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SCANNED ON 2/7/2012

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 12
Justice

MATEO

-v-

VARGAS

INDEX NO. 602043/2009

MOTION DATE

MOTION SEQ. NO. 012

The papers considered on this motion (□ and cross motion) are enumerated in the attached decision/order.

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this motion (☑ and cross motion) are decided in accordance with the annexed decision and order.

FILED

FEB 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/1/2012

J.S.C.

1. Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
CROSS MOTION IS GRANTED IN PART.

3. Check if appropriate: ☐ SETTLE ORDER/JUDGMENT ☐ SUBMIT ORDER/JUDGMENT
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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FERNANDO MATEO and STELLA MATEO,
Plaintiffs,

Index Number 602043/2009
Mot. Seq. No. 012

against

HENRY VARGAS, AKERMAN SENTERFITT and MADISON REALTY CAPITAL, L.P.,
Defendants.

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HENRY VARGAS,
Third-Party Plaintiff,

against

DECISION AND ORDER

PETER SKYLLAS,
Third-Party Defendant.

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For the Mateos:
Garvey Schubert Barer
Andrew J. Goodman, Esq.
100 Wall St., 20th fl.
New York, NY 10005

For Vargas:
Henry Vargas, *pro se*
10-R-1254
Watertown Correctional Facility
23147 Swan Rd.
Watertown, NY 13601

Papers considered in review of this motion to dismiss and cross motion for summary judgment :

Papers	**Document Number:**
Notice of Motion, Affidavits, Exhibits	1
Notice of Cross Motion	Efile Doc. 146, ex. B[1]
Affidavits, Exhibits, Memo of Law	Efile Docs. 142, 143
Answering Affirmation, exhibits	3
Reply Affirmation, exhibits	4
Opposition to Reply Affirmation, exhibits	5, 6[2]

[1]This court, Part 12, is a designated efiling Part of Supreme Court, New York County. The earlier motion papers in this matter have been uploaded into the New York State Court E-Filing system (NYSCEF). Subsequent to submission of the cross motion, however, this matter was removed from electronic filing because defendant/third-party plaintiff Henry Vargas is self represented and currently incarcerated. For purposes of rendering this decision, the efiled cross motion and related documents were read in their electronic form.

[2]Defendant's papers were received after the motion was marked submitted in the motion submission part; however, because of previous difficulties encountered by defendant in receiving and serving papers, the court accepts and considers these late-filed papers.

PAUL G. FEINMAN, J.:

The motion and cross motion are consolidated for purposes of decision.

Defendant Henry Vargas, who is self-represented, moves for an order to dismiss the first cause of action of the Amended Verified Complaint on the grounds that it fails to state a cause of action and that a necessary party is absent (CPLR 3211 [a] [7], [a] [10]). Plaintiffs Fernando Mateo and Stella Mateo[3] cross-move for an order granting summary judgment as to liability as against defendant on the first cause of action. For the reasons which follow, the motion is denied and the cross motion is granted in part and otherwise denied..

The Amended Verified Complaint alleges that plaintiffs were defrauded when they relied on claims made by defendant communicated to them by a third party, Peter Skyllas, and as a result of the fraud, plaintiffs allege they have lost $3.8 million. The background to this claim is alleged as follows: Mateo had become interested in pursuing real estate development with Skyllas through discussions together "[o]ver the course of several months from early 2008 through the summer" (Doc. 133, Am. Compl. ¶ 30). A main focus, but not the sole focus, of their interest was in a building denominated in the Amended Complaint as "the Skyllas building" (Doc. 133, Am. Compl. ¶¶ 29-30). Skyllas also told Mateo about an interest he shared with Vargas in a limited liability company ("2141 LLC"), which owned a building on Lenox Avenue that was up for sale (Doc. 133, Am. Compl. ¶ 10). Skyllas had initially negotiated in May 2008, and then canceled in July 2008, an option to purchase Vargas's interest in the 2141 LLC; he then renegotiated a new agreement with Vargas in August 2008 transferring Vargas' 49 percent

[3]Throughout the remainder of this decision, unless specified otherwise, "plaintiff" or "Mateo" refer to Fernando Mateo.

interest to Skyllas, memorialized in the Amendment to Operating Agreement (Doc. 133, Am. Compl. ¶¶ 12, 14, 27; Doc. 140-2 at 180 *et seq.*, Cross Mot. ex. 10 [Amendment to Operating Agreement of 2141 MD JR LLC]). Mateo, according to his affidavit, was introduced to Vargas at some point after the agreement between Skyllas and Vargas was signed (Doc. 140-1, Mateo Aff. in Opp. and in Supp. ¶ 9).

