# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

*Justice*

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BROADWAY SKY, LLC,

Plaintiff,

- v -

53RD STREET HOLDINGS, LLC,CITY OUTDOOR, INC.,CLARK CUMMINS,

Defendant.

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**INDEX NO.** 654594/2012

**MOTION DATE** 11/24/2019

**MOTION SEQ. NO.** 009 011 012 013 014

**DECISION + ORDER ON MOTION**

53RD STREET HOLDINGS, LLC, CLARK CUMMINS

Plaintiff,

-against-

OOS INVESTMENTS, LLC

Defendant.

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Third-Party
Index No. 590405/2013

CITY OUTDOOR, INC.

Plaintiff,

-against-

OOS INVESTMENTS, LLC, 53RD STREET HOLDINGS, LLC, CLARK A. CUMMIS

Defendant.

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Second Third-Party
Index No. 595042/2017

The following e-filed documents, listed by NYSCEF document number (Motion 009) 310, 311, 312, 313, 314, 320, 321, 359, 362, 363, 364, 365, 366, 371, 375, 480, 486

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 361, 373, 380, 393, 394, 395, 396, 397, 398, 399, 401, 481, 487

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 384, 385, 386, 387, 388, 389, 390, 391, 392, 402, 403, 404, 405, 406, 407, 408, 482, 488

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 483, 489

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY REMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 465, 466, 484, 490

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

ORDERED that the part of the motion by plaintiff Broadway Sky, LLC (Broadway) for an order dismissing the cross claims brought by second-third party defendant OOS Investment, LLC (OOS) against it (motion sequence no. 009) is denied as moot; and it is further

ORDERED that the part of Broadway's motion for the imposition of monetary sanctions against OOS (motion sequence no. 009) is denied; and it is further

ORDERED that the part of the motion by defendant/second third-party plaintiff City Outdoor, Inc. (City Outdoor) to amend its replies to the counterclaims brought by the 53rd Street Defendants and OOS (motion sequence no. 011) is granted; and it is further

ORDERED that City Outdoor's amended replies in the proposed forms annexed to the moving papers as exhibits J and L shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the part of the motion by City Outdoor to dismiss the counterclaims brought by the 53rd Street Defendants and OOS in the second third-party action (motion sequence no. 011) is granted to the extent of dismissing the first counterclaim in the 53rd Street Defendants' answer and dismissing the first counterclaim (Count I) and second counterclaim (Count II) in OOS's second amended answer in the second third-party action, and the balance of the motion is otherwise denied; and it is further

ORDERED that the part of Broadway's motion to quash the two subpoenas served by OOS and for a protective order prohibiting OOS from seeking to depose or requesting documents from Broadway (motion sequence no. 012) is granted to the extent that the subpoena duces tecum dated October 9, 2019 and the subpoena ad testificandum dated October 9, 2019 served upon Broadway by OOS are hereby quashed, and Broadway need not respond to these subpoenas; and it is further

ORDERED that the branch of Broadway's motion for a protective order (motion sequence no. 012) is denied; and it is further

ORDERED that the motion brought by Broadway to strike so much of the note of issue filed on December 31, 2019 by City Outdoor seeking a trial by jury, or in the alternative, for an order severing the second third-party action from the main action (motion sequence no. 013) is granted to the extent of striking that part of the note of issue demanding a trial by jury, and that part of the note of issue demanding a trial by jury is hereby stricken; and it is further

ORDERED that, within 15 days from the entry of this order, counsel for Broadway shall serve a copy of this order with notice of entry on all parties and on the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who are directed to amend their records accordingly; and it is further

ORDERED that the motion brought by the 53rd Street Defendants for summary judgment dismissing the fifth cause of action against Cummins in City Outdoor's amended second third-party complaint (motion sequence no. 014) is denied.

**MEMORANDUM DECISION**

In this dispute arising out of the alleged failure to pay license fees, the following motions are consolidated for disposition.

In motion sequence no. 009, plaintiff Broadway Sky, LLC (Broadway) moves, pursuant to CPLR 3211 (a) (1), (2), (5) and (7), to dismiss the cross claims brought against it by second-third party defendant OOS Investment, LLC (OOS), and for an order awarding Broadway sanctions, legal fees and expenses under Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1.

In motion sequence no. 011[1], defendant/second third-party plaintiff City Outdoor, Inc. (City Outdoor) moves, pursuant to CPLR 3211 (a) (1), (3), (5) and (7), for an order dismissing the counterclaims asserted by the 53rd Street Defendants and OOS against it in the second third-party action, or in the alternative, for an order, under CPLR 3212 (c), granting City Outdoor summary judgment dismissing these counterclaims. City Outdoor also moves under CPLR 3025 (b) for leave to amend its replies to the counterclaims brought by the 53rd Street Defendants and OOS to plead additional affirmative defenses.

In motion sequence no. 012, Broadway moves, pursuant to CPLR 2304 and 3103, to quash the subpoena duces tecum and the subpoena ad testificandum served upon it by OOS and for a protective order prohibiting OOS from deposing or requesting documents from Broadway.

In motion sequence no. 013, Broadway moves for an order, under CPLR 4101 and 4102 and Uniform Rules of the Trial Courts (22 NYCRR) § 202.21 (e), striking so much of the note of issue filed by City Outdoor seeking a trial by jury, or in the alternative, for an order severing the second third-party action from the main action.

[1] Motion sequence no. 010, in which the 53rd Street Defendants moved to dismiss the branch of OOS's amended answer seeking contractual indemnification against Cummins, was withdrawn by So-Ordered Stipulation dated October 25, 2019 (NYSCEF doc No. 383).

In motion sequence no. 014, the 53rd Street Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the fifth cause of action pled against Cummins in the amended second third-party complaint.

**BACKGROUND FACTS**

The underlying facts in this matter are set forth in the prior decisions and orders in this action, familiarity with which is here presumed. Briefly, this action arises out of a series of agreements related to outdoor advertising space at a building owned by Broadway at 1691-1695 Broadway, New York, New York (the Building).

On February 12, 2008, Broadway, as "Licensor," and City Outdoor, as "Licensee," executed a License Agreement for Exterior Signage (Roof) and a License Agreement for Exterior Signage (Façade) (together, the License Agreements) granting City Outdoor 10-year licenses to affix one or more sign structures to the roof and the exterior perimeter walls of the Building (NY St Cts Elec Filing [NYSCEF] Doc No. 441, Jay H. Katz [Katz] affirmation, exhibit I at 4, 6 and 8; NYSCEF Doc No. 440, Katz affirmation, exhibit H at 3, 6 and 8). In exchange, City Outdoor agreed to pay Broadway "Minimum Fixed License Fees" and "Percentage License Fees," with the latter amount calculated as a percentage of net advertising revenues (NYSCEF Doc No. 440 at 9; NYSCEF Doc No. 441 at 9). It is not disputed that City Outdoor fell behind on the payments due under the License Agreements and that Broadway brought an action for breach of contract against it captioned *Broadway Sky, LLC v City Outdoor, Inc.* (Sup Ct, NY County, Index No. 600015/2010) (the 2010 Action) (NYSCEF Doc No. 443, Katz affirmation, exhibit K at 1).

While the 2010 Action was pending, Broadway, City Outdoor, OOS and 53rd Street negotiated a transaction whereby 53rd Street acquired City Outdoor's rights to the licenses. On July 1, 2010, the parties executed a number of agreements to complete the transfer of rights. First,

City Outdoor signed an Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Façade) and an Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Roof) assigning its right, title and interest in the License Agreements to OOS (NYSCEF Doc No. 447, Katz affirmation, exhibit O at 1 and 20). OOS immediately executed an Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Façade) and Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Roof) assigning its right, title and interest in the License Agreements to 53rd Street (NYCSEF Doc No. 448, Katz affirmation, exhibit P at 1 and 22). Broadway, as "Licensor," City, as "Assignor," OOS, as "Immediate Assignee," and 53rd Street, as "Remote Assignee," then executed a Consent to Sequential Assignment and Assumption of License Agreements for Exterior Signage in which Broadway consented to "the Assignor's assignment unto the Immediate Assignee of all the Assignor's right, title and interest in, to and under" the License Agreements and "the Immediate Assignee's assignment unto the Remote Assignee of all the Immediate Assignee's right, title and interest in, to and under" the License Agreements (NYSCEF Doc No. 451, Katz affirmation, exhibit S [the Consent Agreement] at 1 and 5).

