SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY A. O'NEILL LEVY **PART** IAS MOTION 19

Justice

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INDEX NO. 156876/2014

BENE LLC,

Plaintiff,

MOTION DATE 03/06/2019, 03/06/2019

- v -

MOTION SEQ. NO. 003 004

NEW YORK SMSA LIMITED PARTNERSHIP, A-Z CORPORATIONS, JOHN DOE, JANE DOE,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 168, 176, 177, 178, 179, 180, 181, 182, 183, 184, 189, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202, 203, 214

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 162, 163, 164, 165, 166, 167, 171, 172, 173, 174, 185, 186, 187, 188, 204, 205, 206, 207, 208, 209, 215

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

HON. KELLY O'NEILL LEVY:

Defendant New York SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon") brings this motion for an Order pursuant to CPLR § 3211(a)(5) dismissing plaintiff BENE LLC's ("Bene") complaint in its entirety due to the expiration of the statute of limitations or an Order pursuant to CPLR § 3212 granting summary judgment. Plaintiff opposes. Defendant also seeks to quash plaintiff's Subpoena Duces Tecum and Subpoena Ad Testificandum pursuant to CPLR § 2304 or a protective order pursuant to CPLR § 3103, for which non-party Leslie J. Snyder, Esq. has submitted an affirmation in support. Plaintiff opposes and cross-moves to compel the deposition.

On August 31, 1994, Verizon entered into a lease agreement with the owner of a building located at 77 Cooper Street, New York, New York 10034 in order to install a communications site at the building. Verizon completed the installation and operated the communication site for years without issue. However, by February 28, 2007, Verizon was notified of damage to the premises allegedly caused by the Verizon installation. After years of negotiation, this suit was commenced by filing of a summons and complaint on July 14, 2014.

Statute of Limitations: Breach of Contract Analysis

Verizon argues that the Statute of Limitations began tolling on February 28, 2007 by which time plaintiff had notified Verizon of the damage and so the six-year statute of limitations for breach of contract ended on February 28, 2013. *See* CPLR § 213. The plaintiff argues that the continuing wrong doctrine extends the statute of limitations.

The lease agreement which enabled Verizon to install the communications site on the roof included a guarantee that Verizon would "maintain the property in a reasonable condition" for the duration of the lease agreement. Verizon thereby agreed to perform a fully bargained-for service. In *Bulova Watch Co. v. Celotex Corp.*, the installation of a roof included a guarantee to repair any leaks to the roof for twenty years. *See* 46 N.Y.2d 606, 612 (1979). The roof installation was contracted for in 1952, and alleged non-performance was communicated as early as 1955, but suit was not brought until 1973 due to protracted efforts to negotiate a resolution without the need for litigation. *See id.* at 608. The Supreme Court ruled that the statute of limitations expired and the Appellate Division affirmed, but the Court of Appeals reversed. *See id.* at 609; *Bulova Watch Co. v. Celotex Corp.*, 59 A.D.2d 831 (1st Dep't 1977). The Court of Appeals reasoned that the Defendant "agreed to perform a service—to repair the roof. Since breaches of this fully bargained-for promise are actionable for six years from their occurrence" then plaintiff "may recover for all of the defendants' derelictions of duty that it can prove took place between…six years prior to the institution of suit…and the date on which the [agreement] expired." *Id.* at 612; *see also Knobel v. Shaw*, 90 A.D.3d 493 (1st Dep't 2011). Similarly, breaches of Verizon's fully bargained-for promise are actionable for six years from their occurrence, so plaintiff may recover for all of the defendants' derelictions of duty that it can prove took place between six years prior to the institution of suit (i.e. July 14, 2008) and the date on which the agreement expired (i.e. when Verizon terminated the Lease Agreement on March 21, 2013).[1] Therefore, plaintiff's suit for breach of a contractual obligation between July 14, 2008 and March 21, 2013 is timely.

[1]There is considerable factual discrepancy regarding when the lease should be considered terminated. Plaintiff at multiple points indicates February 22, 2011. Verizon at one point indicates that it was prepared to be held to the terms of the lease until September 30, 2013 despite terminating much earlier. As the parties have not argued the point and the record is unclear, the end date of Verizon's obligations under the lease will not be decided at this time.

Statute of Limitations: Equitable Estoppel Analysis

Any actions based on breaches of contract prior to July 14, 2008—and actions based on negligence prior to July 14, 2011—would normally be barred by the Statute of Limitations, but plaintiff argues that Verizon should be equitably estopped from asserting the Statute of Limitations defense. Upon review, the court finds that equitable estoppel is not appropriate here.

The "[d]octrine of equitable estoppel is an 'extraordinary remedy' which may bar defendant from asserting the statute of limitations when plaintiff 'was induced by fraud, misrepresentations, or deception from filing a timely action.' … [P]laintiff must demonstrate reasonable reliance on the defendant's misrepresentations and due diligence…in ascertaining the facts, and in commencing the action." *Pahlad ex rel. Berger v. Brustman*, 33 A.D.3d 518, 519-520 (1st Dep't 2006) (quoting *East Midtown Plaza Hous. Co., Inc. v. City of New York*, 218 A.D.2d 628 (1995) and *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-449 (1978)); *see also Putter v. North Shore Univ. Hosp.*, 7 N.Y.3d 548 (2006) ("A plaintiff seeking to apply the doctrine of equitable estoppel must 'establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit.'" (quoting *Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006))); *see generally* General Obligations Law, § 17-103(4)(b) (reserving courts the power "to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose a defense of the statute of limitations.").

Plaintiff alleges that Verizon consistently offered higher settlement offers for years—from $20,000 initially, to $80,000 in May 2008, to $100,000 in September 2008, to $175,000 in October 2011, and finally to $220,700 in April 2012 – thereby enticing plaintiff to continue negotiations. These were offers that at any point plaintiff could have accepted, so if anything this indicates that Verizon was negotiating in good faith for this period. The ample record indicates that plaintiff was well aware of its ability to initiate a lawsuit and threatened to do so many times during negotiations. While there is some support in the record for plaintiff's chief complaint that Verizon knew internally that the April 2012 offer was a final offer and did not communicate this to plaintiff, and Verizon by no means facilitated settlement as much as it could have, the actions that plaintiff alleges fall far short of the burden necessary to establish equitable estoppel. *See Dailey v. Mazel Stores, Inc.*, 309 A.D.2d 661, 663 (1st Dep't 2003) ("It is well-settled law in New York that the mere fact that settlement negotiations have been ongoing between parties is insufficient to estop a party from asserting the Statute of Limitations as a defense.").

Typically, "whether [plaintiff] should be equitably estopped from pleading the statute of limitations in these circumstances is a question of fact to be determined on the trial of the proceeding." *See Will of Spewack*, 203 A.D.2d 133, 134 (1st Dep't 1994); *see also Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 76 A.D.3d 310 (1st Dep't 2010) ("Although the plaintiffs have not established, on this record, their entitlement to equitable estoppel, I find that they have demonstrated a reasonable basis to believe that with additional discovery they may be able to develop facts sufficient to sustain their claim."). However, it is clear from the robust record that equitable estoppel does not apply in the circumstances presented and so can be rejected as a matter of law. *See Dailey*, 309 A.D.2d at 309 ("Since we find, as a matter of law, that the doctrine of equitable estoppel does not apply in the circumstances presented, the complaint should be dismissed."). This does not dismiss plaintiff's case, due to the above breach of contract analysis, but it limits plaintiff's claims to any breach of a contractual obligation between July 14, 2008 and March 21, 2013.

Subpoena Duces Tecum and Ad Testificandum

Verizon also seeks to quash a Subpoena Duces Tecum and Ad Testificandum seeking testimony of non-party Leslie Snyder, Esq. pursuant to CPLR § 2304, or a protective order pursuant to CPLR § 3103. Plaintiff opposes and moves to compel the deposition. Verizon's motion to quash pursuant to CPLR § 2304 is granted.

Non-party Leslie Snyder, Esq. was counsel for Verizon and corresponded with plaintiff until 2016. The correspondence between Ms. Snyder, Esq. and plaintiff has been produced, along with many other documents relating to Ms. Snyder, Esq.'s work for Verizon and relating to the property at issue. Plaintiff now seeks Ms. Snyder, Esq.'s testimony, but plaintiff does not adequately explain why this is not either duplicative or privileged information. Ms. Snyder, Esq. should not be burdened with appearing and testifying for information that is not "material" or "necessary". *See, e.g., Penn Palace Operating, Inc. v. Two Penn Plaza Assoc.*, 215 A.D.2d 231 (1st Dep't 1995).

Accordingly, it is

ORDERED that Defendant's motion for an Order pursuant to CPLR § 3211(a)(5) dismissing plaintiff's complaint and for an Order pursuant to CPLR § 3212 granting summary judgment is granted in part and denied in part; it is also further

ORDERED that Defendant's motion for an Order pursuant to CPLR § 2304 quashing plaintiff's Subpoena Duces Tecum and Ad Testificandum is granted.

This constitutes the decision and order of the court.

6/20/2019
DATE

Kelly D'Neill Levy
KELLY A. O'NEILL LEVY, 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