In September or October 2008, Vargas signed an agreement to sell the Lenox Avenue building to the New York Road Runners Club, with a closing anticipated in November 2008 (Doc. 133, Am. Compl. ¶ 16). The sale price of the building was $8,500,000 (Doc. 142 at 191 *et seq.*, Aff. in Opp. and in Supp. ex. 12 [Contract of Sale, 2d page]).

Beginning in about October 2008, Skyllas told Mateo he needed "substantial sums" in order to keep his interest in both the Skyllas Building and in the 2141 LLC (Doc. 133, Am. Compl. ¶ 32). Skyllas promised to repay Mateo with the proceeds he would obtain from the sale of the Lenox Avenue building, and provided a copy of the August 2008 amended operating agreement Skyllas had signed with Vargas concerning the 2141 LLC (Doc. 133, Am. Compl. ¶¶ 33-34). Based on the document showing Skyllas's interest in the 2141 LLC and Skyllas' promises, plaintiff made two loans to Skyllas on October 10, 2008 and October 27, 2008, totaling $800,000 (Doc. 133, Am. Compl. ¶¶ 36-37). Both promissory notes include a provision that, as part of the security for the loan, Skyllas promised to turn over his 49 percent interest in the 2141 LLC to Mateo if the loans were not repaid (Pl. Reply Aff ex. E [Promissory Note dated October 10, 2008]; Doc. 140-2 at 213, Cross Mot. ex. 13 [Promissory Note dated Oct. 27, 2008]).

Unbeknownst to Mateo, and to Skyllas, the Lenox Avenue building was not owned by any entity owned or controlled by Vargas, but was in fact owned by a limited liability company

called 2141 MD Jr., LLC, solely owned by one Manuel Duran, Jr. (Doc. 133, Am. Compl. ¶¶ 6, 7).[4] Duran discovered in about mid-November 2008 that his building was wrongfully in contract to be sold (Doc. 133, Am. Compl. ¶¶ 44-45). The closing on the Lenox Avenue building did not occur in November, and by December 2008, the contract of sale signed by the Road Runners Club was terminated (Doc. 133, Am. Compl. ¶¶ 14, 44-47).[5]

In late October or early November 2008, Skyllas informed Mateo that he was in default on a mortgage note secured by the Skyllas building and was in danger of losing the building and any opportunity for them to develop that building; Skyllas explained to Mateo that he had planned to use his share of the proceeds from the sale of the Lenox Avenue building to pay on the note secured by the Skyllas building, but the closing of the Lenox Avenue building had not yet occurred (Doc. 133, Am. Compl. ¶ 38). Based on Skyllas's representations as to his ownership in the 2141 LLC and the upcoming sale of the Lenox Avenue building, and based on Mateo's desire to save the development opportunity represented in the Skyllas building, Mateo loaned Skyllas a total of $3,000,000 on November 4, 2008 (Doc. 133, Am. Compl. ¶¶ 39, 40). Mateo provided an official check of Merrill Lynch in the amount of $3,000,000, made payable to Madison Realty Capital, the holder of the Skyllas building mortgage, which Skyllas turned over to Madison Realty, after which a mortgage extension agreement was signed (Doc. 142 at 52 *et*

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[4]According to the complaint, Vargas and Duran had entered into an agreement by which Vargas purchased an option to purchase the building from Duran for $30,000,000, with payments to be made in installments (Doc. 133, Am. Compl. ¶ 8). Vargas never exercised the option to purchase the building (Doc. 133, Am. Compl. ¶ 47).

[5]According to the press release issued by the Office of the District Attorney, New York County, on April 9, 2010, defendant Vargas pleaded guilty to attempted grand larceny in the first degree and forgery in the second degree (Doc. 140-2 at 230, Cross Mot. ex. 19 [press release]). He admitted that he had fraudulently passed himself off as the majority owner of the Lenox Avenue building and made false statements and forged documents to trick investors into believing he was the majority owner of the LLC that owned the building (*id.*).

seq., Aff. in Opp. and in Supp. ex. 2 [Skyllas Aff. ¶ 23]). No promissory note memorializing this loan from Mateo to Skyllas is included in the papers. However, according to the August 3, 2009 affidavit of Peter Skyllas, the promissory note pledged to Mateo the same 49 percent ownership interest in the 2141 LLC should the loan not be repaid (Doc. 142 at 52 *et seq.*, Aff. in Opp. and in Supp. ex. 2 [Skyllas Aff. ¶ 23]).[6]

