Irma C. Pollack LLC v OP Dev. Corp.
2022 NY Slip Op 31541(U)
May 11, 2022
Supreme Court, New York County
Docket Number: Index No. 155868/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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IRMA C. POLLACK LLC,

Plaintiff,

- v -

OP DEVELOPMENT CORP., BENENSON CAPITAL PARTNERS, LLC,S&S CADILLAC MOTORS CORP., and KRISTAL CHEVROLET MOTORS CORP.

Defendants.

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INDEX NO. 155868/2019

MOTION DATE

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 39, 51, 52, 53, 56, 58, 60, 63, 65, 68, 70, 72, 76
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 48, 57, 59, 61, 62, 64, 66, 67, 71, 73, 74, 75
were read on this motion to/for DISMISS.

In motion sequence number 002, defendants OP Development Corp. (OP) and Benenson Capital Partners, LLC (Benenson) (together, OP Defendants) move, pursuant to CPLR 3211(a)(1), (5) and (7), to (i) dismiss the first, second, and fourth causes of action for breach of contract, indemnification and trespass as time-barred; (ii) partially dismiss the third cause of action for violations of Article 12 of New York's Navigation Law as to the diminution in the value of property claim as time-barred; and (iii) dismiss the verified complaint in its entirety as against Benenson for failure to state a cause of action.

In motion sequence number 003, defendant S&S Cadillac Motors Corp. n/k/a KAM Auto Mall Corp. (Kristal)[1] moves, pursuant to CPLR 3211(a)(5) and (7), to dismiss the verified complaint on the grounds that (i) plaintiff's claims are time-barred; (ii) plaintiff failed to state a cause of action upon which indemnification under the Navigation Law may be granted; and (iii) claims cannot be brough against Kristal Chevrolet Motors Corp, KAM Auto Mall Corp, and KAM Chevrolet Motors Corp. as these are not actual entities that exist or existed in New York.

Background

Plaintiff Irma C. Pollack LLC (Pollack) alleges claims against OP, Benenson, Kristal, and KAM Chevrolet Motors Corp. (KAM) for (i) breach of a lease agreement between Pollack and OP[2] (Lease) pertaining to real property located at 5200 Kings Highway, Brooklyn, New York (Property); (ii) indemnification for the damages arising

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1 In the Summons with Notice, Pollack names S&S Cadillac Motors Corp. n/k/a Kristal Auto Mall Corp. and Kristal Chevrolet Motors Corp. as defendants. (NYSCEF Doc. No. [NYSCEF] 1, Summons with Notice [filed June 2019].) In the Amended Summons with Notice, Pollack also names S&S Cadillac Motors Corp. n/k/a Kristal Auto Mall Corp. and Kristal Chevrolet Motors Corp. as defendants. (NYSCEF 3, Amended Summons with Notice [filed October 2019].) However, in the caption of the verified complaint, filed in November 2019, Pollack names S&S Cadillac Motors Corp. n/k/a KAM Auto Mall Corp. and KAM Chevrolet Motors Corp. as defendants. (*See* NYSCEF 5, Verified Complaint at 1.) In the body of the verified complaint, plaintiff alleges that S&S Cadillac Motors Corp. is now doing business as Kristal Auto Mall Corp and refers to KAM Chevrolet Motors Corp. as Kristal Chevrolet Corp. (*Id.* ¶ 2.) Kristal asserts that Kristal Chevrolet Motors Corp, KAM Auto Mall Corp., and KAM Chevrolet Motors Corp are not entities that exist in New York. (NYSCEF 45, Defendant's Brief at n 1; NYSCEF 44, NYS Corporation and Business Entity Database Entries.) Kristal uses the names in the caption of the verified complaint without conceding that KAM Auto Mall Corp identifies with any legal entity. (NYSCEF 45, Defendant's Brief at n 1.)

2 The Lease was originally entered into by nonparties Utica Recreation Center, Inc., as lessee, and Pollack's predecessors in interest, Frances P. Headley and Irma Cohn, as lessors. (NYSCEF 24, Verified Complaint ¶ 17.) Subsequently, the Lease was assigned to OP. (*Id.*)

from or relating to the contamination of the Property, including clean-up costs and diminution of the Property's value; (iii) trespass, by causing, allowing and/or failing to remediate the contamination of the Property; and (iv) violations of the Navigation Law by causing, allowing and/or failing to remediate the discharge of petroleum on and/or into the Property.

Unless indicated otherwise, the following facts are taken from the verified complaint, and for the purposes of these motions to dismiss, are accepted as true.