According to Section 3 (a) (i) of the Consent Agreement, Broadway conditioned its approval upon its receipt of the following payments: $200,000 from City Outdoor in full satisfaction of the license fees due through June 23, 2010; $25,000 from City Outdoor as reimbursement for Broadway's costs in the 2010 Action and the assignments; $3,733.33 from 53rd Street as license fees from June 23, 2010 through June 30, 2010; $48,000 from 53rd Street as license fees from July 1, 2010 through September 30, 2010; and $48,000 from 53rd Street as a security deposit (NYSCEF Doc No. 451 at 6-7). Cummins, a managing member for 53rd Street, attests that 53rd Street wired $50,000 to the escrow account for OOS's counsel on June 9, 2010;

$400,000 to the escrow account for OOS's counsel on June 16, 2010; and $96,000 to the escrow account for Broadway's counsel on June 24, 2010 (NYSCEF Doc No. 432, Cummins aff, ¶¶ 1 and 42; NYSCEF Doc No. 452, Katz affirmation, exhibit T at 1). An undated settlement statement shows that 53rd Street transferred $3,733.31 to Broadway as its pro rata share of the license fees for June 2010 (NYSCEF Doc No. 453, Katz affirmation, exhibit U at 1). 53rd Street has also paid Broadway $16,000 for "OCT 2010 RENT" and $16,000 for "NOV 2010 RENT" (NYSCEF Doc No. 454, Katz affirmation, exhibit V at 1).

Broadway also conditioned its consent upon the delivery of a personal guaranty from Cummins (NYSCEF Doc No. 451 at 7). On July 1, 2010, Cummins executed two personal guaranties (together, the Guaranties) in which he "personally, irrevocably, unconditionally, directly and absolutely guarantees to Licensor [Broadway] … the timely and full performance and observance of each and all of the terms, agreements, covenants, warranties and representations contained in" the License Agreements (NYSCEF Doc No. 450, Katz affirmation, exhibit R at 1 and 5). Broadway further conditioned its consent upon the execution of certain amendments to the License Agreements (NYSCEF Doc No. 451 at 7), and on July 1, 2010, Broadway, as "Licensor," and 53rd Street, as "Licensee," executed a First Amendment to License Agreement for Exterior Signage (Façade) and a First Amendment to License Agreement for Exterior Signage (Roof) (NYSCEF Doc No. 449, Katz affirmation, exhibit Q at 1 and 11).

The Consent Agreement contains two nearly identical provisions whereby City Outdoor and 53rd Street agreed to be held jointly and severally liable for fulfilling the terms of the License Agreements. Importantly, sections 5 and 6 partially state:

> "The Assignor and Remote Assignee, each for itself, hereby covenants and agrees that the Assignor and Remote Assignee shall be each jointly and severally liable for the observance and performance of each and every one of the terms, covenants and

> conditions of the … License Agreement[s] on the licensee's part to be performed, including, without limitation, the payment of Minimum Fixed License Fees, Additional License Fees and other charges under the … License Agreement[s] …"

(NYSCEF Doc No. 451 at 8-9).

In addition, the Consent Agreement contains an indemnification provision. Section 12 reads, in relevant part:

> "Assignor and Assignee shall be jointly and severally liable to defend, indemnify and hold Licensor harmless from and against any and [sic] claims, damage, loss, liability, costs and expenses, including, without limitation, reasonable attorneys' fees, which Licensor shall suffer or incur in connection with or arising out of the Assignment, this Agreement or the transactions contemplated thereby"

(NYSCEF Doc No. 451 at 12-13).

Lastly, the Consent Agreement indicates that Broadway and City Outdoor had signed a separate agreement settling the 2010 Action (NYSCEF Doc No. 451 at 5). A stipulation of discontinuance has since been filed that action (NYSCEF Doc No. 19, stipulation of discontinuance, in *Broadway Sky, LLC v City Outdoor, Inc*, Sup Ct, NY County, index No. 600015/2010).

Less than two weeks after the parties completed the above transaction, the New York City Department of Buildings (DOB) received a request from the New York City Fire Department for DOB to conduct a "STRUCTURAL STABILITY CHECK [of the Building] DUE TOLOOSE [sic] BRICKS ON THE 10TH FLOOR," and opened complaint no. 1285242 on the Building (NYSCEF Doc No. 455, Katz affirmation, exhibit W at 1). On July 14, 2010, DOB served Broadway with Environmental Control Board (ECB) violation no. 34852646K based on DOB violation no. 071310CERRS01 for Broadway's failure to maintain the Building in a code-compliant manner

(*id.* at 2). The ECB violation specifically referred to spalling of the brick veneer and hair line cracks in the Building exterior (*id.*).

In September 2010, Broadway obtained a construction permit to repair the Building's façade (NYSCEF Doc No. 456, Katz affirmation, exhibit X at 3). The scaffolding erected to perform the repair work enveloped the entire exterior (NYSCEF Doc No. 6, ¶¶ 155-157; NYSCEF Doc No. 457, Katz affirmation, exhibit Y at 1), and remained in place through July 2011 (NYSCEF Doc No. 346, Daniel G. Heyman [Heyman] affirmation, exhibit A [the 2014 Decision] at 10). Broadway concedes that 53rd Street could not have affixed any sign structures to the façade while the scaffolding remained in place (*id.*). Beginning in January 2011, 53rd Street fell behind on the fees due under the License Agreements (NYSCEF Doc No. 1, ¶¶ 18 and 66).

After observing diagonal and vertical cracks in stucco panels facing West 53rd Street, DOB issued ECB violation no. 34948008M to Broadway on May 2, 2012, citing its failure to maintain the Building's exterior walls and appurtenances (NYSCEF Doc No. 458, Katz affirmation, exhibit Z at 1). Four months later, DOB issued ECB violation no. 34979672M to Broadway for its failure to maintain the Building (NYSCEF Doc No. 459, Katz affirmation, exhibit AA at 1).

In 2014, Broadway commenced an action against one of its tenants, Pie Face 1691 LLC. (Pie Face), and others captioned *Broadway Sky LLC. v Pie Face 1691 LLC.,* Sup Ct, NY County, Index No. 452852/2014, alleging that the construction work Pie Face performed at the southern wall of the Building in December 2011 had "caused the foundation and walls of the Loss Location to shift, resulting in substantial damage, to the exterior and interior portion of the Loss Location and BUILDING" (NYSCEF Doc No. 460, Katz affirmation, exhibit BB, ¶¶ 11-13). The complaint against Pie Face referred to an unspecified ECB violation for the Building (*id.*, ¶ 15).

*Procedural History*

Broadway initiated the present action on December 31, 2012 by filing a summons and complaint for breach of contract, account stated, breach of the Guaranties, and specific performance against City Outdoor and the 53rd Street Defendants (NYSCEF Doc No. 1). The 53rd Street Defendants interposed an answer asserting counterclaims, cross claims and third-party claims against Broadway, City Outdoor, and OOS for fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and rescission (NYSCEF Doc No. 6, ¶¶ 118-201). The 53rd Street Defendants had alleged that Broadway, City Outdoor and OOS were aware the Building "was unable to withstand and support the installation of sign structures to the façade and roof," and that Broadway would undertake "substantial, extended construction and remediation … that would frustrate the intent of the agreement and make impossible the installation of sign structures to the [Building] façade and roof" (*id.*, ¶¶ 142-143). Broadway, City Outdoor and OOS allegedly concealed these conditions from the 53rd Street Defendants (*id.*, ¶ 146).

Broadway moved to dismiss the 53rd Street Defendants' counterclaims and their fifth, ninth, tenth and twelfth affirmative defenses (NYSCEF Doc No. 8), and OOS moved to dismiss the third-party complaint (NYSCEF Doc No. 27). The 53rd Street Defendants filed separate cross motions to amend their answer to plead additional facts and to combine two of the counterclaims and third-party claims into one cause of action. In a decision rendered orally on January 30, 2014, the court (J. Friedman) granted the 53rd Street Defendants' cross motions to amend, dismissed their first counterclaim for fraud, and granted OOS dismissal of "all of the claims" against it (NYSCEF Doc No. 346 at 31 and 35-36). In dismissing the 53rd Street Defendants' fraud claim, Justice Friedman noted that the 53rd Street Defendants had taken the Building in "as is" condition

as per section 5.01 in License Agreements, and that their amended answer failed to plead facts sufficient to bring their claim of fraud within the special facts doctrine (*id*. at 31-34).

City Outdoor did not answer Broadway's complaint until March 3, 2014 (NYSCEF Doc No. 100). The court notes that City Outdoor did not plead a counterclaim, cross claim or third-party claim in its answer, and that it took no part in the motion practice between Broadway, the 53rd Street Defendants and OOS.

In May 2014, Broadway served 53rd Street with notices of default alleging that it had failed to pay the license fees due and with notices purporting to terminate the License Agreements (NYSCEF Doc No. 313, Scott Brody [Brody] affirmation, exhibit A, ¶¶ 33, 37, 81 and 85). Broadway later amended its complaint to seek judgments declaring the License Agreements terminated. Broadway and the 53rd Street Defendants have now resolved their dispute, and have filed a stipulation of discontinuance (NYSCEF Doc No. 421, Heyman affirmation, exhibit B at 1). According to paragraph 2 of a Settlement Agreement and Mutual Release dated September 1, 2016, the License Agreements and Guaranties,

> "[s]hall all be deemed to be unconditionally and irrevocably terminated, and shall be of no further force or effect whatsoever, provided however, neither such termination nor anything contained in this Settlement Agreement shall be deemed to release or waive any claims, rights or remedies which Broadway SKY may have thereunder, at law, or in equity, by reason of any breach thereof against any party or parties, other than as against 53rd Street Holdings or Cummins as set forth in Paragraph 4 of this Agreement, all of which shall be preserved"

(NYSCEF Doc No. 420, Heyman affirmation, exhibit A [the Settlement Agreement] at 5) (emphasis in original).