According to plaintiff, as the sale of the Lenox Avenue property started to run into trouble, "Vargas became very apologetic and acted interested in helping me recoup the money I lost making the Loans" (Doc. 140-1, Mateo Aff. in Opp. and in Supp. ¶ 15). At some point in November 2008, Vargas and Skyllas each signed an agreement that, effective "immediately," transferred to Mateo all the reputed interest of Skyllas and Vargas in the 2141 LLC, totaling 90 percent, but also indicated that Mateo was not to "sell" until the "effective date" of December 15, 2008 (Doc. 140-1, Mateo Aff. in Opp. and in Supp. ¶ 16; Doc. 142 at 222, Aff. in Opp. and in Supp. ex. 16 [Vargas-Skyllas agreement]). Vargas also signed a promissory note dated November 21, 2008, in which he pledged to pay Mateo $4,010,000 by December 15, 2008 and promised that once "repayment of the Debt in full" had been made, Vargas owed no more duty to Mateo (Doc. 142 at 225-227, Aff. in Opp. and in Supp. ex. 17 [Promissory Note signed by Vargas]). Vargas issued two checks to Mateo, both dated January 12, 2009, one for $4,000,000, with the notation of "loan payoff," and the other for $4,030,000, with the notation of "loan Pay-off plus interest" (Doc. 140-2 at 228, Cross Mot. ex. 18 [checks]). According to plaintiff, "[b]oth

[6]Plaintiff provides copies of two letters dated November 4, 2008, one signed by Fernando Mateo and the other by Fernando and Stella Mateo, addressed to Merrill Lynch, requesting a transfer of $3,000,000 from one account for another "for a purchase of a commercial building" (Doc. 142 at 218, Aff. in Opp. and in Supp. ex. 14). Plaintiff also provides a photocopy of his "client copy" of the official check dated November 4, 2008, payable to Madison Realty, in the amount of $3,000,000 (*id.*, at 217).

of Defendant's checks were returned due to insufficient funds" (Doc. 140-1, Mateo Aff. in Opp. and in Supp. ¶ 18).[7]

The plaintiffs commenced this action by filing the summons and complaint in July 2009. Their amended summons and complaint was filed on October 7, 2009 (Doc. 133). The amended complaint refers to co-plaintiff Stella Mateo as Fernando's wife and "a participant in some of the ventures" (Doc. 133, Am Ver. Compl. ¶ 2). The first and only cause of action against defendant Vargas sounds in fraud and claims damages of $3,800,000 as the foreseeable result of his intentional fraud.

Defendant Vargas' Motion to Dismiss

Failure to state a cause of action (CPLR 3211 [a] [7]).

A motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7) requires an assessment by the court of whether the facts stated in complaint are sufficient to support any cognizable legal theory (*Campaign for Fiscal Equity v State of N.Y.*, 86 NY2d 307, 318 [1995]). The court "must take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader." (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]).

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[7]It is unclear when and how Mateo attempted to deposit either check. A copy of the front of both checks appears on a page dated "12/30/2008," along with a copy of the front of another check dated December 22, 2008, made out to "Sum Corp.," by a different entity in the amount of $20,000 (Doc. 142-2 at 228-229, Cross Mot. ex. 18). The stamp "Return Reason A Not Sufficient Funds" appears only over this third check.

In opposing a motion to dismiss, a plaintiff may submit affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims." (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636 [1976]). Submissions of a party in opposition to a motion to dismiss are to be "given their most favorable intendment" (*Cron v Hargro Fabrics, Inc.*, 91 NY2d at 366). Where factual claims in the complaint are contradicted by documentary evidence, the claims will not be entitled to such consideration (*Maas v Cornell University*, 94 NY2d 87, 91 [1999]).

Vargas argues that the complaint fails to sufficiently make out a claim of fraud and therefore it must be dismissed pursuant to CPLR 3211 (a) (7). To state a claim for fraud, a plaintiff must allege a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance . . . and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A plaintiff must generally show prima facie that the defendant's negligence was a substantial cause of the events which produced the injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). The alleged fraudulent misrepresentation does not need to have been made directly to the plaintiff (*see John Blair Communications, Inc. v Reliance Capital Group, L.P.*, 157 AD2d 490 [1st Dept 1990]; *Buxton Mfg. Co, Inc. v Valiant Moving & Storage, Inc.*, 239 AD2d 452 [2nd Dept 1997] [fraud may exist where a false representation is made to a third party resulting in injury to plaintiff]). A defendant will be liable to any person who is intended to rely upon the misrepresentation and who does in fact so rely to his or her detriment (*John Blair Communications, Inc.*, 157 AD2d at 492).

