> Cir. 2002]; *Williams v. King*, 796 F.Supp. 737, 740 [E.D.N.Y.1992]; *Clissuras v. City of University of New York*, 90 Fed. Appx. 566, 567, 2004 WL 322421 [2<sup>nd</sup> Cir. 2004]; *Styles v. Goord*, 198 Fed.Appx. 36, 2006 WL 2335225 [2<sup>nd</sup> Cir. 2006] *see also, Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 1095 [2007]).

Applying these principles to the proposed § 1983 claims, the Court cannot determinatively conclude on the papers submitted here, that they are time-barred and thus “patently devoid of merit” (*Lucido v. Mancuso, supra*, at 226-227 *see, Bennett v. Long Island Jewish Medical Center*, 51 AD3d 959, 961).

Notably, there is ample evidence in the record as it currently exists suggesting that: (1) Water Works could not – even with reasonable diligence – have been fully aware of the concealed and operative facts underlying their federal claims until after discovery recently progressed (*see, Prop. Ans., ¶ 156-157*); and (2) could not, therefore, have ascertained the source of its alleged constitutional injury until at least that point in time (*cf., Pearl v. City of Long Beach, supra*, at 85-87). Moreover, while the deeds were initially issued in 2004, this Court did not actually determine that the notices to redeem were in fact defective – and that the deeds were therefore subject to cancellation upon the grounds asserted – until late January of 2006.

Based upon these relevant considerations, the Court does not agree that the subject theories, on the current state of the record, can be definitively described as time-barred and thus palpably insufficient so as to warrant denial of the motion (*GK. Alan Assoc., Inc. v. Lazzari, supra*, 44 AD3d at 99 *see also, Lucido v. Mancuso, supra*, at 226-227).

Water Works effectively concedes, however, that the latest date by which its RICO claim could be timely interposed was on or about July 8, 2008 (Brief at 29; 10-11<sup>th</sup> causes of action) – four years after the issuance of the deeds.

In arguing that the foregoing RICO claim is timely, Water Works cites to the Court of Appeals’ holding in *Perez v. Paramount Communications, Inc.*, 92 NY2d 749 [1999]), which held, *inter alia*, that the filing of a motion for leave to amend and/or add a party will toll the

limitations period – provided, however, that the motion is accompanied by a copy of the proposed supplemental summons and pleading.

Here, while Water Works filed the instant motion in late June of 2008 (Brief at 29), its application was not contemporaneously accompanied by a supplemental summons filed with the Court (*Perez v. Paramount Communications, Inc.*, *supra*, at 753-754 *see also*, *Tricoche v. Warner Amex Satellite Entertainment Co.*, 48 AD3d 671; *Long v. Sowande*, 27 AD3d 247, 248; *Battle v. Brookhaven Nursing Home*, 7 AD3d 553 *cf.*, *Assalone v. Pawling Cent. School Dist.*, 36 AD3d 613 *see also*, Rosenberg Reply, Exh., “E”).

Accordingly, since the requisite filing was not properly made, Water Works’ RICO claims are time-barred and therefore palpably insufficient (*Battle v. Brookhaven Nursing Home*, *supra*; *Lodge v. D’Aliso*, 2 AD3d 525, 526). The Court notes, however, that Water Works has filed a separate action re-asserting the same RICO claims as a precautionary measure within the foregoing limitations period (Brief at 30; Mot., Exh., “D”).

Turning to the originally interposed claims sounding in slander to title and violation of RPAPL § 853 (now recast and reasserted as the proposed first through third causes of action), the D.H. defendants assert that both claims are governed by a one-year limitation period applicable to intentional torts (Brief at 9)(*see, Gold v. Schuster*, 264 AD2d 547, 549; *Hanbidge v. Hunt*, 183 AD2d 700, 702).

Water Works does not dispute that the one year limitations period has facially expired as to the D.H. defendants, who have not previously been made parties to this action. It contends, however, that the relation back doctrine is applicable and that the foregoing claims are therefore timely as to these newly proposed defendants.

“The relation-back doctrine, which is codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are ‘united in interest’” (*Shapiro v. Good Samaritan Regional Hosp. Medical Center*, 42 AD3d 443 *see*, *Buran v. Coupal*, 87 NY2d 173, 177-178 [1995]; *Hirsh v. Perlmutter*, 53 AD3d 597).