The Settlement Agreement did not resolve Broadway's claims or the 53rd Street Defendants' cross claims against City Outdoor.

Three months later, City Outdoor commenced a second third-party action for indemnification against 53rd Street and OOS and for breach of the Guaranties against Cummins (NYSCEF Doc No. 134).

Meanwhile, Broadway moved and City Outdoor cross-moved for summary judgment in the main action. The 53rd Street Defendants and OOS filed separate motions to dismiss City Outdoor's amended second third-party complaint, and City Outdoor cross-moved to allow its amended complaint, which had been served without its adversaries' consent or with leave of court, to stand. In a decision dated April 4, 2019, Justice Friedman denied Broadway's motion and City Outdoor's cross motion for summary judgment; granted the 53rd Street Defendants' motion to the extent of dismissing City Outdoor's second, fourth, sixth and seventh causes of action; denied OOS's motion to dismiss the amended second third-party complaint; and granted City Outdoor's cross motions to amend its pleading, but only as to the third cause of action for indemnification against 53rd Street, the fifth cause of action for contribution against Cummins, and the first cause of action for indemnification against OOS (NYSCEF Doc No. 439, Katz affirmation, exhibit G [the 2019 Decision] at 32-34). Significantly, Justice Friedman observed that the court "cannot and need not determine whether and to what extent City Outdoor is entitled to contribution" from Cummins (*id.* at 26). Justice Friedman also permitted discovery to proceed on the third-party claim against OOS, albeit on an expedited basis (*id.* at 32).

In their answer in the second third-party action, the 53rd Street Defendants asserted counterclaims and cross claims against City Outdoor and OOS for breach of contract/breach of the implied covenant of good faith and fair dealing, rescission, and fraud/fraudulent inducement (NYSCEF Doc No. 348, Heyman affirmation, exhibit C, ¶¶ 133-181). Twenty days after serving its answer (NYSCEF Doc No. 280), OOS amended its pleading to assert counterclaims and cross

claims for fraudulent inducement against Broadway (Counts I and II); fraudulent inducement against City Outdoor (Count III); negligent misrepresentation against City Outdoor (Count IV); and contractual indemnification against the 53rd Street Defendants (Count V) (NYSCEF Doc No. 349, Heyman affirmation, exhibit D at 12-25).

Broadway filed a note of issue on September 30, 2016 (NYSCEF Doc No. 417, Frank affirmation, exhibit H at 1), and on December 31, 2019, City Outdoor filed a note of issue demanding a trial by jury (NYSCEF Doc No. 416, Frank affirmation, exhibit G at 1).

**DISCUSSION**

Motion Sequence No. 009

In this motion, Broadway argues that Counts I and II, denominated as "cross claims," in OOS's amended answer in the second third-party action are procedurally improper, and urges the court to dismiss them. It seeks monetary sanctions for OOS's refusal to withdraw its cross claims.

OOS opposes and states that it has withdrawn its affirmative claims against Broadway, as evidenced in a second amended answer filed August 16, 2019 (NYSCEF Doc No. 330). OOS submits that this new pleading renders its prior pleading a legal nullity and moots Broadway's motion (NYSCEF Doc No. 339, Jason A. Nagi affirmation, ¶ 2). OOS also opposes Broadway's request for sanctions on the ground that its actions were not frivolous.

*Dismissal of OOS's "Cross Claims" against Broadway*

Broadway advances four arguments in support of dismissal. First, Broadway argues that the cross claims are procedurally improper. Under CPLR 3019 (b), a cross claim may be asserted only against a defendant, and in this instance, Broadway is the plaintiff. Second, Broadway argues that the cross claims for fraud or fraudulent inducement began to accrue in July 2010, and are now time-barred by the six-year statute of limitations governing fraud. Third, OOS's fraud claims are

barred by the doctrines of res judicata, collateral estoppel and law of the case based on the 2014 Decision. Fourth, Broadway submits that OOS's amended answer fails to adequately plead the elements necessary to state a cause of action for fraudulent inducement.

It is well settled that service of an amended answer supersedes the original as a party's operative pleading (*see OneWest Bank, FSB v Deutsche Bank Natl. Trust Co.*, 186 AD3d 92, 99 [1st Dept 2020]). CPLR 3025 (a) permits a party to amend its pleading once without leave of court within 20 days after service of a responsive pleading, and OOS took advantage of this opportunity when it amended its answer on May 29, 2019. In response to the present motion, OOS amended its answer a second time without obtaining leave of court or a stipulation signed by all parties, in accordance with CPLR 3025 (b). Ordinarily, OOS's second amended answer would be deemed a nullity (*see Walden v Nowinski*, 63 AD2d 586, 586 [1st Dept 1978]). Broadway, though, has waived any objection to OOS's improper service of a second amended answer (*see Nardi v Hirsh*, 250 AD2d 361, 364 [1st Dept 1998], citing *Nassau County v Incorporated Vil. of Roslyn*, 182 AD2d 678, 679 [2d Dept 1992], *lv dismissed* 80 NY2d 972 [1992]). Furthermore, Broadway and OOS agree that OOS's second amended answer omits pleading any affirmative claims against Broadway, and that any affirmative claims have been withdrawn (NYSCEF Doc No. 375, Frank reply affirmation, ¶ 4). Thus, that branch of Broadway's motion to dismiss OOS's cross claims against it is denied as moot.[2]

*Monetary Sanctions against OOS*

[2] In some instances, the court may amend a pleading sua sponte (*see N450JE LLC v Priority 1 Aviation, Inc.*, 102 AD3d 631 [1st Dept 2013], citing Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:17]). The court declines to do so here in the absence of a request for such relief from OOS.

Broadway seeks the imposition of monetary sanctions against OOS for its failure to respond promptly to counsel's request that OOS withdraw the procedurally improper cross claims. Broadway further contends that OOS's claims lack any legal merit on the grounds described above.

OOS argues that sanctions are not warranted. First, it posits that the cross claims were not procedurally improper because "CPLR § 3019 (b) permits cross claims 'against one or more defendants … *and other persons alleged to be liable*" (NYSCEF Doc No. 363, OOS mem of law at 5) (emphasis in original). Furthermore, it is immaterial whether the affirmative claims should have been styled a counterclaim as opposed to a cross claim since it is the substance of the claim, as opposed to its label, that controls. OOS also argues that it had a good faith basis to assert an claim for fraudulent inducement because Broadway's knowledge of whether the Building was structurally sound has never been explored, OOS's principal was not privy to any inspection reports prepared by the 53rd Street Defendants' engineer, and the element of detrimental reliance should be resolved by a jury.

Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (a) permits the court, in its discretion, to impose monetary sanctions on a party as the result of that party's frivolous conduct. Conduct is considered "frivolous" where:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have

> been apparent, or was brought to the attention of counsel or the party."
>
> (Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [c]).

An award of monetary sanctions is proper if a party manifests "extreme behavior" (*Ray v Ray*, 180 AD3d 472, 474 [1st Dept 2020], *lv dismissed* 35 NY3d 1007 [2020] [internal quotation marks and citation omitted]). The court must look at the offending party's "broad pattern" of conduct (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]). For instance, an award of sanctions is appropriate where a party continues to "press the same patently meritless claims" (*Tsabbar v Auld*, 26 AD3d 233, 234 [1st Dept 2006]; *Nachbaur v American Trans. Ins. Co.*, 300 AD2d 74, 75-76 [1st Dept 2002], *lv denied* 99 NY2d 576 [2003], *cert denied* 538 US 987 [2003] [discussing "repetitive and meritless motions"]).

Broadway persuasively argues that it was impermissible for OOS to plead a cross claim against it. CPLR 3019 (b) states, in relevant part, that "[a] cross-claim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable." Generally, "[a] cross-claim is a claim by one defendant against another" (Siegel & Connors, NY Prac § 227 [6th ed 2018]; *Figueroa v Kahn*, 101 Misc 2d 821, 822 [Sup Ct, NY County 1979] [stating that "[o]bviously, a cross claim can only be asserted against another defendant"]). This view is bolstered by the language in CPLR 1008 stating that a "third-party defendant shall have the rights of a party adverse to the other parties in the action, including the right to counter-claim, cross-claim and appeal," and CPLR 1011 stating that "[w]hen a counterclaim is asserted against a plaintiff, he may proceed pursuant to section 1007 as if he were a defendant." CPLR 3011 also provides that "[a]n answer may include a counterclaim against a plaintiff and a cross-claim against a defendant."

