Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

GUS KESS and SOULTANA KESSISIADES,

Plaintiffs,

-against-

ATOMIC FUEL OIL TRANSPORT, INC., ATOMIC FUEL OIL CO., INC., WILLIAM DIONISION and GEORGE DIONISIO,

Defendants.

Index No: 26786/10

Motion Date: 3/23/11

Motion Cal. No.: 19

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment dismissing the complaint

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 8
Replying Affidavits.....	9 - 10

Upon the foregoing papers it is ordered that this motion is determined as follows.

This action arises out of the installation of a radiator and its component parts by defendants at the plaintiffs' home in August, 2003. The work included installation of a radiator valve which leaked and caused a flood which caused substantial damage to the plaintiffs' home, allegedly in excess of $350,000.00. The plaintiffs settled their claim for the damage to their home through Fairmont Specialty Insurance Company (Fairmont), the insurance company acting for "Atomic Fuel Oil" and "MATCO-NORCA" on or about April 18, 2005 for $17,306.85. The insurance company sent the plaintiff Gus Kess a Property Damage Release form in connection with the settlement. Gus Kess executed the Release on March 31, 2005, however, he inserted a hand written provision into the type written Release stating the following:

> "In addition, it is to be understood that part of the settlement agreement entails the obvious choice by Atomic Fuel towards forfeiture of any further recourse to collect any debt associated with the herein mentioned claim and loss."

Upon receiving the executed altered release, defendants allege that Mark Potter, Fairmont's claims adjuster, sent Gus Kess a letter, dated April 18, 2005, with the settlement check enclosed, advising Kess that Fairmont did not have the power and authority to release Atomic Fuel's claim against Kess, and that if this was not acceptable, Kess should return the check. Plaintiffs admit that they received and cashed the check.

On or about April, 2008, Atomic Fuel Transport, Inc. commenced an action to recover the cost of the installation of the radiator in the Small Claims Part of The Civil Court of the City of New York, Queens County, and obtained a default judgment dated December 4, 2008, against the plaintiff, Gus Kess in the amount of $1643.62. To recover the judgment amount, Atomic Fuel Transport, Inc. delivered an Execution to the City Marshal on September 11, 2009. On February 1, 2010, the City Marshal seized the plaintiff's automobile pursuant to the Execution. On February 3, 2010, the plaintiffs paid the City Marshal $2,236.80 to redeem the vehicle and to obtain a satisfaction of the judgment.

In addition, after commencing the action in Small Claims Court the defendant, Atomic Fuel Oil Transport, Inc., filed a mechanic's Lien against the plaintiffs' property on October 3, 2008 for $2854.28, the amount allegedly due and owing for the installation of the radiator. A satisfaction of Mechanic's Lien was filed on April 7, 2010 .

On October 24, 2010, the plaintiffs commenced this action against Atomic Fuel Oil Transport, Inc. and Atomic Fuel Oil Co., Inc., as well as the CEO and shareholders of the corporate defendants William Dionisio and George Dionisio in their individual capacity, asserting sixteen(16) causes of action including breach of contract, negligence, breach of express and implied warranty, products liability, gross negligent, reckless and intentional conduct, unjust enrichment, quantum meruit and abuse of process to recover money damages. Issue was joined by defendants' service of their answer on December 8, 2010.

The defendants now move for summary judgment dismissing the complaint based upon, inter alia, the Release, statute of limitations and failure to state a cause of action. In support of their motion, the defendants submitted the affidavit of Mark

Potter, Fairmont's claims adjuster, copies of the Release, the April 18, 2005 letter and the settlement check, a copy of the Small Claims judgment, the Execution and City Marshal's receipt for the redemption of the automobile.

Specifically, defendants contend that the 1st - 10th and 15th causes of action to recover for the damages to plaintiffs' property caused by the flood based upon breach of contract, breach of implied and express warranty, strict products liability and intentional torts such as willful, intentional and gross negligent conduct, abuse of process are barred by the applicable statute of limitations; that the 11th cause of action alleging *res ipsa loquitor* as a basis for recovery fails to state a cause of action; and that the 12th, 13th, 14th, and 16th causes of action constitute impermissible collateral attack of the Small Claims Court judgment.

In opposition to the defendants' motion, plaintiffs submitted only the affirmation of their attorney and rely on the exhibits and pleadings submitted by the defendants. Plaintiffs do not deny that the statute of limitations bar recovery of damages caused by the flood whether based upon breach of contract, negligence or any other theory asserted in the complaint. Instead they assert that the causes of action asserted are addressed to the defendants' breach of the Release and defendants' malicious conduct in fraudulently obtaining a default judgment, seizing the plaintiff's automobile seven years after the settlement and filing a wrongful and exaggerated Mechanic's Lien five years after the settlement.

