

Suite v Fox

2026 NY Slip Op 31347(U)

March 19, 2026

Supreme Court, New York County

Docket Number: Index No. 161269/2021

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

DEREK SUITE, DARCEL DILLARD-SUITE,
Plaintiffs,

INDEX NO. 161269/2021
MOTION DATE 12/05/2025
MOTION SEQ. NO. 003

- v -

TOM FOX, SERVPRO OF THE UPPER EAST SIDE, TOM
FOX AS OWNER/PROPRIETOR/OFFICER OF SERVPRO
OF THE UPPER EAST SIDE, SERVPRO INDUSTRIES,
INC.,

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78,
79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105,
106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for JUDGMENT - SUMMARY

This action arises from fire damage remediation services rendered to plaintiffs at their
home by defendant Servpro of the Upper East Side ("Servpro") and its principal, defendant Tom
Fox, pursuant to a contract dated December 17, 2017 (the "Contract").¹ Plaintiffs assert causes of
action for breach of contract, conversion, fraud, unjust enrichment, and negligence based on
allegations that, in the process of performing the contracted-for remediation services, Servpro
lost and damaged items of plaintiffs' personal property, charged plaintiffs' homeowner's insurer
for work it did not perform, failed to complete the remediation work, and damaged Plaintiffs'
driveway. Defendants now move pursuant to CPLR 3212 for summary judgment dismissing the
complaint. Plaintiffs oppose the motion and cross-move, pursuant to CPLR 3025(b), for leave to
amend the complaint to add three new defendants and, pursuant to CPLR 3211(b), to dismiss
Servpro's and Fox's affirmative defenses. Defendants oppose the cross-motion. For the reasons
that follow, defendants' motion is granted and plaintiffs' cross-motion is denied.

On a motion for summary judgment, the proponent bears the initial burden of making a
prima facie showing that it is entitled to summary judgment as a matter of law, providing
sufficient evidence that no material issues of triable fact exist (see Trustees of Columbia Univ. in
the City of N.Y. v D'Agostino Supermarkets, Inc., 36 NY3d 69, 74 [2020]; Alvarez v Prospect
Hosp., 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce

¹ Plaintiffs voluntarily discontinued their claims against defendant Servpro Industries, Inc. by Stipulation of
Discontinuance filed on August 4, 2022 (NYSCEF Doc. No. 21).

evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

Defendants submit, *inter alia*, the parties’ deposition testimony and a copy of the Contract. At her deposition, plaintiff Darcel Dillard-Suite acknowledged that she signed the Contract. Her signature appears immediately beneath the following prominently displayed language: “I HAVE READ THIS AUTHORIZATION TO PERFORM SERVICES, INCLUDING THE TERMS AND CONDITIONS OF SERVICE ON THE REVERSE SIDE HEREOF, AND AGREE TO SAME” (emphasis in original). Paragraph 7 of the Contract’s Terms and Conditions of Service states, in pertinent part, that “NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION” (emphasis in the original). Defendants also submit letters received from plaintiffs regarding damaged or missing property, the last of which, dated August 8, 2018, demands payment from Servpro for items of personal property that were allegedly lost while being moved/stored by Servpro, as well as for alleged damage to plaintiffs’ driveway. It is undisputed that plaintiffs moved back into their house in January 2019, following the completion of Servpro’s remediation work.

It is well settled that “parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law[,]” and that “an agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable” (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550–51 [1979]; see *Turner Constr. Co. v Nastasi & Assocs., Inc.*, 192 AD3d 103, 106 [1st Dept. 2020]; *Hunt v Raymour & Flanigan*, 105 AD3d 1005, 1006 [2nd Dept. 2013]). Defendants’ submissions demonstrate that plaintiffs contractually agreed to a one-year limitation period for claims related to Servpro’s services; that plaintiffs were aware of the alleged loss of their personal property and damage to their driveway no later than August 2018; and that Servpro completed its remediation work no later than January 2019. As such, the one-year limitation period for any claims related to plaintiffs’ allegedly lost or damaged property expired in August 2019, while the limitation period for any claims related to allegedly unperformed or incomplete remediation work expired in January 2020. Plaintiffs, however, did not commence this action until December 2021. As such, defendants have demonstrated their *prima facie* entitlement to summary judgment dismissing the complaint as untimely.