In response, OOS isolates and misinterprets the phrase "and other persons alleged to be liable" in CPLR 3019 (b) to include a plaintiff, such as Broadway, as an "other person." OOS neglects the language contained in CPLR 3019 (d) which reads, "[w]here a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant." When read in conjunction with CPLR 3019 (d), the phrase "other person" in CPLR 3019 (b) clearly contemplates "new parties who may or may not have any interest in or knowledge of the plaintiff's claim" (5 Weinstein-Korn-Miller, NY Civ Prac: CPLR ¶ 3019.21 [2020]). Broadway is clearly not an "other person" against whom a cross claim may be asserted. Thus, OOS's contention that it is permissible for a third-party defendant to plead a cross claim against a plaintiff is unsupported.

That said, the mere act of erroneously pleading a "cross claim" instead of a "counterclaim" does not constitute frivolous conduct for the purposes of Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (c). As stated above, CPLR 1008 expressly grants a third-party defendant "the rights of a party adverse to the other parties in the action, including the right to counter-claim, cross-claim and appeal," and OOS has argued that its cross claims could be considered counterclaims. The court may overlook this "technical infirmity" (*see e.g. Matter of Miller v Board of Assessors*, 91 NY2d 82, 87 [1997], citing CPLR 2001]).

Broadway also argues that sanctions are appropriate because OOS's fraudulent inducement claims are without legal merit. Although OOS argues that its claims are not patently devoid of merit, it fails to adequately address whether it is precluded from maintaining them based on the 2014 Decision. Notwithstanding the foregoing, the court declines to impose sanctions (*see Rabinowitz v Robert C. Gottlieb, P.C.*, 167 AD3d 410, 411 [1st Sept 2018], *appeal dismissed* 33 NY3d 944 [2019] [declining to award sanctions even after dismissing a complaint as barred by the

doctrine of res judicata]; *Wax v 716 Realty, LLC*, 151 AD3d 902, 904-905 [2d Dept 2017] [concluding that the court providently exercised its discretion in refusing to award sanctions to the plaintiffs]). In response to the present motion, OOS promptly withdrew its affirmative claims against Broadway. As such, Broadway has not shown that "the challenged conduct, while without legal merit, was 'so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1'" (*Bradley v Bradley*, 167 AD3d 489, 490 [1st Dept 2018] [internal citation omitted]). Accordingly, that part of Broadway's motion for the imposition of sanctions is denied.

Motion Sequence No. 011

In this motion, City Outdoor moves to dismiss the counterclaims brought by the 53rd Street Defendants and OOS in the second third-party action.[3] As against the 53rd Street Defendants, City Outdoor argues that 53rd Street lacks the legal capacity to sue and that their counterclaims are barred by the doctrines of res judicata, collateral estoppel or law of the case and the statute of limitations and also fail to state a cause of action. As against OOS, City Outdoor maintains that OOS failed to plead timely counterclaims for fraudulent inducement and negligent misrepresentation and failed to plead the elements necessary to sustain either counterclaim. City Outdoor also invokes the doctrine of judicial estoppel to preclude OOS from taking contrary positions in this action. Finally, City Outdoor moves for leave to serve a second amended complaint to plead the following affirmative defenses: a defense founded on documentary evidence; res judicata; collateral estoppel; and law of the case.

In response, the 53rd Street Defendants argue the motion is procedurally defective under CPLR 3211 (e) and 3212 (b) and should be denied. They maintain that 53rd Street does not lack

[3] City Outdoor appears to have accepted service of OOS's second amended answer (NYSCEF Doc No. 345, Heyman affirmation at 4 n.2).

legal capacity to sue and reject the contention that the counterclaims are barred by the statute of limitations. They further assert that the motion should be denied on substantive grounds.

OOS has not submitted any opposition to this motion.

*City Outdoor's Motion to Amend under CPLR 3025*

City Outdoor moves to amend its reply to the 53rd Street Defendants' counterclaims to plead affirmative defenses of (i) a defense grounded in documentary evidence, (ii) res judicata and (iii) collateral estoppel. City Outdoor contends that the proposed amendments are not palpably insufficient or devoid of merit, and that there is no prejudice to the 53rd Street Defendants for its delay in moving to amend.

In opposition, the 53rd Street Defendants argue the motion is procedurally defective since City Outdoor failed to offer a proposed pleading that clearly shows the changes or additions to its original reply.

It is well established that a motion for leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is "palpably insufficient or patently devoid of merit" (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dep't 2013], quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). "An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v BSP Realty Corp.*, 171 AD3d 504, 504 [1st Dept 2019]). As such, the court must examine the sufficiency of the merits of the proposed amendment and is not required to accept the new allegations as true (*see Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). The party moving to amend the pleadings need not prove the facts (*see Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]), but must tender an affidavit of merit or an offer of evidence similar to that used to support a motion for summary judgment (*see Velarde v City of*

*New York*, 149 AD3d 457, 457 [1st Dept 2017]); *Matthews v City of New York*, 138 AD3d 507, 508 [1st Dept 2016]). The party opposing the motion bears a heavy burden of showing prejudice (*see McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]), or demonstrating that the facts as alleged are unreliable or insufficient to support the motion (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

Here, City Outdoor has demonstrated the potential merit to its proposed affirmative defenses, as discussed *infra*. The 53rd Street Defendants object to City Outdoor's delay in moving to amend, but "[m]ere lateness is not a barrier" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]). Despite insisting that allowing the amendment would be prejudicial, the 53rd Street Defendants have not shown they suffered any appreciable prejudice from the delay. The argument that City Outdoor failed to submit a "proposed amended or supplemental pleading clearly showing the changes or additions to be made" (CPLR 3025 [b]) also fails. The proposed pleading annexed to the motion clearly shows the changes that were made. Accordingly, the part of City Outdoor's motion to amend its replies to the 53rd Street Defendants' and OOS's counterclaims is granted.

*Dismissal under CPLR 3211 (e) and 3212 (b)*

As a preliminary matter, the court rejects the 53rd Street Defendants' argument that City Outdoor's motion is procedurally defective under CPLR 3211 (e) and CPLR 3212 (b).

CPLR 3211 (e) states, in relevant part:

> "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two,

> seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted ...."

Although City Outdoor moved for dismissal after serving a responsive pleading, its original reply to the counterclaims raised several of the grounds enumerated in CPLR 3211 (a) as affirmative defenses. City Outdoor's reply to the 53rd Street Defendants' counterclaims pleads the failure to state a cause of action as a first affirmative defense, the law of the case doctrine as a second affirmative defense, 53rd Street's lack of authority to conduct business in New York as a thirteenth affirmative defense and the statute of limitations as a seventeenth affirmative defense (NYSCEF Doc No. 354, Heyman affirmation, exhibit I, ¶¶ 32-33, 44 and 48). Thus, at least as to those affirmative defenses, coupled with this court granting City Outdoor leave to amend its pleading, the 53rd Street Defendants' argument that the motion is procedurally defective lacks merit.

CPLR 3212 (b) states, in part, that a summary judgment motion "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." Where a summary judgment motion is "not supported by [an] affidavit or affirmation of facts," the motion will be denied (*Pollack v Ovadia*, 173 AD3d 464, 464 [1st Dept 2019]). The 53rd Street Defendants have demonstrated that City Outdoor has not proffered an affidavit from a person with personal knowledge. But, as is the case here, it is permissible for a party to rely on an attorney's affirmation to introduce contracts and other admissible evidence in support of a summary judgment motion (*see De-Spec, Inc. v Sadick*, 147 AD3d 425, 425 [1st Dept 2017]).

*Legal Capacity under CPLR 3211 (a) (3)*

City Outdoor next argues that 53rd Street lacks the legal capacity to sue because it is a foreign limited liability company not authorized to conduct business in New York. The 53rd Street Defendants, in opposition, maintain that 53rd Street's failure to secure a certificate of authority is not a fatal defect and may be cured.

CPLR 3211 (a) (3) provides that a party may move to dismiss a complaint for lack of capacity to sue. As is relevant here, Limited Liability Company Law § 808 (a) states:

> "(a) A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state."

An action brought by an unauthorized foreign limited liability company will be dismissed (*see Caring People Mgt. Servs., LLC v Assistcare Home Health Servs. LLC*, 162 AD3d 509, 509 [1st Dept 2018]), and City Outdoor has demonstrated that 53rd Street is not authorized to conduct business in this state. A printout from the website maintained by the New York State Department of State, Division of Corporations, of which the court takes judicial notice (*see Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012]), for an entity known as "53rd Street Holdings LLC" lists an address for a business incorporated in New York and based in Kings County (NYSCEF Doc No. 353, Katz affirmation, exhibit H at 1). 53rd Street has admitted that it is a foreign company organized in Oklahoma (NYSCEF Doc No. 348, ¶ 3).

However, a foreign limited liability company's failure to secure the requisite certificate of authority "before initiating the action is not a fatal jurisdictional defect" (*Basile v Mulholland*, 73 AD3d 597, 597 [1st Dept 2010]). Instead of ordering a dismissal, the court may temporarily stay the action to allow the foreign company time to cure its noncompliance with the Limited Liability Company Law (*Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686 [2d Dept 2009]). Thus, the court declines to dismiss 53rd Street's counterclaims outright.

