

**U.S. Real Estate Servs., Inc. v Silver State Realty &
Invs.**

2023 NY Slip Op 32862(U)

August 18, 2023

Supreme Court, New York County

Docket Number: Index No. 161588/2015

Judge: Sabrina Kraus

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

U.S. REAL ESTATE SERVICES, INC.,

Plaintiff,

INDEX NO. 161588/2015

MOTION DATE 07/28/2023

MOTION SEQ. NO. 006

- v -

SILVER STATE REALTY & INVESTMENTS, MITCHELL A.
KOVE, VALHALLA FINANCIAL, INC., JEFFREY A.
GUGICK, UBS AG, UBS INVESTMENT BANK, JHONNY
LLANA, MO LENG, JOHN DOE, DOE COMPANIES

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this action seeking asserting causes of action for contribution, indemnification, contractual indemnification, negligent misrepresentation, breach of contract, and fraud, which relate to a personal injury action where plaintiff was sued in a personal injury case for damages for an accident occurring on a foreclosed property for which it served as a managing agent.

The only remaining defendants in this action are Silver State Realty & Investments and Mitchell A. Kove (“Defendants”).

Plaintiff alleges that Defendants are responsible for the issuance of a Broker Price Opinion which asserted the property was in good condition. The tenant in the New Jersey

accident fell on outdoor stairs that were alleged to be defective and covered with snow. Plaintiff settled the personal injury lawsuit for \$75,000.00

Plaintiff also asserts that Defendants fraudulently created accounts on Plaintiff's system in the names of licensed brokers and wrongfully obtained multiple listings for foreclosed properties in this manner. Plaintiff asserts damages primarily consisting of attorneys' fees expended in litigation it said it would not have pursued but for defendants' fraudulent conduct.

Defendants deny any wrongdoing.

PENDING MOTION

On April 17, 2023, Defendants moved for the following relief:

- 1) an order pursuant to CPLR §3025(b) for leave to amend their answer to add the affirmative defenses of GOL 15-108-c, collateral estoppel, and *res judicata*; and
- 2) an order pursuant to CPLR §3212 granting summary judgment as to the third cause of action for contractual indemnification and fifth cause of action or breach of contract; and
- 3) an order pursuant to CPLR §3211(a)(5) dismissing the fourth cause of action for negligent misrepresentation, the sixth and seventh causes of action for fraud, based on the expiration of the Statute of Limitations; and
- 4) an order pursuant to CPLR §3211(a)(5) dismissing the first cause of action for contribution pursuant to the General Obligations Law 15-108(c); and
- 5) an order pursuant CPLR §3211 dismissing all causes of action based on the defenses of collateral estoppel and *res judicata*.

On July 28, 2023, the motion was fully briefed and marked submitted. The motion is determined as set forth below.

DISCUSSION

Defendants Motion for Leave to Amend

Motions to amend pleadings should be granted freely unless the proposed amendment is palpably improper or actual prejudice results. *See* CPLR 3025(b); *Nissenbaum v. Ferazzoli*, 171 A.D.2d 654 (2nd Dept. 1991); *Haven Associates v. Duoro Realty Corp.*, 96 A.D.2d 526 (2nd Dept. 1983).

“[I]n the absence of prejudice or surprise to the opposing party, leave to amend a [pleading] should be freely granted unless ‘the proposed amendment is palpably insufficient or patently devoid of merit’” (*Rodgers v. New York City Tr. Auth.*, 109 A.D.3d 535, 536 quoting *Delahaye v. Saint Anns School*, 40 A.D.3d 679, 685; see CPLR 3025[b]).

Plaintiff, relying on CPLR §3211(e), argues that the failure to include the defenses of collateral estoppel and *res judicata* in Defendants’ original answer or a pre-answer motion resulted in a waiver of said defenses. However, absent significant prejudice, even inordinate delay is not a barrier to amendment of Defendants’ answer to assert a defense that would otherwise be waived by Defendants’ failure to assert it by the time of the answer.