Plaintiffs fail to raise a triable issue of fact in opposition. They submit no evidence to support the conclusory assertion that the one-year limitation provision is unenforceable because the Contract is one of adhesion (see generally *Brower v Gateway 2000, Inc.*, 246 AD2d 246, 253 [1st Dept. 1998]). They make no showing that defendants used deceptive or high-pressure tactics to obtain their agreement to the Contract, or that they were prevented from reading the Contract

or asking that its contents be explained (*see Morris v Snappy Car Rental, Inc.*, 84 NY2d 21, 30 [1994]). To the contrary, the limitation provision at issue was set forth in a clear and legible manner, and the language above the Contract's signature line prominently and emphatically directed plaintiffs to review the Contract's terms and conditions before signing (*see id.*). Nor do plaintiffs make any showing that they were deprived of a meaningful choice in entering into the Contract because they could not have chosen another service provider to complete the remediation work (*see RE Corp. v New York Energy Sav. Corp.*, 78 AD3d 546, 547 [1st Dept. 2010]; *Ranieri v Bell Atl. Mobile*, 304 AD2d 353, 354 [1st Dept. 2003]).

Therefore, defendants' motion for summary judgment dismissing the complaint is granted.

Given the dismissal of the complaint, the branch of plaintiffs' cross-motion that seeks the dismissal of defendants' affirmative defenses is denied as moot. The remainder of plaintiffs' cross-motion seeks leave to amend the complaint to add John Capriles, Genevieve Vazquez, and NYC Urgent Fire & Water Restoration Inc. ("NYC Urgent Fire") as additional defendants. Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit (*see CPLR 3025(b)*; *JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc.*, 107 AD3d 643, 644 [1st Dept. 2013]; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept. 2007]).

Plaintiffs seek to add the proposed new defendants based on testimony by Fox indicating that Capriles was involved in certain aspects of Servpro's remediation work for plaintiffs, together with publicly-filed documents uncovered from unrelated lawsuits purportedly indicating that NYC Urgent Fire, of which Capriles and Vazquez are allegedly principals, has in the past "shared business resources, subcontractors, and accounts" with Servpro. However, the proposed amended complaint is devoid of any factual allegations whatsoever regarding NYC Urgent Fire; alleges only that Vazquez was "involved in the [remediation] project" in some unspecified way, without alleging any specific misconduct on her part²; and, with respect to Capriles, alleges only that he "made key [unspecified] decisions regarding storage and cleanup" as part of the remediation project, but again without any specific allegation of misconduct by him. The court further notes that plaintiffs did not learn of Capriles's involvement with the remediation project from Fox's testimony, as they now claim, but were admittedly aware of Capriles's involvement as the project was underway (*see* NYSCEF Doc. No. 91 ¶ 8), yet they offer no explanation

² The court notes that, while the proposed amended complaint asserts that Fox testified regarding Vazquez's involvement in Servpro's remediation work for plaintiffs, a review of Fox's deposition transcript reveals no mention of Vazquez at all in Fox's testimony (*see* NYSCEF Doc. No. 94 [Proposed Am. Compl.] ¶ 20; NYSCEF Doc. No. 96 [Fox EBT Tr.]).

whatsoever for waiting almost four years after commencing this action to seek to add Capriles as a defendant.

Moreover, the negligence and conversion claims asserted against the prospective new defendants in the proposed amended complaint are all governed by a three-year statute of limitations period (see *Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept. 2013]; *Broecker v Conklin Prop., LLC*, 189 AD3d 751 [2nd Dept. 2020]). For the reasons already discussed above, the three-year limitation period for these claims expired no later than August 2021, four months before plaintiffs commenced this action. As such, plaintiffs propose to add new defendants against whom they have only time-barred claims.

For all of these reasons, the branch of plaintiffs' cross-motion seeking leave to amend the complaint is denied, as their proposed amendments are palpably insufficient and patently devoid of merit.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed in its entirety; and it is further

ORDERED that plaintiffs' cross-motion for leave to amend the complaint and to dismiss defendants' affirmative defenses is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

3/19/2026

DATE



LYNN R. KOTLER, 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