Pollack was the owner of the Property at all relevant times. (NYSCEF 24, Verified Complaint ¶ 1.) Benenson directly or indirectly owned OP. (*Id.* ¶ 10.) Pursuant to the assignment of the Lease, OP entered into possession of the Property on May 21, 1968. (*Id.* ¶ 17.) On November 1, 1986, Kristal and/or KAM (collectively, Subtenants) entered into possession of the Property pursuant to a sublease between them and OP (the Original Sublease). (*Id.* ¶ 18.) Through extensions or renewals of the Original Sublease, at least one of the Subtenants remained in continuous possession of the Property, and possession continued through subsequent subleases with OP, the last one dated May 1, 2005 (the Sublease). (*Id.* ¶ 19.)

The Lease and Sublease expired on August 31, 2008, but OP and the Subtenants continued to holdover in possession of the Property without permission, requiring litigation against OP and Subtenants in the Civil Court of the City of New York, Kings County. (*Id.* ¶¶ 20, 21.) On December 12, 2008, the Civil Court found OP and Subtenants liable for holding over and owing use and occupancy. (*Id.* ¶ 22.) OP and the Subtenants continued to holdover until March 31, 2018, at which time they vacated

the Property. (*Id.* ¶ 24.) On June 5, 2018, Pollack sold the Property to nonparty PTMA 5200 Kings Highway LLC. (*Id.* ¶ 25.)

Pollack alleges that the soil and groundwater at the Property were not contaminated by hazardous substances or petroleum when the Lease commenced, but became contaminated by "petroleum, chlorinated solvents, and semi-volatile organic chemicals" during the Lease and/or Sublease period as a result of defendants' operation of a retail automobile dealership. (*Id.* ¶¶ 2, 26-30.) Specifically, the alleged "source of the Contamination was, *inter alia*, a dry well and an underground petroleum product storage and dispensing system, both of which had been constructed on the Property by one or more of the Defendants." (*Id.* ¶ 31.) Defendants did not remediate the contamination, requiring Pollack to incur the costs for the investigation, removal, and remediation prior to selling the Property (the Cleanup Costs). (*Id.* ¶¶ 32-33.)

Pollack alleges that, as a result of the contamination, it also suffered a diminution in value of the Property. (*Id.* ¶ 53.) On August 9, 2017, Pollack entered into a contract to sell the Property for $16 million; thereafter, the buyer terminated the contemplated transaction because of the contamination. (*Id.* ¶¶ 49 -51.) In June 2018, Pollack sold the Property for $9.25 million. (*Id.* ¶ 52.)

Discussion

On a motion to dismiss 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 only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, "bare legal conclusions as well as factual claims which are either inherently incredible or flatly

contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim.'" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted]). "A cause of action may be dismissed under CPLR 3211 (a) (1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted]), and their content "'essentially undeniable.'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].)

To prevail on a CPLR 3211(a)(5) motion to dismiss, the movant must establish a prima facie case that the plaintiff's time to commence an action has expired; then the burden shifts to the plaintiff to raise a question of fact as to whether it commenced the action within the applicable limitations period, or whether an exception or tolling applies. (*Williams v City of Yonkers*, 160 AD3d 1017, 1019 [2d Dept 2018] [citation omitted]; *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016].)

Motion Seq. No. 002 – OP Defendants' Motion to Dismiss

Alter Ego – Benenson

Pollack alleges that, although Benenson is not a formal party to the Lease, it negotiated the Lease's terms, formed OP to act as lessee, occasionally paid the rent, occasionally collected the rent from the Subtenants, was aware of the contamination, and directed OP not to remediate it. (NYSCEF 24, Verified Complaint ¶¶ 41, 44-46, 48.) Pollack also alleges that OP's CEO was a principal of Benenson, and that OP did not maintain its own office. (*Id.* ¶¶ 42-43.)

> "The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners. The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation. The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners."

(*Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993] [citations omitted].)

"Piercing the corporate veil generally 'requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.'" (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005] [citation omitted].) Plaintiff's burden is heavy and "mere conclusory alter ego allegations are insufficient to survive a motion to dismiss." (*226*

Fifth Ave. LLC v SBF Intl., Inc., 2012 NY Slip Op 33491[U], *11-12 [Sup Ct, NY County 2012] [citations omitted].) The question of control is highly fact-dependent and in determining that question,

> "courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity. . . [n]o one factor is dispositive."

(*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]), citing *TNS Holdings v MKL Sec. Corp.*, 243 AD2d 297, 300, *revd on other grounds*, 92 NY2D 891 [1998].)

Pollack's allegations are woefully inadequate to pierce the corporate veil to hold Benenson liable for any breach of the Lease by OP. Even accepting the allegations as true, Pollack fails to meet its heavy burden. A shared principal officer and allegations that OP did not maintain its own office and occasionally paid or collected rent are not enough to show that Benenson exercised complete domination of OP. Further, plaintiff must sufficiently allege that the domination was used to commit a fraud or wrong against it (*Sheridan Broadcasting Corp.*, 19 AD3d at 332), and "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016] [citation omitted], *affd* 31 NY3d 1002 [2018] [internal quotation marks and citation omitted].)