Moreover, City Outdoor ignores Limited Liability Company Law § 808 (b), which states that "[t]he failure of a foreign limited liability company that is doing business in this state to

comply with the provisions of this chapter does not ... prevent the foreign limited liability company from defending any action or special proceeding in any court of this state." It is not disputed that 53rd Street did not commence the main action, or that 53rd Street brought its counterclaims and cross claims as a result of having been sued. In *Reese v Harper Surface Finishing Sys.* (129 AD2d 159, 164 [2d Dept 1987]), the Court concluded that an unauthorized foreign corporation did not violate Business Corporation Law § 1312 by bringing a third-party action for contribution and indemnification as part of its defense in an action brought against it in New York. Citing CPLR 1007, 1403 and 3019, the Court noted that a defendant may bring a counterclaim, cross claim or a third-party claim as part of its defense in any action (129 AD2d at 164). Since Limited Liability Law § 808 is analogous to Business Corporation Law § 1312 (*see Matter of Mobilevision Med. Imaging Servs., LLC*, 66 AD3d at 686), it is permissible for 53rd Street to assert counterclaims or cross claims as part of its defense. Consequently, this branch of City Outdoor's motion to dismiss is denied.

*The Statute of Limitations under CPLR 3211 (a) (5)*

City Outdoor contends that the counterclaims all arise out of events occurring no later than July 1, 2010, and therefore, they are all time-barred under the statutes of limitations applicable to fraud, contract and negligent misrepresentation claims. The 53rd Street Defendants maintain that their counterclaims are not time-barred under CPLR 203.

A party moving under CPLR 3211 (a) (5) to dismiss a claim as time-barred "'bears the initial burden of establishing, prima facie, that the time in which to sue has expired'" (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017], quoting *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). To meet this burden, it is incumbent upon the movant to demonstrate when the claim accrued (*see Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st

Dept 2016]). The non-moving party, in response, must show "whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period … [and] must aver evidentiary facts establishing that the action was timely or … raise an issue of fact as to whether the action was timely" (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019] [internal quotation marks and citations omitted]).

A cause of action for fraud is subject to a six-year statute of limitations which begins to run from the date the fraudulent act occurred or two years from the date the plaintiff, exercising reasonable diligence, could have discovered it (*see* CPLR 213 [8]; *Held v Kaufman*, 91 NY2d 425, 431 [1998]). A claim for rescission based on fraud is subject to a six-year limitations period (*see Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 180 [1st Dept 1998], *lv denied* 92 NY2d 1000 [1998]). Negligent misrepresentation is governed by a three-year statute of limitations (*see* CPLR 214), unless the claim is grounded in fraud (*see Colon v Banco Popular N. Am.*, 59 AD3d 300, 301 [1st Dept 2009]). In that instance, a six-year statute of limitations applies (*id.*, citing CPLR 213). Finally, a six-year statute of limitations controls a cause of action for breach of contract (*see* CPLR 213 [2]; *2138747 Ontario, Inc. v Samsung C&T Corp.*, 31 NY3d 372, 375 [2018]).

The 53rd Street Defendants' and OOS' counterclaims largely concern events that occurred prior to July 1, 2010, and these parties raised their counterclaims more than six years after that date. City Outdoor, however, concedes that CPLR 203 (d) may be applicable. CPLR 203 (d) codifies the doctrine of equitable recoupment and "permits a defendant to seek equitable recoupment in an otherwise untimely defense or counterclaim, if it arises from the transactions, occurrences, or series of transactions or occurrences alleged in the complaint" (*California Capital Equity, LLC v IJKG, LLC*, 151 AD3d 650, 650 [1st Dept 2017]). Here, the counterclaims in the

second third-party action and the claims in the main action arise out of the same facts, and the claims in the main action are all timely. Thus, City Outdoor has not met its initial burden of demonstrating that the claims are untimely, and this branch of the motion is denied.

*Res Judicata, Collateral Estoppel and the Law of the Case under CPLR 3211 (a) (5)*

Regarding the fraud or fraudulent inducement counterclaims, City Outdoor contends that this issue was litigated, and the claims dismissed in 2014. As discussed earlier, the 53rd Street Defendants' first counterclaim and cross claim for fraud was dismissed for failing to state a cause of action. City Outdoor posits that res judicata, collateral estoppel or law of the case precludes the 53rd Street Defendants from raising fraud a second time. Finally, City Outdoor submits that the 53rd Street Defendants' remaining counterclaims for rescission and breach of contract fail based on a lack of privity of contract.

The 53rd Street Defendants oppose and argue that they have now pled additional facts solely within City Outdoor's particular knowledge. As such, their current fraud counterclaim is not identical to the previously-dismissed fraud counterclaim. The 53rd Street Defendants also note that City Outdoor did not participate in the motion practice that resulted in the 2014 Decision and did not answer Broadway's complaint until after that decision was rendered. As such, the 2014 Decision did not resolve the 53rd Street Defendants' cross claims against City Outdoor. Additionally, while they admit Cummins does not seek any relief on the contract or rescission counterclaims, 53rd Street is in privity with City Outdoor based on the Consent Agreement.

CPLR 3211 (a) (5) provides for the dismissal of a complaint based on res judicata and collateral estoppel. "Res judicata or claim preclusion precludes successive litigation based on the same transaction or series of connected transactions if there is a valid and enforceable judgment and the party against whom the doctrine is invoked was a party to the previous action, or in privity

with a party" (*Matter of Silvar v Commissioner of Labor of the State of N.Y.*, 175 AD3d 95, 103 [1st Dept 2019]). Because New York employs a transactional approach, whether a transaction or series of transactions forms a "factual grouping … depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understandings or usage" (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981], *rearg denied* 55 NY2d 878 [1982] [internal quotation marks and citation omitted]).

In contrast, "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party … whether or not the tribunals or causes of action are the same'" (*Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 [1st Dept 2011], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The doctrine "applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007] [internal quotation marks and citation omitted]).

The law of the case doctrine is similar to res judicata and collateral estoppel since all three "limit relitigation of issues" (*People v Evans*, 94 NY2d 499, 502 [2000], *rearg denied* 96 NY2d 755 [2001]). The "law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment" (*id.*; *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975], *mot to amend remittitur denied* 37 NY2d 818 [1975] [stating that "[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"]). "The

doctrine 'applies only to legal determinations that were necessarily resolved on the merits in the prior decision,' and to the same questions presented in the same case" (*Moran Enters., Inc. v Hurst*, 96 AD3d 914, 916 [2d Dept 2012] [internal quotation marks and citation omitted]). As such, the law of the case doctrine requires an identity of issues (*see Darzimanova v Le Clere*, 122 AD3d 421, 422 [1st Dept 2014]). In assessing whether the law of the case applies, the court must consider the procedural posture of the case and each parties' evidentiary burdens (*see Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]).

Applying these precepts, neither res judicata nor collateral estoppel are applicable. Both doctrines require a final judgment on the merits in a prior proceeding, and without an order severing a third-party action from the main action, third-party actions are not separate or successive proceedings to which those doctrines apply. Indeed, the third-party claims all flow from the same transactions that are the subject of the main action.

The law of the case doctrine, however, does apply (*see Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990] [reasoning that a "prior ruling is law of the case and may not be relitigated"]). A comparison of the 53rd Street Defendants' pleadings in the main action and the second third-party action reveals a significant overlap in the factual allegations pertaining to fraud. For example, it is alleged that City Outdoor instructed OOS to solicit 53rd Street to assume the License Agreements even though City Outdoor was aware the licenses were of little or no value (NYSCEF Doc No. 6, ¶ 74; NYSCEF Doc No. 348, ¶¶ 80 and 122). It is further alleged that City Outdoor concealed or refused to disclose the true condition of the Building façade, which would have made it impossible for 53rd Street to affix sign structures to the façade and roof (NYSCEF Doc No. 6, ¶ 146 and 164; NYSCEF Doc No. 348, ¶¶ 115-116). In evaluating whether the 53rd Street Defendants stated a claim for fraud, Justice Friedman assessed whether

the factual allegations were sufficient to bring the action within the special facts doctrine (NYSCEF Doc No. 346 at 32). Justice Friedman concluded that the 53rd Street Defendants' allegations of due diligence were wholly conclusory, that the issuance of an ECB violation on the Building shortly after the assignments, without more, was insufficient, and that the original licensee, City Outdoor, represented in the License Agreements that it had examined the Building and accepted it in "as-is" condition (*id.* at 32-34). Significantly, each successive licensee is subject to the representations City Outdoor had made in the original agreements. Because there is an identity of issues, the law of the case precludes the 53rd Street Defendants from maintaining their third counterclaim for fraud in the second third-party action.