Defendant's arguments in support of his motion are not persuasive. Contrary to what he claims, the complaint sufficiently alleges that he knew or should have known that his intentional

misstatements to Skyllas would justifiably be relied upon not only by Skyllas, but by other investors sought out by Skyllas, such as Mateo (*see* Doc. 142, Aff. in Opp. and in Supp. ex. 23 [June 6, 2008 email to Vargas from his attorney referencing Skyllas's plan to use the Lenox Avenue building to draw equity for his other property]). It also alleges damages totaling $3.8 million, comprised of the monies loaned to Skyllas on the basis of his alleged ownership interest in the Lenox Avenue building. Where there is near privity, a defendant will be held liable for his or her statements when made to a third person which the plaintiff then relies on (*see e.g., Fortress Credit Corp. v Dechert LLP*, 89 AD3d 615, 616 [1st Dept 2011]).

Defendant argues that the complaint is fatally flawed because it does not sufficiently allege that his misrepresentations were the direct and proximate cause of plaintiffs' losses. He relies on the reasoning of the Appellate Division, First Department in an earlier appeal in this action dismissing the complaint as against Vargas's law firm (*Mateo v Akerman Senterfitt*, 82 AD3d 515 [1st Dept 2011]). However, his law firm, Akerman Senterfitt, had a very different relationship to plaintiffs than did Vargas himself and this changes the analysis. For instance, as set forth by the Appellate Division, the complaint does not allege that the law firm had actual knowledge of any fraud perpetrated by Vargas, but only that the firm relied on Vargas' misrepresentations of his ownership interest when drafting documents that would be signed by Skyllas and Vargas (*id.*, 82 AD3d at 517). The complaint also did not adequately allege that the law firm should reasonably have foreseen that persons such as Mateo would rely on the contents of the legal documents it drafted (82 AD3d at 518). Furthermore, the Court pointed to "at least three events" that took place between Vargas' alleged misrepresentations and plaintiff's loans to Skyllas, namely, (1) Skyllas backed out of the option to purchase that had been negotiated with

the help of the law firm, (2) Skyllas then negotiated separately with Vargas the 49 percent transfer of ownership interest, and (3) the holder of the mortgage on the Skyllas building demanded immediate payment of part of the principal. These events, held the Court, "constitute superseding causes that broke the chain of causation" as to the law firm (82 AD3d at 518).

A plaintiff is required to demonstrate that the defendant's misrepresentations "were the direct and proximate cause of the claimed losses" (*Friedman v Anderson*, 23 AD3d 163, 167 [1st Dept 2005], citing *Laub v Faessel*, 297 AD2d 28, 30-31 [1st Dept 2002]). When there is an intervening act between the making of the misrepresentation and the injury to plaintiff, if the intervening act is a "normal or foreseeable consequence of the situation created by the defendant's negligence," the causal connection is not automatically severed (*Derdiarian v Felix Constr. Co.*, *supra*, 51 NY2d at 315; *see Mirand v City of N.Y.*, 84 NY2d 44, 50 [1984]). In general, of course, questions as to proximate cause are to be decided by the finder of fact (*Terry v Danisi Fuel Oil Co., Inc.*, 40 AD3d 1072, 1072 [2d Dept 2007]).

Here, the amended complaint sufficiently makes out a claim of fraud against Vargas, and the motion to dismiss based on CPLR 3211 (a) (7) is denied.

Failure to join a necessary party (CPLR 3211 [a] [1])

Defendant argues that the complaint should be dismissed because Peter Skyllas is a necessary party and the fact that he is not named as a direct defendant shows that plaintiffs have unclean hands in this litigation. Plaintiffs argue that Skyllas is not a necessary party, and that this branch of defendant's motion to dismiss is academic because defendant himself has made Skyllas a defendant in the third-party action and thus should be able to obtain full justice.

Persons who are "necessary parties" by statute are those "who ought to be joined if

complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001 [a]). Vargas argues that Skyllas should be joined as a direct defendant. His motion papers contain allegations of Skyllas' allegedly wrongful actions, including that it was Skyllas and his attorney who primarily negotiated with the New York Road Runners in that organization's unsuccessful attempt to buy the Lenox Avenue building (Mot., Vargas Aff. ¶ 21). He also points out that the complaint alleges that the sums were loaned to Skyllas, and that the entirety of the loans were lost, and Vargas argues that Skyllas should be made a defendant to establish that the loans were never reimbursed (Mot., Vargas Aff. ¶¶ 25, 41).