Pollack argues that other courts have found similar facts sufficient for a landlord to hold the parent company liable under the alter ego theory in a lease dispute.

However, in those cases, the plaintiffs alleged more instances of domination. (*See Anderson St. Realty Corp. v RHMB New Rochelle Leasing Corp.*, 243 AD2d 595, 596 [2d Dept 1997] [evidence of "(1) an overlap in ownership of the two corporations; (2) an inadequate capitalization of [defendant]; (3) payments of some if not all of [defendant]'s rent by the appellant [Atlantic to Pacific Bedding Corp]; (4) the appellant's reference to itself as the parent company; and (5) that the appellant obtained insurance regarding the subject leased premises (which named the appellant as the insured on the policy)"]; *Simplicity Pattern Co. v Miami Tru-Color Off-Set Serv.*, 210 AD2d 24, 25 [1st Dept 1994] [evidence of "the absence of the formalities and paraphernalia of corporate existence," inadequate capitalization, "overlap in ownership, officer, directors and personnel," "common addresses and telephone numbers," payment of debts, and "use by Miami Tru-Color of Tru-Color's property," as well as evidence that funds were shifted back and forth between the corporations].)

Pollack alternatively argues that Benenson's failure to direct OP to remediate the contamination is an adequate basis for Benenson's direct lability under the Navigation Law.

> "[I]n order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated. . . . In our view, this standard of liability strikes the appropriate balance between holding only culpable individuals personally liable for wrongful corporate activities leading to a discharge and protecting those individual stockholders and officers who remain uninvolved in corporate wrongdoing who are entitled to rely on the corporate form to insulate them from personal liability."

(*State v Markowitz*, 273 AD2d 637, 642 [3d Dept 2000] [citations omitted].) Here, Pollack's allegation that the "failure by OP to remediate the [c]ontamination was made

at the direction of, and following a decision by, Benenson" (NYSCEF 24, Verified Complaint ¶ 48) is insufficient. Absent from the verified complaint are allegations that Benenson "directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated." (*State v Markowitz*, 273 AD2d at 642.)

Pollack relies on *Golovach v Bellmont L.M., Inc.*, 4 AD3d 730 (3d Dept 2004) and *Emerson Enters., LLC v Kenneth Crosby NY, LLC*, 781 F Supp 2d 166 (WD NY 2011) to support its argument. However, in those cases the defendants were involved in the day-to-day operations of the entity involved in the spill. Here, Pollack does not allege that level of involvement by Benenson. However, if during the course of discovery, it is revealed that Benenson was involved in the spill or allowed the spill to continue unabated, this alter ego claim may be revisited. Therefore, the verified complaint is dismissed against Benenson without prejudice.

Statute of Limitations

Pollack argues that that the OP Defendants are equitably estopped from asserting a statute of limitations defense because Pollack refrained from bringing an action earlier due to the Subtenants' assurances that they would remediate the contamination prior to vacating the Property.

"[A] defendant is estopped from pleading a statute of limitations defense if the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007] [internal quotation marks and citation omitted].) A "plaintiff seeking to invoke the doctrine of equitable estoppel must establish that subsequent and specific actions by defendants

somehow kept [the plaintiff] from timely bringing suit." (*Jacobson Dev. Group, LLC v Yews, Inc.*, 174 AD3d 868, 870 [2d Dept 2019] [internal quotation marks and citation omitted].)

Pollack asserts that it "refrained from bringing an action earlier than it did because of Defendants' subtenants' assurances that they would remediate the contamination prior to vacating the property." (NYSCEF 65, Opposition Brief at 23.)[3] This conclusory statement does not establish inducement by fraud, misrepresentations, or deception. Further, Pollack had "timely awareness of the facts requiring [them] to make further inquiry before the statute of limitations expired, and an equitable estoppel defense to the statute of limitations is therefore inappropriate as a matter of law." (*Pahlad v Brustman*, 8 NY3d 901, 902 [2007] [internal quotations and citation omitted].)

1. Breach of Contract Claim

"In New York, a breach of contract cause of action accrues at the time of the breach." (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993] [internal quotation marks and citations omitted].) "Accordingly, New York does not apply the discovery rule to statutes of limitations in contract actions. Rather, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." (*ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 [2015] [internal quotation marks and citations omitted].)

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3 Pollack notes that due to COVID-19 it was unable to access documents that would establish that Subtenants assured Pollack that they would investigate and remediate the Property. (*See* NYSCEF 65, Plaintiff's Opposition Brief at n. 2, 3.)

The OP Defendants assert that Pollack's breach of contract claim is time-barred pursuant to CPLR 213(2)[4], which requires that this claim be brought within six years of the date of accrual. The OP Defendants argue that Pollack knew of the contamination as early as May 15, 2008, when it sent OP a Notice of Default due to the contamination, and thus, any breach of contract claim should have been filed no later than May 2014.