However, a plain reading of the complaint reveals that the factual allegations in the 1st through 10th causes of action refer to the improper installation of the radiator and valve and seek recovery for the property damages sustained as a result of the improper installation of the valve. Plaintiffs' counsel has conceded in his affirmation that these causes of action are barred by the applicable statute of limitations, however he seems to argue that these claims are somehow revived or that the statute of limitations is tolled. Counsel's is mistaken. In addition, these causes of action are also barred by the Release. The defendants' subsequent conduct does not revive the plaintiffs' claim covered by the Release.

Accordingly, the 1st through 10th causes of action are dismissed.

The 16th cause of action alleging breach of the implied covenant of good faith and fair dealing, however does assert a

claim for breach of the Release. In this regard plaintiffs asserts that the Kass', handwritten insertion into the Release was a valid modification of the Release, that the Release as modified was accepted by the defendants' insurance company when it sent the settlement check for $17,306.85 and became binding on the defendants. Plaintiffs' counsel asserts that the plaintiffs did not receive the April 18, 2005 letter purporting to reject Kass' hand written modification. Plaintiffs further assert defendants breached the modified Release by, inter alia, commencement of the Small Claims action in 2008 and thus, plaintiffs' claim for breach of the Release is timely having been commenced in October, 2010.

Counsel's argument regarding the modification of the Release is without merit. A release is a contract which is construed in accordance with the principals of contract law (see generally Glassberg v. Lee, 82 AD3d 836, 837 [2011]; Mangini v. McClurg, 24 NY2d 556, 562 [1986]). The Release was a contract which Kess could either reject it or accept it by signing (Valashinas v. Koniuto, 308 NY 233, 244 [1954]). In this case, Kess added terms not originally contained in the release and signed it. As a result, the release with the additional term was a counter offer (see Woodward v. Tan Holding Corp., 32 AD3d 467 [2006]; Winiarski v. Duryea Associates, LLC., 14 AD3d 697 [2005]). Mark Potter, the insurance adjuster responded by letter dated April 18, 2005 informing Kess that he did not have the power or authority to release the debt and that, if Kess rejected the terms of the release in the form originally sent, Kess should return the check. It is undisputed that Kess retained and cashed the check, thereby accepting the terms contained in the original release and in Potter's letter dated April 18, 2005 which letter clearly and unambigously informed the plaintiffs that acceptance of the check meant that there was no release or waiver of any claims the defendants may have as against the plaintiffs (see Narenda v. Thieriot, 41 AD3d 442, 443 [2007] citing Merrill Lynch Realty v. Skinner, 63 NY2d 590,596 [1984]).

Plaintiffs' counsel's affirmation, not based upon personal knowledge, stating that plaintiffs did not receive Potter's April 18, 2005 letter, is of no probative or evidentiary significance and insufficient to raise a triable issue (see JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373, 384-385 [2005]; Warrington v. Ryder Truck Rental, Inc., 35 AD3d 455 [2006] Crispino v. Greenpoint Mortg. Corp., 2 AD3d 478, 479 [2003]). In any event, plaintiffs' conclusory denial of receipt of a properly mailed letter while at the same time admitting that they received the check which was enclosed, is unsubstantiated by probative facts, and insufficient to rebut the presumption that delivery

and receipt occurred (see e.g. Kihl v. Pfeffer, 94 NY2d 118, 122 [1999]; Northern v. Hernandez, 17 AD3d 285, 286 [2005]).

Even accepting, arguendo, plaintiffs' contention that Kess' handwritten addition modified the Release, the defendants would not be bound by this provision, inasmuch as Potter's authority did not extend beyond the settlement of the plaintiffs' claim for the loss plaintiffs sustained as a consequence of the flood (see e.g. (Bryan v. State Wide Ins. Co., 144 AD2d 325, 327 [1988]; State Farm Mut. Auto. Ins. Co. v. Classic Pontiac GMC Corp., 12 Misc.3d 1183(A) [Table] [N.Y.Dist.Ct.], 2006 N.Y. Slip Op. 51385[U]]).