When a necessary party is missing but available, the court's recourse is to order the missing necessary party to be joined (CPLR 1001 [b]). However, it is well established that a plaintiff may proceed against any or all alleged tortfeasors, as each party is held individually liable for the whole of the damage (*Hecht v City of N.Y.*, 60 NY2d 57, 63 [1983]). Moreover, it is also well established that a joint tortfeasor is not an indispensable party or even a conditionally necessary party (*see Tudor v Riposanu,* 93 AD2d 718 [1st Dept 1983]; *Siskind v Levy*, 13 AD2d 538, 539 [2d Dept 1961]). Thus, Skyllas is not a necessary party. Vargas has already protected his interest by commencing a third-party action against Skyllas. Accordingly, the motion to dismiss is denied on this ground as well.

Plaintiffs' Cross Motion for Summary Judgment

Summary judgment is proper only when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence

will be construed in the light most favorable to the one moved against (*Corvino v Mount Pleasant Centr. Sch. Dist.*, 305 AD2d 364, 364 [2d Dept 2003]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept. 2000]). To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, it shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Plaintiffs establish a prima facie claim of fraud as against defendant Vargas. They sufficiently establish that Vargas knowingly made material misrepresentations to Skyllas. Defendant's argument in opposition suggesting that the option to transfer agreement between Duran and himself was still valid, is clearly incorrect, given the subsequent criminal proceeding against Vargas. His argument that the fraudulent statements were actually made by Skyllas is not supported by anything presented in his motion papers or in any of plaintiffs' papers. This is true as well for defendant's claim that the documents produced by other parties are forgeries; he offers nothing other than his self-serving statement to support this claim which is insufficient to raise a question of fact (*see Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 384 [2004]; *Bronsnick v Brisman*, 30 AD3d 224, 224 [1st Dept 2006]). As discussed above, there is evidence to show that Vargas knew or should have known that his intentional misstatements to Skyllas would be relied upon not only by Skyllas, but by other investors sought out by Skyllas, such as Mateo. Plaintiffs also show that Mateo justifiably loaned Skyllas a total of $3.8 million, relying on Skyllas's representations of his ownership rights in a property on the market.

Defendant's attempts to point to questions of fact that would preclude summary judgment are insufficient, except as to the amount claimed as damages. Plaintiffs contend that the totality of their losses was foreseeable, based on defendant's fraud. In opposition, Vargas opposes and argues that the complaint is silent as to the circumstances surrounding the outcome of the loans made to Skyllas. For instance, the complaint alleges that the two October loans, totaling $800,000, were not entirely used by Skyllas for the Lenox Avenue property.[8] Additionally, there is nothing in the complaint to suggest that the payment of $3 million to the mortgage holder of the Skyllas building was unavailing in saving that property as an investment for Mateo and Skyllas, at least for some period of time. Vargas thus argues that there is nothing to show that the loan amounts were not partially repaid, put into new investments, forgiven, or some other course of action.

Plaintiffs have not established the amount of damages to which they are entitled. Accordingly, their motion for summary judgment on the complaint is granted as to liability, but not as to damages. It is therefore

ORDERED that the motion to dismiss the first cause of action of the complaint pursuant to CPLR 3211 (a) (7) and (a) (10), is denied in its entirety; and

It appearing to the court that plaintiffs are entitled to judgment on liability and that the only triable issues of fact arising on plaintiffs' motion for summary judgment relate to the amount of damages to which plaintiffs are entitled, it is

ORDERED that the motion for summary judgment on the first cause of the complaint is

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[8]See e-Doc. 133 (Am. Compl. ¶ 36).

granted as against defendant Vargas[9] as to liability; and it is further

ORDERED that the parties are to appear at a compliance conference to address what discovery remains to be exchanged, to determine the status of the third-party action, and to ready the matter for trial, with defendant to appear by telephone, and counsel for plaintiffs and third-party defendant, if subject to the jurisdiction of the court, to appear in person on Wednesday, March 7, 2012, at 11:00 a.m.; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order on defendant and third-party defendant, with notice of entry, within 10 days of today's date.

This constitutes the decision and order of the court.

Dated: February 1, 2012

J.S.C.

[9] The complaint was previously dismissed as against defendant Madison Realty Capital, Inc., by decision and order of this court dated June 7, 2010. The complaint has also been dismissed as against defendant Akerman Senterfitt. *See, Mateo v Akerman, Senterfitt*, 82 AD3d 515 (1st Dept 2011).