In the verified complaint, Pollack alleges that the OP Defendants breached the Lease by failing to investigate and remediate the contamination prior to vacating the Property. (NYSCEF 24, Verified Complaint ¶¶ 57-58.) It also alleges that, under the Lease, OP was obligated to maintain the Property in good condition during the Lease's term. (*Id.* ¶ 34.) Thus, Pollack asserts that it alleges three distinct breaches of the Lease: (1) a failure to remediate prior to vacating the Property; (2) a failure to investigate the contamination; and (3) a failure to remediate during the time of defendants' possession of the Property. Pollack argues that its claim for breach arising out of defendants' failure to remediate prior to vacating the Property could not have accrued until March 31, 2018, the date defendants vacated the Property. As to the claim for breach arising out of defendants' failure to remediate during their occupancy, Pollack asserts that this was a continuing obligation under the Lease, requiring defendants' continued performance. Thus, for that claim, the statute of limitations does not run from the original wrong, but instead continues to run anew as each occurrence

[4] In their reply, the OP Defendants argue that CPLR 214-c (2) applies to the breach of contract claims. This is a new argument raised on reply and will not be considered. (*Givoldi, Inc. v UPS*, 286 AD2d 220, 220 [1st Dept 2001].) However, the OP Defendants are not barred from raising this argument on a future dispositive motion.

continuously occurs. Finally, Pollack asserts that the OP Defendants fail to address the breach of contract claim arising out of the alleged failure to investigate.

Pursuant to Article Thirty-Second of the Indenture of Lease, OP agreed, "on the last day of the Lease's term or other sooner termination of the Lease," to "quietly and peaceably quit, leave, surrender and yield up to the Lessor ... the demised premises with the building, buildings, structures and improvements thereon and the appurtenances thereof ... contained in good order and condition without fraud or delay." (NYSCEF 24, Verified Complaint, Indenture of Lease Exhibit at 65.)

The lease was to expire on August 31, 2008. (*Id.* at 60 [Article Twenty-Ninth]; NYSCEF 24, Verified Complaint ¶ 20.) However, on August 8, 2008, Pollack, OP, Kristal, and S&S Chevrolet Motors Corporation entered into a stand-still agreement, whereby they agreed that the Lease and Sublease terminated on August 7, 2002 and any continued possession by OP and Kristal and S&S Chevrolet Motors Corporation is a holdover. (NYSCEF 25, Holdover Petition, Stand-Still Agreement Exhibit at 20.) Despite this agreement, OP and the Subtenants remained in possession of the Property, requiring Pollack to file a Holdover Petition in the New York City Civil Court, Kings County. (NYSCEF 24, Verified Complaint ¶ 21.) On December 12, 2008, the Civil Court (Silver, J.), issued a decision finding OP and the Subtenants liable for holding over and owing Pollack for use and occupancy. (*Id.* ¶ 22.) According to Pollack, Judge Silver found that "'such payment [of use and occupancy] shall neither constitute nor be deemed (A) a release of OP, (B) a waiver by [Plaintiff] of any rights or remedies, or (C) a new relationship between [Plaintiff] and the holding-over Subtenants.'" (*Id.* ¶ 23.) The holdover continued until March 31, 2018. (*Id.* ¶ 24.)

Although the parties agreed to terminate the Lease in August 2008, the continued holdover may have extended the terms of the Lease until OP's vacancy. A landlord's acceptance of a tenant's rent checks after a lease expires creates a month-to-month holdover tenancy. (*Harlorn LLC v Poy Ao Cheng*, 59 Misc 3d 1221[A], 2018 NY Slip Op 50642[U], *4 [Sup Ct, NY County 2018], citing *Omansky v 160 Chambers St. Owners, Inc.*, 155 AD3d 460, 461 [1st Dept 2017].) "'The legal theory underlying the notion of a periodic tenancy is that of an implied agreement. The holdover tenant is viewed as proffering, through his tender of rent, an option to the landlord to continue the tenancy upon the same terms (except as to duration) as the just expired lease.'" (*Id.*, quoting *Park Summit Realty Corp. v Frank*, 107 Misc 2d 318, 322 [App Term, 1st Dept 1980], affd 84 AD2d 700 [1st Dept 1981], affd 56 NY2d 1025 [1982].) The OP Defendants have failed to point to provision of the Lease providing otherwise. (*See North Shore Community Servs., Inc. v Community Dr. LLC*, 120 AD3d 1142, 1143 [1st Dept 2014].)

Here, it is unknown whether rent was paid creating a month-to-month holdover tenancy which would continue under the same terms as the Lease. The court was also not provided with a copy of Judge Silver's decision in the Holdover Proceeding, and thus, beside the single allegation in the verified complaint, the court is not aware of the details of that decision or subsequent agreements by OP and Pollack, if any. If a month-to-month tenancy was created, the Lease terms continued until the end of that holdover tenancy, which appears to be March 31, 2018. Any breach of provision requiring that the Property surrendered in good order and condition would have

occurred at that time, making this action timely as to that claim, if a month-to-month holdover was created.

Pursuant to Articles Fifth and Sixth of the Lease, OP was to keep the Property in "good and first class order and condition" at all times during the Lease term and agreed to comply with all statutes, laws, ordinances, regulations, etc. (NYSCEF 24, Verified Complaint, Indenture of Lease Exhibit at 84.) Pollack asserts that OP continuously breached these obligations through the term of the Lease, and therefore, this portion of its breach of contract claim is timely.

"[W]here a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to the filing of the suit." (*Encore Nursing Ctr. Partners LP-85 v Schwartzberg*, 172 AD3d 1166, 1168 [2d Dept 2019] [internal quotation marks and citations omitted].) Under the Lease, OP had a continuing obligation to maintain the Property in good order and condition and comply with all laws. Any breach of those lease provisions are "not referable exclusively to the day the original wrong was committed; rather, a cause of action accrues anew every day, and for each injury." (*1050 Tenants Corp. v Lapidus*, 289 AD2d 145, 146 [1st Dept 2001] [citation omitted].) In regard, to any alleged breaches based on violations of the law, "[t]he rule that a cause of action accrues anew every day, or for each injury, applies whenever one unlawfully produces some condition which is not necessarily of a permanent character, and which results in intermittent and recurring injuries to another. Like the maintenance of a continuous nuisance, such

conduct is not immune from suit once it has continued past the limitations period." (*Id.* [internal quotation marks and citation omitted].)

As to whether the breach of contract claim for a failure to investigate is timely, the OP Defendants did not address this claim in their moving papers. To the extent it was addressed in their reply, there is no law cited to support their position.

Accordingly, the OP Defendants' motion to dismiss this claim as time-barred is denied without prejudice.

2. Indemnification

Pollack alleges that the OP Defendants "failed to indemnify Pollack against the damages suffered arising from or relating to the Contamination of the Property, including the Cleanup Costs and the diminution in the value of the Property," "constitut[ing] a breach of the Lease." (*Id.* ¶¶ 64-65). The OP Defendants argue that Pollack's indemnification claim is effectively a breach of contract claim, and therefore, is also time-barred for the same reasons.

Any alleged right of Pollack to indemnification by OP is a contractual one established in Article Fifteenth of the Lease. Typically, "[c]laims for indemnification and/or contribution do not accrue for purposes of the Statute of Limitations until the party seeking indemnification or contribution has made payment to the injured party." (*Rosenblum v Columbia Univ. Sch. of Dental & Oral Surgery*, 123 AD2d 587, 587 [1st Dept 1986] [citation omitted].) Here, however, Pollack claims that OP breached the Lease's Indemnification provision by failing to indemnify Pollack for the Clean-Up Costs and diminution of value of the Property. This is not a situation where a third party was injured, and Pollack now awaits indemnification from OP for the payment made to that

third party. (*See Xerox State & Local Solutions, Inc. v Xchanging Solutions (USA), Inc.*, 216 F Supp 3d 355, 363 [SD NY 2016].)

This is essentially a breach of contract claim, and if the claim sounds in contract, the statute of limitations is six years. (*Varo, Inc. v Alvis PLC*, 261 AD2d 262, 267 [1st Dept 1999].) As discussed above, as it unclear whether the terms of the Lease continued until March 2018, the court cannot determine on this motion whether this claim is time-barred. Thus, the OP Defendants' motion as to this claim is denied without prejudice.

3. Trespass

The OP Defendants assert that Pollack's trespass claim is time-barred pursuant to CPLR 214-c (2), which does not permit the application of the continuing wrongs doctrine for trespass claims based on contamination. Pollack asserts that the trespass is a continuing tort, which continued after March 2018, as the contamination was not fully remediated, making this claim well within the three-year limitations period of CPLR 214. Pollack argues that CPLR 214-c (2) is inapplicable because the resulting injury of OP's trespass was not caused by latent effects of exposure.

CPLR 214-c provides,

> "[n]otwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the *latent effects* of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" (emphasis added).

"A latent injury occurs at the time of exposure: the reason that the injury is latent is that the injury is concealed, and not visible or otherwise apparent, and the property damage

results from the seepage or infiltration of a toxic foreign substance over time … . A patent injury, on the other hand, is immediately apparent, and there is no interval between the alleged exposure and the resulting harm. (*Suffolk County Water Auth. v Dow Chem. Co*., 121 AD3d 50, 58 [2d Dept 2014] [internal quotation marks and citations omitted].)

Here, Pollack seeks to recover for damage to the Property caused by the alleged contamination of soil and groundwater by "petroleum, chlorinated solvents, and semi-volatile organic chemicals." (NYSCEF 24, Verified Complaint ¶ 30.) The source of the contamination includes "a dry well and an underground petroleum product storage and dispensing system…." (*Id.* ¶ 31.)

"It is well-settled that CPLR 214-c applies to actions to recover damages caused by contamination by any substance, including petroleum." (*Curry v D'Onofrio*, 29 AD3d 727, 729 [2d Dept 2006] [citations omitted]; *see also Christy v Harvey*, 262 AD2d 755, 757 [3d Dept 1999] [holding "CPLR 214-c plainly is applicable to petroleum contamination cases"]; *Suffolk County Water Auth*. 121 AD3d at 57-58 [citations omitted] [applying CPLR 214-c (2) where the alleged contamination of wells was caused by a chemical used in dry cleaning and products of its degradation including contamination of soil and groundwater]; *Jensen v Gen. Elec. Co*., 82 NY2d 77, 81-82 [1993] [applying CPLR 214-c (2) where groundwater contamination was caused by hazardous waste]; *Miller Realty Assoc. v Amendola*, 51 AD3d 987, 989 [2d Dept 2008] [applying CPLR 214-c (2) where soil contamination was caused by leakage of volatile organic compounds from a buried "dipping tank"].) Like these cases, the substances that seeped into the Property's soil and groundwater caused a latent effect such that

those substances seeping from the dry well and storage and dispensing system created the contamination, and that contamination occurring during the Lease period is the latent effect of the exposure to those substances.

The cases Pollack relied on are distinguishable. In *Manhattanville Coll. v James John Romeo Consulting Engr., P.C.,* 5 AD3d 637, 640 [2d Dept 2004], the Appellate Division, Second Department, found that plaintiff did not "allege that carbon monoxide caused any delayed or latent physical damage to its property over the course of several months or years." CPLR 214-c (2) was inapplicable because a single exposure of a dormitory to carbon monoxide, followed by an evacuation of the building, was determined to cause an immediate hazard. (*Id.* at 639-40.) The Court noted that once the gas dissipated, the building became safe for its occupants. (*Id.* at 640.)

Here, Pollack alleges that contamination occurred during defendants' use and occupancy of the Property; the source of which was a dry well and storage and dispensing system from which the substances came. (NYSCEF 24, Verified Complaint ¶¶ 2, 31, 72.) There is no allegation or indication that it was a one-time occurrence causing immediate damage. To the contrary, while the verified complaint contains little detail as to the contamination, reading all allegations together, the seepage of the chemicals into the soil and groundwater occurred throughout the period lease and was not a single exposure.

In *Germantown Cent. Sch. Dist. v Clark, Clark, Millis & Gilson, AIA*, 100 NY2d 202, 204 [2003], the defendant conducted asbestos abatement works and certified that no asbestos remained in certain areas of the building. 13 years later, the plaintiff learned that asbestos remained in those areas. (*Id.*) In determining that CPLR 214-c

(2) was not applicable, the Court of Appeals found that "[p]laintiff's situation is not analogous to hazardous waste or chemical spill contamination cases where the property damage results from the seepage or infiltration of a toxic foreign substance over time. Here, the harm to plaintiff's property occurred upon installation of the asbestos in the building." (*Id.* at 207 [citation omitted].) The Court found that "plaintiff's property damage claim involves no additional damage to its building since the original implantation of the harmful substance—or, stated another way, where the passage of time has produced no change in the consequences of the presence of asbestos—the injury cannot be said to have resulted from the latent effects of exposure to a toxic substance." (*Id.* at 206-207.) Again, this is not the same situation here. This is a situation where the soil and groundwater at the Property were contaminated by the toxic substances coming from the dry well and storage and dispensing system over time. Thus, the court finds CPLR 214-c (2) applicable here. CPLR 214-c (2) applies to the trespass claim for damages from injury to the Property.

"Prior to the enactment of CPLR 214-c (2), the Statute of Limitations began to run as of the date of exposure, regardless of the date on which the injury was discovered. A narrow common-law exception evolved to ameliorate the harshness of this accrual rule with respect to some particular continuous wrongs." (*Jensen v Gen. Elec. Co.*, 82 NY2d 77, 85 [1993] [citations omitted].) However, with the enactment of CPLR 214-c (2), the continuing-wrong exception was eliminated for continuing trespass cases involving damage from toxic or chemical contamination. (*Id.* at 88.) Therefore, pursuant to CPLR 214-c (2), the three-year period is "computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of

reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." The documentary evidence shows that Pollack was aware of the contamination of the Property in May 2008. (NYSCEF 25, Holdover Petition, Notice of Default Exhibit.)