An adjuster for an insurance company is generally a special agent of the company, not the insured, which is in this case was the defendants. His powers and authority extend only to the business entrusted to his care, which is usually limited to the ascertainment and adjustment of a loss covered by the insurance policy (see 70A N.Y. Jur. 2d Insurance § 2223) and there is no evidence or claim that Potter had apparent authority to waive defendants' claim against plaintiffs. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority" (ER Holdings, LLC v. 122 W.P.R. Corp., 65 AD3d 1275, 1277 [2009] quoting Hallock v. State of New York, 64 NY2d 224, 231 [1984]). The plaintiffs failed identify any act or word by which Fairmont conferred apparent authority upon Potter to do anything other than settle their claim (see Hallock v. State of New York, supra; Marshall v. Marshall, 73 AD3d 870, 871 [2010]). On the contrary, Potter, the insurance adjuster specifically informed the plaintiffs that he did not have authority to release or waive any claims defendants may have against the plaintiffs. In addition, defendants' continued demand to be paid for the cost of installation, even though plaintiffs disputed the claim and refused to pay it, is further evidence that defendants did not waive or relinquish their claim against plaintiffs. Nor is there any merit to counsel's claim that the insertion of the provision provided for mutuality of the release since the release was never sent to Atomic Fuel for signature and was never signed by Atomic Fuel or any of the defendants in this action (see Calavano v. New York City Health & Hospitals Corp., 246 AD2d 317, 318 [1998]).

Accordingly, the 16th cause of action for breach of the Release is dismissed.

The 11th cause of action to recover based upon *res ipsa loquitur* fails to state a cause of action and is dismissed. The doctrine of *res ipsa loquitur* is "a rule of evidence" not a cause of action (see States v Lourdes Hospital, 100 NY2d 208, 213-14 [2003]; Dermatossian v. New York City Tr. Auth., 67 NY2d 219, 226-227 [1986]; Abbott v Page Airways, Inc., 23 NY2d 502, 512 [1969]; Cucci v. Cucci, 31 AD3d 598 [2006]).

The 12th, 13th, and 14th, causes of action based upon allegations of unjust enrichment, quantum meruit and declaratory judgment, respectively, constitute impermissible collateral attack of the Small Claims Court judgment. Contrary to Plaintiff's attorney's assertion, the Supreme Court does not have subject matter jurisdiction over a collateral attack on personal jurisdiction in a prior action (see Weinstock v. Citibank, N.A., 289 AD2d 326 [2001]). The plaintiffs' allegations forming the basis of these causes of action, however, may be asserted as affirmative defenses to the claim asserted in the Small Claims action if plaintiffs are successful in opening their default.

Accordingly, the 12th, 13th, and 14th, causes of action are dismissed.

With respect to the 15th cause of action for abuse of process, it is dismissed on the ground that the factual allegations are insufficient to state a cause of action. CPLR 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine whether the plaintiffs have a legally cognizable cause of action and not whether the action has been properly plead. (see (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]; and Rovello v. Orofino Realty Co., 40 NY2d 633 [1976]).

The elements of abuse of process are "(1) regularly issued process ..., (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." (Curiano v. Suozzi, 63 NY2d 113, 116 [1984]).

Here, the plaintiffs allege that the defendants filed an untimely and exaggerated Mechanic's Lien in violation of Lien Law and commenced an action in Small Claims Court to recover for the cost of installation of the radiator. This allegation do not state even a colorable claim for abuse of process. First, "the

institution of a civil action by summons and complaint is not legally considered process capable of being abused." (Curiano v. Suozzi, 63 NY2d 113, 116 [1984]). Thus commencement of the Small Claims action cannot be the basis of a claim for abuse of process.

Although a Mechanic's Lien can form the basis of a claim for abuse of process (see Key Bank of N. New York, N.A. v. Lake Placid Co., 103 AD2d 19, 26 [1984]), a cause of action for abuse of process is not stated, even where the one using the process has an ulterior motive in doing so, in the absence of any allegations that process was used outside of the purpose for which it was intended (see Mago v. Singh, 47 AD3d 772 [2008]). There is no evidence oe even an allegation that the Mechanic's Lien was used as anything other than to secure the defendants' claim for services after it was issued (see Hornstein v. Wolf, 67 NY2d 721, 723 [1986]; Reisman v. Kerry Lutz, P.C., 6 AD3d 418 [2004]; see also New York State Properties, Inc. v. Clark, 183 AD2d 1003, 1004-1005 [1992]).

Therefore, plaintiffs has no claim for abuse of process and the 15th cause of action is dismissed.

Dated: June 27, 2011
D# 44

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J.S.C.