Even if the law of the case doctrine is inapplicable, the 53rd Street Defendants' counterclaim fails to adequately state a cause of action for fraud. A motion brought under CPLR 3211 (a) (7) addresses the sufficiency of a pleading (*see Arister-Farer v State of New York*, 29 NY3d 501, 509 [2017]). The court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux*

*Holdco S.A.R.L. v Sic Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]).

A claim of fraudulent concealment requires a party to plead a material misrepresentation of fact intentionally made by the defendant to defraud or mislead the plaintiff, the plaintiff's reasonable reliance on the misrepresentation, damages, and "an allegation that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). In their answer to the second third-party complaint, the 53rd Street Defendants have pled additional facts pertaining to City Outdoor's "special knowledge" of the façade defects in an effort to cure the pleading deficiencies identified in the 2014 Decision. They refer to an April 13, 2010 email City Outdoor received from its contractor, North Shore Neon Sign Company, about a visit to the Building (NYSCEF Doc No. 348, ¶ 68). City Outdoor's contractor wrote,

> "Upon field measuring, the location, we found, has many areas that either have stress crack [sic] and/or loose bricks, which could be a potential problem since we will need to add additional holes in the façade to mount the mesh face.
>
> It may be in our best interest to have someone look at this condition before we move ahead to prevent any more damage and/or wall failure.
>
> Attached are photos for this location."
>
> (*id.*).

Chris Carr, a City Outdoor officer, responded to the email the same day (*id.*, ¶ 69). Additionally, the 53rd Street Defendants cite City Outdoor's submission in the 2010 Action "that it was 'impossible' to install signage to the roof pursuant to the Roof Agreement" (*id.*, ¶ 72).

These new allegations, however, still fail to adequately plead a claim for fraud. Under the special facts doctrine, "a duty to disclose arises 'where one party's superior knowledge of essential

facts renders a transaction without disclosure inherently unfair'" (*P.T. Bank Cent. Asia, N.Y. Branch*, 301 AD2d at 378 [internal quotation marks and citation omitted]). The party seeking to invoke the special facts doctrine must satisfy "a two-prong test: that the material fact was information peculiarly within the knowledge of one party and that the information was not such that could have been discovered by the other party through the exercise of ordinary intelligence" (*Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 516 [1st Dept 2015], *lv denied* 29 NY3d 913 [2017]).

The License Agreements and the assignments contain numerous disclaimer provisions. Importantly, Section 5.01 of the License Agreements states:

> "Licensee acknowledges and represents that it has examined the Building and the License Area, including, but not limited to, the perimeter walls, roof and parapets thereof, and agrees to accept same in their condition and state of repair existing as of the date hereof, i.e., 'AS IS', including, but not limited to, patent and latent defects of every kind and nature, and that it is expressly understood and agreed that Licensor shall not be required to perform any work, supply any materials or incur any expense whatsoever to prepare the Building or the License Area for Licensee's use thereof pursuant to this Agreement, and Licensee acknowledges and represents further that neither Licensor, nor any of Licensor's agents, servants or employees, or any representative, has made any representations or promises in regard to the Building or the License Area other than that, if any, specifically set forth herein"
>
> (NYSCEF Doc No. 440 at 12; NYSCEF Doc No. 441 at 12) (emphasis in original).

Similarly, paragraph 16 (a) of the Consent Agreement states that OOS and 53rd Street had "examined the Building and the License Area … and agree[ ] to accept same in their condition and state of repair existing as of the date hereof, i.e., "AS IS" (NYCEF Doc No. 451 at 14) (emphasis in original). The assignments between City Outdoor, OOS and 53rd State contain identical provisions, and partially state:

> "[t]he Purchaser has inspected and is familiar with the License Agreement and the License Area, and it hereby declares and agrees that it is purchasing voluntarily and on its own judgment and not upon any representations made by the Seller, or by anyone acting in its behalf of Seller, other than those contained in this Agreement, as to the character, condition or quality of the License Agreement and the License Area …"
>
> (NYSCEF Doc No. 447 at 6 and 25; NYSCEF Doc No. 448 at 7 and 28).

"[A] specific disclaimer of reliance on representations as to the condition of real property will ordinarily bar a fraud claim" (*TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 87 [1st Dept 2015]). Here, the 53rd Street Defendants' allegations that the Building defects were within City Outdoor's peculiar knowledge are pled in wholly conclusory terms. The façade defects described by City Outdoor's contractor were not underlying latent defects, and could, or should, have been discovered with reasonable diligence (*see 85-87 Pitt St., LLC v 85-87 Pitt St. Realty Corp.*, 83 AD3d 446, 446 [1st Dept 2011]). Indeed, it appears from the April 13, 2010 email that the façade defects were readily visible. OOS's counterclaim for fraudulent inducement against City Outdoor suffers from the same infirmity. As such, the court need not address whether judicial estoppel precludes OOS from maintaining a counterclaim for fraudulent inducement. Accordingly, the 53rd Street Defendants' third counterclaim and Count III in OOS's second amended answer are dismissed.

*Dismissal of the Remaining Counterclaims*

As to the remaining counterclaims, City Outdoor moves for dismissal under CPLR 3211 (a) (1) and (7).

1. *The 53rd Street Defendants' First Counterclaim for Fraud/Fraudulent Inducement and Second Counterclaim for Rescission/Nullity*

In their first counterclaim for breach of contract/breach of the implied covenant of good faith and fair dealing, the 53rd Street Defendants allege that City Outdoor breached the "warranties

and representations contained in the sequential Assignment Agreements by failing to disclose the condition of the building" (NYSCEF Doc No. 346, ¶ 144). Their second counterclaim seeks rescission of "all contracts to which 53rd Street Holdings and/or Cummins are a party" (*id.*, ¶ 169).

City Outdoor submits that the contract and rescission counterclaims must be dismissed because it was not in privity with 53rd Street. The 53rd Street Defendants characterize this argument as "a red herring" because City Outdoor is in direct privity with OOS and 53rd Street (NYSCEF Doc No. 401, 53rd Street Defendants mem of law at 16-17).

To sustain a cause of action for breach of contract, the plaintiff must plead the existence of a contract, the plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Absent privity of contract with the defendant, a plaintiff's breach of contract claim will be dismissed (*see Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538, 539 [1st Dept 2014], *affd* 27 NY2d 577 [2016]; *Leonard v Gateway II, LLC*, 68 AD3d 408, 408 [1st Dept 2009]). As proffered in this action, City Outdoor's argument that it lacks contractual privity with 53rd Street is unpersuasive, since both are signatories to the Consent Agreement (NYSCEF Doc No. 451 at 19-20). City Outdoor has advanced no other basis for dismissal of these two counterclaims. Thus, the court is constrained to deny that part of City Outdoor's motion to dismiss the 53rd Street Defendants' first and second counterclaims.

*1. OOS's "Count II" for Negligent Misrepresentation*

To state a cause of action for negligent misrepresentation, the plaintiff must plead "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007], *rearg denied* 8

NY3d 939 [2007]). "A special relationship may be established by 'persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [internal citation omitted]). Here, the allegations of a special relationship between City Outdoor and OOS are wholly conclusory, and fail to plead facts sufficient to establish the existence of a special relationship (*see Coöperative Centrale Raiffeisen-Boerenleenbank B.A., "Rabobank Intl.," N.Y. Branch v Atradius Credit Ins. N.V.*, 149 AD3d 416, 416 [1st Dept 2017], *lv denied* 29 NY3d 914 [2017] [dismissing a complaint for failing to plead facts establishing a special relationship]). Thus, Count IV in OOS's second amended answer is dismissed, without opposition.

Motion Sequence No. 012

In motion sequence no. 012, Broadway moves for an order quashing a subpoena ad testificandum dated October 9, 2019 and a subpoena duces tecum dated October 9, 2019 served by OOS upon Broadway, and for a protective order prohibiting OOS and any other party in this matter from pursuing additional discovery against it. Broadway also contends the subpoenas are procedurally defective because the prior discovery orders allowed for limited, expedited discovery only as to the third-party claims against OOS, and Broadway has not pled any affirmative claims against OOS. Broadway next argues that the subpoenas are facially defective because they fail to include a notice apprising Broadway of the reasons for the disclosure. Lastly, Broadway contends that a protective order is necessary because neither subpoena seeks the production of material germane to the claims asserted against OOS.

In response, OOS argues that Broadway has not satisfied its burden of quashing the subpoenas or for a protective order. It submits that the disclosure sought by subpoena is identical

to the disclosure sought in OOS's first interrogatories and first document request propounded to Broadway dated May 23, 2019 (NYSCEF Doc No. 404, Phillip J. R. Zeeck [Zeeck] affirmation, exhibit A at 1; NYSCEF Doc No. 405, Zeeck affirmation, exhibit B at 1). As Broadway failed to timely object to those demands, it is now foreclosed from raising an objection or moving to quash the subpoenas. OOS also rejects Broadway's contention that the subpoenas are facially defective, since the subpoenas state the reason why the disclosure is necessary. Nor, as OOS argues, is notice required, since Broadway is the plaintiff in this matter. Furthermore, Broadway has actively participated in discovery proceedings in the second third-party action by attending the deposition of OOS's principal.

In reply, Broadway repeats its position that the 2019 Order explicitly restricted the subject of discovery to the third-party claims against OOS.

CPLR 3101 calls for the full disclosure of all evidence material and necessary in the prosecution or defense of an action (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "Liberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176 [1st Dept 1996]).

Pursuant to CPLR 3101 (a) (4), a party may seek disclosure from a nonparty "upon notice stating the circumstances or reasons such disclosure is sought or required." The "subpoenaing party's notice obligation … [is] meant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required" (*Matter of Kapon v Koch*, 23 NY3d 32, 39 [2014]). The subpoenas at issue both state that "[t]his action seeks to determine liability for paying license fees under licenses and assignments for advertising rights on certain real property" (NYSCEF Doc No. 391, Frank affirmation, exhibit J at 1; NYSCEF Doc No. 392, Frank

affirmation, exhibit K at 1). Contrary to Broadway's assertion, this language adequately places Broadway on notice of the subject matter of the deposition and the reason why documentary discovery had been requested. Moreover, Broadway is intimately familiar with the facts, as it is the plaintiff in the main action.

Broadway also takes an overly restrictive view of Justice Friedman's prior orders regarding discovery. The 2019 Decision allowed discovery to move forward on the "third-party claim against OOS" (NYSCEF Doc No. 439 at 32). The preliminary conference order signed April 25, 2019 discusses disclosure only between City Outdoor and OOS (NYSCEF Doc No. 389, Frank affirmation, exhibit H at 1-3). Likewise, a stipulation so-ordered June 27, 2019 states that "[t]his discovery is approved in the context of the 1st 3d party action & in the 2d 3d party action as between City Outdoor & OOS only" (NYSCEF Doc No. 390, Frank affirmation, exhibit I at 1). However, the 2019 Decision states that "OOS will also be granted leave to assert any affirmative defenses or cross-claims" (NYSCEF Doc No. 439 at 33). Neither the preliminary conference order nor the stipulation expressly precludes OOS from taking discovery related to its affirmative defenses or cross claims.

That said, "[t]he right to disclosure, although broad, is not unlimited" (*Forman v Henkin*, 3 NY3d 656, 661 [2018]). The material sought must be "material and necessary," meaning that it is "relevant to the prosecution or defense of an action" (*Matter of Kapon*, 23 NY3d at 38). It is within the court's discretion to determine whether the disclosure sought is relevant (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 747 [2000]). To that end, the "court [may] issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' where necessary 'to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'" (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164

AD3d 401, 403 [1st Dept 2018], quoting CPLR 3103 [a]; *accord Jones v Maples*, 257 AD2d 53, 56-57 [1st Dept 1999]). Issuance of a protective order is appropriate to preclude discovery of information that "is palpably improper in that it seeks irrelevant and/or confidential information, or is overly broad and burdensome" (*Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845, 847 [2d Dept 2018]). Ultimately, "the method of discovery sought must result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011] [internal quotation marks and citation omitted]). "The burden of showing that discovery is improper is on the party seeking a protective order" (*Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 40 [1st Dept 1998] [citation omitted]). Additionally, under CPLR 2304, the court may grant a motion to quash a subpoena "[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious … or where the information sought is utterly irrelevant to any proper inquiry where" (*Matter of Kapon*, 23 NY3d at 38 [internal quotation marks and citations omitted]). Thus, whether the disclosure sought is material and relevant turns on OOS's defense to City Outdoor's claim for contractual indemnification (NYSCEF Doc No. 164, ¶¶ 43-44). OOS's second amended answer pleads the impossibility of performance as an affirmative defense (NYSCEF Doc No. 330 at 10).

OOS's subpoenas request information Broadway possesses about the condition of the Building, including studies and surveys of the roof and façade, Broadway's communications with City Outdoor about the Building, and payments Broadway has received under the agreements referenced in its complaint (NYSCEF Doc No. 392 at 6-7). These requests are material and relevant to City Outdoor's claim of damages against OOS, and OOS's defense of impossibility. Therefore, the disclosure sought is not palpably improper.

A "nonparty" subpoena, though, may not be the appropriate vehicle by which OOS may obtain discovery from Broadway. Broadway claims that it is a nonparty to the second third-party action based on OOS's service of the subpoenas upon it in lieu of more traditional discovery devices, such as a formal notice of deposition or document demand (NYSCEF Doc No. 385, Broadway mem at law at 5-6). However, Broadway ignores the fact that OOS served it with a demand for interrogatories and a first request for production in May 2019. OOS admits Broadway never replied or objected to those demands (NYSCEF Doc No. 402, OOS's mem of law at 5). Generally, the failure to timely object to a request for discovery constitutes a waiver of the objection, except for privilege or palpable impropriety (*see Khatskevich v Victor*, 184 AD3d 504, 505 [1st Dept 2020]; *see generally* CPLR 3122 [a]). While OOS maintains that Broadway has waived its right to object, the March 2019 discovery requests are not the subject of the present motion. In any event, OOS never moved to compel Broadway's compliance with its previously-served demands.

Nevertheless, OOS cannot circumvent the discovery procedures set forth in the CPLR by serving two "nonparty" subpoenas upon Broadway for its refusal to respond to OOS's earlier demands. Counter to both Broadway's and OOS's positions, unless this court severs the second third-party action from the main action, Broadway remains a "party." Therefore, the branch of Broadway's motion to quash the two subpoenas dated October 9, 2019 served upon it is granted, and the branch of the motion for a protective order is denied. OOS is not entirely without recourse, as it may renew its discovery demands to Broadway, if it be so advised, provided they are not in the form of a nonparty subpoena. On that occasion, Broadway, likewise, may avail itself of any objections it may have in accordance with Article 31 of the CPLR.

Motion Sequence No. 013

Broadway moves to strike that part in the note of issue filed December 31, 2019 in which City Outdoor requests a trial by jury. Broadway argues that City Outdoor is not entitled to a jury trial because it has waived this right, and relies on Section 29.17 in both License Agreements, which states in relevant part:

> "LICENSEE AND LICENSOR EACH WAIVES TRIAL BY JURY IN ANY ACTION, PROCEEDING, OR COUNTERCLAIM BROUGHT BY ANY OF THEM AGAINST THE OTHER ON ANY MATTER WHATSOEVER (INCLUDING, WITHOUT LIMITATION, ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREMEENT, ANY OTHER DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREIN OR THEREIN). No party to this instrument, including, but not limited to, any assignee or successor of any party, shall seek a jury trial in any lawsuit, proceeding, counterclaim, or any other litigation procedure based upon, or arising out of, this instrument, any related instruments, any collateral or the dealings or the relationship between or among the parties, or any of them. No party will seek to consolidate any such action, in which a jury trial has been waived, with any other action in which a jury trial cannot be or has not been waived. THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY DISCUSSED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS. NO PARTY HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES"
>
> (NYSCEF Doc No. 440 at 46; NYSCEF Doc No. 441 at 46) (emphasis in original).

In the alternative, Broadway moves for an order severing the second third-party action. City Outdoor, in response, argues that the note of issue pertains only to the second third-party action, and as a result, Broadway has no standing to contest the jury demand. City Outdoor also opposes that branch of the motion seeking to sever the second third-party action, since the court has previously denied City Outdoor's request for this relief.

In reply, Broadway urges the court to disregard City Outdoor's untimely opposition, citing CPLR 2214 (b) in support. If the court considers the papers, Broadway submits that it does not challenge whether City Outdoor was compelled to file the note of issue as required under earlier court orders or stipulations. Rather, Broadway claims that City Outdoor expressly waived its right to a trial by jury, a point City Outdoor does not, and has not, contested.

At the outset, the court rejects Broadway's contention that City Outdoor's late-served opposition should not be considered. Although CPLR 2214 (c) states, in part, that "[o]nly papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion," the court has discretion to consider late papers (*see U.S. Bank Trust, N.A. v Rudick*, 156 AD3d 841, 842 [2d Dept 2017]). City Outdoor served its opposition five days after it was due. Given that Broadway has submitted a reply, it has not established having suffered any prejudice from this short delay (*see JPMorgan Chase Bank, N.A. v Hayes*, 138 AD3d 617, 617 [1st Dept 2016]).

CPLR 4102 (a) states, in relevant part, that "[a]ny party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury." Nonetheless, the right to a jury trial may be waived by an express agreement between the parties (*see People's Capital & Leasing Corp. v 1 800 Postcards, Inc.*, 162 AD3d 560, 560 [1st Dept 2018]; *Highbridge House Ogden LLC v Highbridge Entities LLC*, 155 AD3d 505, 505 [1st Dept 2017] [same]; *Uribe v Merchants Bank of N.Y.*, 227 AD2d 141, 141 [1st Dept 1996] [stating that "[j]ury waiver provisions are valid and enforceable as a general matter"]). Although a motion seeking to strike a jury demand "may be made at any time up to the opening of trial" (*Moyal v Sleppin*, 139 AD3d 605, 605 [1st Dept 2016]), if the motion is based on a contract provision waiving the right to a trial by jury, the motion must be made in a

timely manner (*see CDC Dev. Props., Inc. v American Ind. Paper Mills Supply Co., Inc.*, 184 AD3d 625, 626 [2d Dept 2020]).

Broadway has demonstrated that City Outdoor waived its right to seek a jury trial. A reading of the plain, unambiguous language in Section 29.17 of the License Agreements "clearly evince[s] the parties' intent to waive their rights to a trial by jury" (*Highbridge House Ogden LLC*, 155 AD3d at 505).

City Outdoor's arguments in opposition are unpersuasive. While it submits that Broadway failed to identify an incorrect material fact in the certificate of readiness to warrant vacating the note issue under Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) (*see Perez v Kone*, 166 AD3d 555, 555 [1st Dept 2018]), City Outdoor fails to address whether it waived its right to a jury trial under the plain terms of the License Agreements. Furthermore, City Outdoor's argument that Broadway lacks standing to vacate the note of issue or the jury demand lacks merit. Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) explicitly states that "any party to the action or special proceeding may move to vacate the note of issue."

The court also recognizes that a provision waiving a jury trial will not be enforced where there is a fraudulent inducement or rescission cause of action (*see J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 510 [1st Dept 2015]). Here, the 53rd Street Defendants' pled a second counterclaim for rescission in their answer to City Outdoor's amended complaint. Rescission is an equitable remedy (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]), and City Outdoor's motion to dismiss this counterclaim has been denied, as determined above. CPLR 4101, though, states that "equitable defenses and equitable counterclaims shall be tried by the court." Hence, that part of Broadway's motion to strike so much of City Outdoor's note of issue demanding a trial by jury is granted.

In view of the foregoing, the court need not address that part of Broadway's application to sever the second third-party action from the main action. In any event, as City Outdoor has pointed out, it has already been determined that "a single trial will … best serve the interests of judicial economy" in this matter (NYSCEF Doc No. 439 at 29).

Motion Sequence No. 014

On this motion, the 53rd Street Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the fifth cause of action for contribution pled against Cummins in City Outdoor's amended second third-party complaint. They submit that City Outdoor cannot maintain a claim for equitable contribution against Cummins because it has not actually paid any sum to Broadway, including any sum greater than its proportionate share of liability. In the alternative, the 53rd Street Defendants move for partial summary judgment directing that City Outdoor's pro rata share of liability equal one-half the total liability plus $581,733.33, or for an order directing that City Outdoor cannot maintain a claim for contribution against Cummins until it pays Broadway a sum in excess of one-half of the purported liability plus $581,733.33. The 53rd Street Defendants claim it would be inequitable for Cummins to bear half of the alleged liability since City Outdoor knew of the issues with the Building's façade in April 2010, three months before it sold and assigned its rights to the License Agreements to 53rd Street.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212 [b]). The movant's "failure to

make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Here, the 53rd Street Defendants have not met their prima facie burden on the contribution claim. "The statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim" (*Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 [2007]). However, the fact that City Outdoor has not paid does not preclude it from maintaining a claim for contribution against Cummins (*see Bay Ridge Air Rights v State of New York*, 44 NY2d 49, 54 [1978] [reasoning that under CPLR 1007 "a party seeking indemnification or contribution ordinarily need not await the ripening of his claim to protect his right to proceed against a third party"]). As determined previously, City Outdoor has adequately pled a claim for contribution (NYSCEF Doc No. 439 at 26). Since City Outdoor has not paid out on any part of Broadway's claims, its "time to sue 'has not even begun to run'" (*Residential Bd. of Mgrs. of Platinum v 46th St. Dev., LLC*, 154 AD3d 422, 422 [1st Dept 2017] [internal citation omitted]). As such, the present motion is premature.

Nor have the 53rd Street Defendants demonstrated their entitlement to an order stating that City Outdoor must bear one-half of the alleged liability to Broadway plus $581,733.33 (NYSCEF Doc No. 463, 53rd Street Defendants' mem of law at 11). "Although a guarantor who has paid more than his or her proportionate share of a common liability is entitled to contribution from any co-guarantors, where there is an inequality of benefits as between co-obligors, it may destroy the equality of contribution among them" (*Leo v Levi,* 304 AD2d 621, 623 [2d Dept 2003]).

The 53rd Street Defendants have shown that City Outdoor was aware of a potential issue with the Building's façade well before assigning the License Agreements. By email to City Outdoor dated April 13, 2010, City Outdoor's contractor wrote, "we found … many areas that either have stress crack[s] and/or loss bricks which could be a potential problem since we will need to add additional holes in the façade to mount the mesh face. It may be in our best interest to have someone look at this condition before we move ahead to prevent any more damage and/or wall failure" in the Building's façade in April 2010 (NYSCEF Doc No. 442, Katz affirmation, exhibit J at 1). Cummins avers that neither City Outdoor nor OOS disclosed the April 13, 2010 email from City Outdoor's contractor (NYSCEF Doc No. 432, ¶ 29). Likewise, the 53rd Street Defendants have shown that City Outdoor raised "Impossibility/Frustration/Changed Circumstances" as an affirmative defense in the 2010 Action (NYSCEF Doc No. 444, Katz affirmation, exhibit L at 2) (emphasis in original). Specifically, City Outdoor alleged that "significant damage to the rooftop of the 1695 Broadway property … prevented/prevents City from using the space as specified in the agreements" (*id.* at 3).

Nevertheless, the motion is denied. The 53rd Street Defendants have failed to address that part of the 2019 Decision discussing whether City Outdoor and Cummins are co-sureties or successive sureties (NYSCEF Doc No. 439 at 26). Generally, contribution is available only to parties who are co-sureties, whereas, "the right of contribution does not attach where the sureties are successive sureties who, as between themselves, are primarily and secondarily liable" (63 NY Jur 2d, Guaranty and Suretyship § 481). Without any admissible evidence disposing of this issue, the 53rd Street Defendants have not met their prima facie burden. Consequently, the branch of the motion on the issue of whether City Outdoor's pro rata share of liability to Broadway is one-half plus $581,733.33 is denied.

## CONCLUSION

Accordingly, it is

ORDERED that the part of the motion by plaintiff Broadway Sky, LLC (Broadway) for an order dismissing the cross claims brought by second-third party defendant OOS Investment, LLC (OOS) against it (motion sequence no. 009) is denied as moot; and it is further

ORDERED that the part of Broadway's motion for the imposition of monetary sanctions against OOS (motion sequence no. 009) is denied; and it is further

ORDERED that the part of the motion by defendant/second third-party plaintiff City Outdoor, Inc. (City Outdoor) to amend its replies to the counterclaims brought by the 53rd Street Defendants and OOS (motion sequence no. 011) is granted; and it is further

ORDERED that City Outdoor's amended replies in the proposed forms annexed to the moving papers as exhibits J and L shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the part of the motion by City Outdoor to dismiss the counterclaims brought by the 53rd Street Defendants and OOS in the second third-party action (motion sequence no. 011) is granted to the extent of dismissing the first counterclaim in the 53rd Street Defendants' answer and dismissing the first counterclaim (Count I) and second counterclaim (Count II) in OOS's second amended answer in the second third-party action, and the balance of the motion is otherwise denied; and it is further

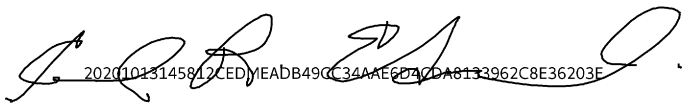
ORDERED that the part of Broadway's motion to quash the two subpoenas served by OOS and for a protective order prohibiting OOS from seeking to depose or requesting documents from Broadway (motion sequence no. 012) is granted to the extent that the subpoena duces tecum dated October 9, 2019 and the subpoena ad testificandum dated October 9, 2019 served upon Broadway by OOS are hereby quashed, and Broadway need not respond to these subpoenas; and it is further

ORDERED that the branch of Broadway's motion for a protective order (motion sequence no. 012) is denied; and it is further

ORDERED that the motion brought by Broadway to strike so much of the note of issue filed on December 31, 2019 by City Outdoor seeking a trial by jury, or in the alternative, for an order severing the second third-party action from the main action (motion sequence no. 013) is granted to the extent of striking that part of the note of issue demanding a trial by jury, and that part of the note of issue demanding a trial by jury is hereby stricken; and it is further

ORDERED that, within 15 days from the entry of this order, counsel for Broadway shall serve a copy of this order with notice of entry on all parties and on the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who are directed to amend their records accordingly; and it is further

ORDERED that the motion brought by the 53rd Street Defendants for summary judgment dismissing the fifth cause of action against Cummins in City Outdoor's amended second third-party complaint (motion sequence no. 014) is denied.




10/13/2020
DATE

CAROL R. EDMEAD, J.S.C.

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