However, in the Notice of Default, Pollack stated that the contamination was due to "hazardous substances – including without limitation certain volatile organic chemicals ('VOCs') and petroleum products, by-products and additives." (*Id.* at 13.) In the verified complaint, Pollack alleges that the contaminants are petroleum, as well "chlorinated solvents," which is not specifically mentioned in the Notice of Default. (NYSCEF 24, Verified Complaint ¶ 30; NYSCEF 25, Holdover Petition, Notice of Default Exhibit.) Thus, while the Notice of Default conclusively establishes the discovery of contamination by certain volatile organic chemicals and petroleum products before May 15, 2008, it does not establish the discovery of contamination by chlorinated solvents.

As to the contamination by chlorinated solvents, plaintiff does not allege when such contamination was discovered[5], and the OP Defendants fail to present any documentary evidence establishing that Pollack discovered or should have discovered such alleged contamination caused by chlorinated solvents more than three years before commencing this action. (*See Williams v City of Yonkers*, 160 AD3d at 1019 [defendant has initial burden on CPLR 3211 (a) (5) motion].) Pollack's trespass claim is time-barred under CPLR 214-c (2) but only to the extent it seeks to recover injury to the

5 In its opposition brief, Pollack represents that its claims "arise, however, also from the more extensive and qualitatively different contamination discovered by Pollack much later [than 2008], while acting to prevent the Property from being listed on the New York State Inactive Hazardous Waste Site." (NYSCEF 65, Plaintiff's Opposition Brief at 8.)

Property caused by the contaminates described in the Notice of Default, volatile organic chemicals and petroleum products. The court, on this record, cannot determine whether the trespass claim involving chlorinated solvents is timely.

4. Navigation Law Claim

"Article 12 of the Navigation Law, commonly known as the Oil Spill Act, was enacted to ensure swift, effective cleanup of petroleum spills that threaten the environment." (*State v Green*, 96 NY2d 403, 406 [2001] [citation omitted].) Navigation Law § 181 provides that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section." Pursuant to this claim, Pollack seeks damages for Clean Up Costs, as well as all indirect and direct damages attributed to the contamination of the Property, including diminution in value of the Property. (NYSCEF 24, Verified Complaint ¶ 68; *see also id.,* Wherefore Clause.) The OP Defendants assert that this claim is time-barred under CPLR 214-c (2) to the extent that it seeks recovery for diminution in the Property's value.

CPLR 214-c (2) applies to the portion of Pollack's claim in so far as it seeks to recover damages to the Property due to the contamination. (*Miller Realty Assoc. v Amendola*, 51 AD3d at 988-989 ["Regardless of the labels attached to the plaintiff's respective causes of action, a review of the underlying amended complaint reveals that the plaintiff was seeking to recover for damage to its property caused by the leakage into the soil of a liquid containing volatile organic compounds from a 'dipping tank,'" and therefore, CPLR 214-c correctly applied"].) "For purposes of CPLR 214-c, discovery

occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based." (*MRI Broadway Rental, Inc. v United States Min. Prods. Co.*, 92 NY2d 421, 429 [1998] [internal quotation marks and citation omitted].)

Here, the alleged contamination was discovered prior May 15, 2008, as evidenced by Pollack's Notice of Default. (*See Christy*, 262 AD2d at 757 [holding that the limitation period under CPLR 214-c (2) on a claim seeking damages for diminution in the value of property began to run when the plaintiff discovered the underground gasoline leak].) The fact that Pollack bore an alleged financial loss in connection with the injury later is irrelevant for the statute of limitations purposes.

Pollack, relying on *Turnbull v MTA New York City Transit*, 28 AD3d 647, 649 [2d Dept 2006], argues that a diminution of property value can only be recovered when, despite all efforts to clean up the property, it cannot be restored to its pre-spill condition. Therefore, any claim by Pollack prior to its investigation and remediation after defendants vacated the Property would have been premature. The court rejects this argument. The *Turnbull* Court held if a property cannot be restored to pre-spill condition, "the proper measure of damages is the total amount of the diminution in value plus the costs of repairs." (*Turnbull*, 28 AD3d at 649 [internal quotation marks and citation omitted].) The Court did not hold that a claim under the Navigation Law can only be brought after it is determined that the property cannot be restored. The impossibility to restore the premises is not a prerequisite to bringing a diminution of property value claim. The Court was only addressing the appropriate damages.

Further, Pollack's argument as to defendants' hypothetical objections to this claim as premature, if Pollack brought the claim earlier, is speculative and has no bearing on whether the claim was timely brought.

Under CPLR 214-c (2), owners are required to bring these claims within three years of discovery of a spill. Accordingly, to the extent that this claim seeks recovery for diminution of property value, it is time-barred.