Unlike a waiver of the jurisdictional defenses listed in CPLR 3211(a)(8) and (9), which cannot be retracted through amendment to the pleadings (*see Adesso v. Shemtob*, 70 N.Y.2d at 690, 518 N.Y.S.2d 793, 512 N.E.2d 314; *McGowan v. Hoffmeister*, 15 A.D.3d at 297, 792 N.Y.S.2d 381), a waiver of the defenses listed in CPLR 3211(a)(1), (3), (4), (5), and (6) may generally be retracted through amendment to the answer pursuant to CPLR 3025 to include the waived defense

GMAC Mortg., LLC v. Winsome Coombs, 191 A.D.3d 37, 42 (2nd Dept. 2020).

Notwithstanding the foregoing, the request to add collateral estoppel and *res judicata* as defenses is denied, because the defenses are not applicable to the facts in the case at bar.

Defendants argue that the Order issued by Judge Edith K. Payne dated January 2014 (“Fifth-Party Action Leave Denial Order”) which denied Plaintiff leave to file its Fifth-Party Complaint in the New Jersey action, bars the claims in this action pursuant to *res judicata* or collateral estoppel.

The order in the New Jersey litigation which denied leave to file an impleader action, was not a determination on the merits, and thus precludes the application of these defenses. *Miller Mfg Co. v Zeiler*, 45 NY2d 956, 958 (1975); *Wilson v New York City Housing Authority*, 15 AD3d 572, 573 (2d Dept. 2005) An issue must have been brought to a final conclusion in order for *res judicata* to apply. *Brown v. Citibank, N.A.*, 304 A.D.2d 513, 514 (2nd Dept. 2003).

Based on the foregoing, the motion for leave to add collateral estoppel and *res judicata* as affirmative defenses is denied. For the same reasons, the motion to dismiss all causes of action based on *res judicata* and collateral estoppel is denied.

Plaintiff did not submit opposition to Defendants’ request for leave to add an affirmative defense predicated on GOL §15-108-c, which addresses waiver of contribution and provides “(a) tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.” N.Y. Gen. Oblig. Law § 15-108 (McKinney).

Therefore, leave to amend the answer to include said defense is granted.

Defendants’ Motion for Summary Judgment as to the Contractual Claims is Denied

"A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit." *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 (1985). If this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a

genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

"[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

The court finds that Defendants have failed to meet their *prima facie* burden in establishing an entitlement to summary judgment. The conclusory affidavits denying any such contract are simply insufficient in this regard.

Assuming *arguendo* they had met their burden, the court would still hold that the affidavit of Michael Bull submitted in opposition, along with evidence of Defendant Kove's alleged registration, creation and use of the legitimate RES.NET Agent 26165 account, the alleged payments made by Defendant Kove for the legitimate RES.NET Agent 26164 account and the fraudulent RES.NET Agent 54298 account, the use of email addresses with the Defendant Silver State's email domain, silverstateinvestments.com are sufficient to raise issues of fact.

The Fourth Cause of Action for Negligent Misrepresentation is Timely

Dismissal is warranted under CPLR 3211 (a) (5) where the movant establishes that a cause of action may not be maintained due to the expiration of the statute of limitations. The movant bears the initial burden of "support[ing] the motion with an affidavit or other competent proof sufficient, if uncontroverted, to establish the [statute of limitations] defense as a matter of law" (*State Higher Educ. Services Corp. v. Starr*, 158 AD2d 771, 771, 551 N.Y.S.2d 363 [3d Dept 1990]; see *Romanelli v. Disilvio*, 76 AD3d 553, 554, 907 N.Y.S.2d 258 [2d Dept 2010]). Upon such a showing, "the burden shifts to the party opposing the motion to aver evidentiary facts" sufficient to defeat the statute of limitations defense, or at least raise factual questions concerning the defense (*Hoosac Val. Farmers Exch. v. AG Assets*, 168 AD2d 822, 823, 563 N.Y.S.2d 954 [3d Dept 1990]; see *Doyon v. Bascom*, 38 AD2d 645, 645–646, 326 N.Y.S.2d 896 [3d Dept 1971]).

New York State Workers' Comp. Bd. v. Comp. Risk Managers, LLC, 59 Misc. 3d 254, 263 (N.Y. Sup. Ct. 2017).