“In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of

the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well” (*Shapiro v. Good Samaritan Regional Hosp. Medical Center supra*, 42 AD3d 443, 444 *see, Buran v. Coupal, supra*, at 177-178; *Mondello v. New York Blood Center-Greater New York Blood Program* 80 NY2d 219 [1995]; *Ito v. Marvin Windows of New York, Inc.*, 54 AD3d 1002; *Marino v. Westchester Medical Group, P.C.*, 50 AD3d 861; *Cardamone v. Ricotta*, 47 AD3d 659, 660; *Xavier v. RY Management Co., Inc.*, 45 AD3d 677; *Holster v. Ross*, 45 AD3d 640; *Davis v. Larhette*, 39 AD3d 693, 694 *see also, Brock v. Bua*, 83 AD2d 61, 69).

Once, as here, “a defendant has demonstrated that the statute of limitations has expired, ‘[t]he burden is on the plaintiff to establish the applicability of the [relation back] doctrine’” (*Cardamone v. Ricotta*, 47 AD3d 659, 660, *quoting from, Nani v. Gould*, 39 AD3d 508, 509 *see, Hirsh v. Perlmutter, supra*, 53 AD3d at 599; *Raymond v. Melohn Properties, Inc.*, 47 AD3d 504; *Xavier v. RY Management Co., Inc.*, 45 AD3d 677; *Austin v. Interfaith Med. Ctr.*, 264 AD2d 702, 703). All three features must be met for the statutory relation back remedy to be operative (*see, Mondello v. New York Blood Center-Greater New York Blood Program, supra*, at 226; *Brock v. Bua*, 83 AD2d 61, 68-67).

In the exercise of its discretion (*Buran v. Coupal, supra*, at 182), the Court concludes that Water Works has failed to discharge its burden in this respect (*Hirsh v. Perlmutter, supra*, 53 AD3d at 599; *Ito v. Marvin Windows of New York, Inc., supra*; *Raymond v. Melohn Properties, Inc.*, 47 AD3d 504).

Neither D.H. – Just Assets’ former attorneys – nor D.H. employees Sernick and Clark – are united in interest with any of the previously named defendants to the extent that they “stand or fall” together, or that the relationship which existed would create “vicarious liability of one for the conduct of the other (*Tricoche v. Warner Amex Satellite Entertainment Co., supra*, 48 AD3d 671; *Xavier v. RY Management Co., Inc., supra*, at 679 *see, Buran v. Coupal, supra*, at

182; *Davis v. Larhette*, *supra*, 39 AD3d at 694).

Notably, “[m]ore is required than a common interest in the outcome” since the parties “must also share exactly the same jural relationship in the subject action” (*Xavier v. RY Management Co., Inc.*, *supra*, 45 AD3d at 679; *27th Street Block Ass'n. v. Dormitory Authority of State of New York*, 302 AD2d 155, 165).

Here, the fact that the D.H. defendants may have, *inter alia*, represented Just Assets; prepared the notices and deeds in the course of that legal representation; and/or later supported Just Assets’ motion for summary judgment as its counsel (Water Works’ Brief at 23-25) – does not establish a unity of interest akin to vicarious liability – much less that D.H. and Just Assets will “stand or fall together” and/or “share exactly the same jural relationship” within the meaning of the relation back doctrine (*see generally, Palmer v. Ciminelli-Cowper Co., Inc.*, 48 AD3d 1210; *Raymond v. Melohn Properties, Inc.*, *supra*, 47 AD3d 504; *Xavier v. RY Management Co., Inc.*, *supra*; *Trisvan v. County of Monroe*, 26 AD3d 875, 876; *Lord, Day & Lord Barrett Smith v. Broadwall Mgt. Corp.* 301 AD2d 362; *Valmon v. 4 M & M Corp.* 291 AD2d 343, 344).

Nor does it appear that the failure to originally name the D.H. defendants with respect to the first through third causes of action can be viewed as a mistake or an omission (*Buran v. Coupal*, *supra*; *Valmon v. 4 M & M Corp.*, *supra*, 291 AD2d at 343-344 *see generally, Marino v. Westchester Medical Group, P.C.*, *supra*; *Cardamone v. Ricotta*, *supra*; *Holster v. Ross*, *supra*, 45 AD3d at 642; *Shapiro v. Good Samaritan Regional Hosp. Medical Center*, *supra*).

Rather, the record indicates that from the inception of the litigation, Water Works possessed knowledge that the D.H. represented Just Assets and that the D.H. defendants, including Keith Sernick, had prepared the notices and the tax deeds. It bears noting that Water Works’ prior answers contain allegations that Just Assets as well as its agents and employees, intentionally altered and/or modified the notices to redeem and then “wrongfully misrepresented” to the County that they were proper and lawful (Rosenberg Aff., Exh., “C” Ans., ¶¶ 47-99, 51; Exh., “E” 1<sup>st</sup> A. Ans., ¶¶ 47, 49, 51). Nevertheless, Water Works elected to interpose its slander to title/RPAPL § 853 exclusively against Just Assets in the two earlier permutations of its pleadings (Rosenberg Aff., Exhs., “C” “E”)(*27th Street Block Ass'n. v.*

*Dormitory Authority of State of New York, supra*, at 165 *see, Lodge v. D'Aliso*, 2 AD3d 525 *cf., Shapiro v. Good Samaritan Regional Hosp. Medical Center supra*, at 444-445).

Lastly, and with respect to the County defendants' release-based opposition to the motion, the Court agrees that at this juncture, the precise temporal scope of the release is arguably unclear. Specifically, and read in its entirety, the release appears to limit its reach to, *inter alia*, claims which "were raised and/or *could have raised*" in the subject action up until the date of its execution, *i.e.*, April 15, 2005 – some nine months before this Court January 26, 2006 decision (Release, 2<sup>nd</sup> decretal paragraph). To the extent that the release language contains latent ambiguity with respect to whether the newly interposed constitutional and/or conspiracy claims "could have been raised" prior to the April 15, 2005 execution date, uncertainty exists which cannot be definitively resolved upon the papers presently before the Court on a motion to amend (*Eaton Elec., Inc. v. Dormitory Authority of New York*, 48 AD3d 619, 624; *Hall Enterprises, Inc. v. Liberty Management & Const., Ltd.*, 37 AD3d 658, 659; *Ofman v. Campos*, 12 AD3d 581, 582; *Kaminsky v Gamache*, 298 AD2d 361, 361-362).

Although to be sure, "[r]eleases are contracts" and will be enforced in accord with the parties' intent and the language employed," nevertheless "[a] release may not be read to cover matters which the parties did not intend to cover" (*Gale v. Citicorp*, 278 AD2d 197 *see, Apfel v. Prestia*, 41 AD3d 520, 521; *Zichron Acheinu Levy, Inc. v. Ilowitz*, 31 AD3d 756; *Wechsler v. Diamond Sugar Co., Inc.*, 29 AD3d 681, 682; *Ofman v. Campos, supra*, 12 AD3d 581; *Meyer v. Fanelli*, 266 AD2d 361; *Grab v. Jewish Assn. for Servs. for Aging*, 254 AD2d 455, 456).

Nor will the Court – at this point – apply the release to those claims proposed by Gary Melius in his individual capacity (Water Works Brief at 36). The Court notes that the County has not addressed or mentioned Melius' individual claims in either of its opposing submissions, but instead has limited its references therein solely to "Water Works' " proposed claims.

In sum, the Court cannot conclude that based solely upon the release – the only objection raised by the County – the newly proposed claims, are "palpably insufficient \* \* \* [or] patently devoid of merit" (*Lucid v. Mancuso, supra*, at 232 *see generally, Bennett v. Long Island Jewish Medical Center*, 51 AD3d 959, 961).

The Court notes that neither Just Assets nor the D.H. defendants have addressed Water

Works' fraud-based claims (fourth and fifth causes of action).

Nor have the opposing parties addressed that branch of the motion which is to delete from the caption, parties "already dismissed from this action and/or parties whose claims have been previously adjudicated" – which branch of the motion is therefore granted as unopposed.

The Court has considered the parties' remaining contentions and concludes that none warrant an award of relief in excess of that granted above.

Accordingly, it is,

**ORDERED** that the motion pursuant to CPLR 3025[b] by the defendant Water Works Realty Corp., for an order, *inter alia*, granting leave to serve a proposed second amended verified answer is granted except with respect to: (i) the tenth and eleventh causes of action alleging violations under U.S.C. § 1961, *et. seq.* ["the RICO claims"]; and (ii) the first through third causes of action sounding in slander of title and violation of Real Property Actions and Proceedings Law § 853 as to the D.H. defendants, and it is further,

**ORDERED** that Water Works shall serve a supplemental summons/with proposed amended caption, together with an amended answer in accord with the Court's holding herein, within twenty days after the notice of entry of this decision and order.

After the third-party defendants have served answers, the parties shall contact the Court to schedule an amended Preliminary Conference.

The foregoing constitutes the decision and order of the Court.

**ENTERED**  
NOV 24 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Dated: November 19, 2008

*[Handwritten Signature]*  
\_\_\_\_\_  
J.S.C.