Motion Seq. No. 003 – Kristal's Motion to Dismiss

Kristal moves to dismiss Pollack's breach of contract, indemnification, trespass, and Navigation Law claims as time-barred. It also seeks dismissal of Pollack's indemnification claim under the Navigation Law § 176 (8) on the ground that Pollack fails to state a cognizable and timely claim. Finally, Kristal moves to dismiss the claims against "Kristal Chevrolet Motors Corp," "KAM Chevrolet Motors Corp" and "KAM Auto Mall Corp" on the ground that these are not actual entities that exist or did exist in New York. (*See* n 1, *supra*.)

Statute of Limitations

The arguments advanced by Kristal are essentially the same as those advanced by the OP Defendants, and Pollack's opposition is also essentially the same. Therefore, for the same reasons as discussed above, the portion of Kristal's motion to dismiss the breach of contract and indemnification claims as time-barred is denied without prejudice; the portion of the motion to dismiss the trespass claim as time-barred is granted, in part, in so far as the claim is dismissed as it based on contamination by volatile organic chemicals and petroleum products; and the portion of the motion to

dismiss the Navigation Law claim as time-barred is granted, in part, to the extent that this claim seeks recovery for diminution of property value.

Navigation Law § 176 (8)

Kristal argues that Pollack failed to state a cognizable and timely claim for indemnification under Navigation Law § 176 (8) because Pollack fails to allege that it incurred cleanup costs within the last six years.

> "[T]o dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. If the defendant meets this initial burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, show that an exception to the limitations period is applicable, or demonstrate that the plaintiff actually commenced the action within the applicable limitations period."

(*Williams*, 160 AD3d at 1019 [citations omitted].) Thus, it is Kristal's burden to offer evidence to establish a prima facie case that Pollack's time to commence an action has expired. Kristal has not met this burden. Dismissal of this claim on this ground is denied.

Claims Against Allegedly Non-Existent Entities

Kristal asserts that claims against Kristal Chevrolet Motors Corp, KAM Chevrolet Motors Corp and KAM Auto Mall Corp must be dismissed because these entities do not exist and have never existed in New York.

Even if Kristal did have standing to move to dismiss these entities, the documentary evidence does not resolve, as a matter of law, the factual issue whether these named defendants identify with actual entities. Cadillac submitted search results from NYS Department of State, Division of Corporations' webpage, showing that "no

business entities [with the above-mentioned names] were found." (NYSCEF 44, NYS Corporation and Business Entity Database Entries.) However, these search results are not conclusive (*see Dixon*, 148 AD3d at 626); they do not contain any substantive information other than the above-quoted language. (*Id*; *see also Lem Lee 58th LP v Baranzelli Silk Surplus Inc*., 2018 NY Slip Op 32094[U], *6 [Sup Ct, NY County 2018].) The court notes, however, that none of these named entities appear on the Sublease. (NYSCEF 24, Verified Complaint, Indenture of Sublease Exhibit at 76.)

Accordingly, it is

ORDERED that the defendants OP Development Corp. and Benenson Capital Partners, LLC's motion to dismiss the complaint is granted, in part, to the extent that plaintiff Irma C. Pollack, LLC's third cause of action for violations of the Navigation Law claim is dismissed as time-barred to the extent that this claim seeks recovery for diminution of property value and its fourth cause of action for trespass is dismissed in so far as the claim is based on contamination by volatile organic chemicals and petroleum products; and it is further

ORDERED that the portion of OP Development Corp. and Benenson Capital Partners, LLC's motion to dismiss Benenson Capital Partners, LLC is granted, and the complaint is dismissed in its entirety as against that defendant, with costs and disbursements to that defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of that defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

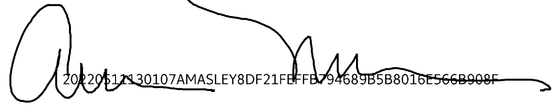
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the defendants S&S Cadillac Motors Corp. n/k/a KAM Auto Mall Corp.'s motion to dismiss the complaint is granted, in part, to the extent that plaintiff Irma C. Pollack, LLC's third cause of action for violations of the Navigation Law claim is dismissed as time-barred to the extent that this claim seeks recovery for diminution of property value and its fourth cause of action for trespass is dismissed in so far as the claim is based on contamination by volatile organic chemicals and petroleum products; and it is further

ORDERED that the remaining defendants shall serve an answer to the verified complaint within 20 days from the date of the Court's entry of this Decision and Order on NYSCEF; and it is further

ORDERED that the parties are to submit a preliminary conference order (SFC-Part48@nycourts.gov) by June 17, 2022. If the parties cannot agree to a PC order, then they may submit competing orders.



5/11/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[ ] **CASE DISPOSED**		[X] **NON-FINAL DISPOSITION**		
	[ ] **GRANTED**	[ ] **DENIED**	[X] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	