In their moving papers, Defendants argue that the statute of limitations for negligent misrepresentation is three years relying upon CPLR §214.

However, Plaintiff correctly argues that the applicable statute of limitations for negligent misrepresentation claims where fraud or constructive fraud is alleged is governed by CPLR § 213's six-year statute of limitation.

A claim of negligent misrepresentation is subject to a three-year limitations period, unless the claim is grounded upon essential allegations of actual or constructive fraud, in which case the claim is governed by a six-year limitations period (*see Colon v Banco Popular N. Am.*, 59 AD3d 300, 301 [1st Dept 2009]; *cf. CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 67 [1st Dept 2016]). Where the misrepresentation claim sounds in actual fraud, plaintiffs also may avail themselves of the two-year discovery rule (*see NYAHS A Servs., Inc., Self-Ins. Trust v People Care Inc.*, 141 AD3d 785, 791 [3d Dept 2016]). The claim accrues when the misrepresentation is made and relied on (*see Gerschel v Christensen*, 143 AD3d 555, 557 [1st Dept 2016]; *Catanzano v Warren Rosen & Co.*, 19 AD3d 250, 250 [1st Dept 2005]; *IFD Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89, 92-93 [1st Dept 1999]).

New York State Workers' Comp. Bd. v. Comp. Risk Managers, LLC, *supra* at 267–68.

The complaint bases the claim of negligent misrepresentation on constructive fraud by including all the elements required for such a cause of action, therefore it is governed by the six-year statute of limitations.

The fraud alleged in this cause of action was the submission of the Broker Price Opinion which occurred on November 12, 2009. Therefore, this cause of action is timely and the motion to dismiss it is denied.

The Sixth and Seventh Cause of Action for Fraud Are Dismissed as Time Barred

The alleged fraud began with the creation of the RES.NET account for Douglas Smolev (agent # 54298) on October 30, 2009.

An action for fraud is timely if brought either within six years of the accrual of the claim, or within two years from the time of actual or imputed discovery of the fraud, CPLR 213(8), 203(f).

The New York action commenced on November 11, 2015, which is beyond the 6-year statute of limitation. Furthermore, the Plaintiff admitted that it found out about the alleged fraud in May 2013 with the deposition of Greg Smolev. Therefore, there is no 2-year savings clause.

Plaintiff argues that fraud includes each piece of information and communication that Defendants communicated through the allegedly fraudulent RES.NET Agent 54298 account but provides the court with no legal authority that suggests this would extend the statute of limitations.

The First Cause of Action Seeking Contribution is Dismissed

Defendants argue that because Plaintiff issued a \$75,000 settlement payment in the New Jersey case and received a release of liability, Plaintiff is not entitled to seek contribution from the movants.

As noted above, General Obligations Law Section 15-108(c) provides that "a tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." *See also Diversified v. Marcum*, 129 AD3d 552 (1st Dept. 2015).

Defendants further assert that Plaintiff has been reimbursed for the \$75,000.00.

Plaintiff does not dispute these allegations and has submitted no opposition to that portion of the motion seeking dismissal of this cause of action.

WHEREFORE it is hereby:

ORDERED that the motion pursuant to CPLR §3025(b) for leave to amend Defendants' its answer is granted as to the affirmative defense of GOL 15-108-c, and denied as to the affirmative defenses of collateral estoppel, and *res judicata*; and it is further

ORDERED that Defendants serve and file the amended answer within 10 days of the date of this order; and it is further

ORDERED that Defendants' motion to dismiss the first cause of action for contribution is granted; and it is further

ORDERED that Defendants' motion for summary judgment on the third and fifth causes of action is denied; and it is further

ORDERED that the motion to dismiss the fourth cause of action for negligent misrepresentation is denied; and it is further

ORDERED that the motion to dismiss the sixth and seventh causes of action for fraud is granted; and it is further

ORDERED that the motion to dismiss the complaint based on collateral estoppel *and res judicata* is denied; and it is further

ORDERED that, within 20 days from entry of this order, Defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

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

ORDERED that this constitutes the decision and order of this court.



20230818124855SBKRAUSEB7133A98E664087A1AE68358BBB4B1D

8/18/2023

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE