

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

<p>PRESENT: <u>HON. KATHRYN E. FREED</u> <i>Justice</i> -----X</p> <p>JEFFREY MURPHY, KATHERINE DILLON Plaintiff,</p> <p align="center">- v -</p> <p>MICHAEL STEVEN WILLIAMS, Defendant.</p> <p>-----X</p>	<p>PART IAS MOTION 2EFM</p> <p>INDEX NO. <u>157441/2019</u></p> <p>MOTION DATE <u>01/28/2020</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for DISMISSAL.

In this breach of contract action, defendant Michael Steven C. Williams (“Williams”) moves, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the complaint given that the action was commenced more than seventeen (17) months after the parties’ contractually agreed statute of limitations (Doc. 22). Plaintiffs Jeffrey Murphy (“Murphy”) and Katherine Dillon (“Dillon”) (collectively “plaintiffs”) oppose the motion (Docs. 25-35). After oral argument, as well as a review of the parties’ papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiffs are the owners of real property located at 527 ½ Manhattan Avenue, New York, New York (“the property”), which they purchased from Williams on February 2, 2015 (Doc. 1 ¶ 1, 3). At the closing on the property, Williams was required to sign and file a Real Property Transfer Tax Return (“RPT”) with the City of New York (“the City”) to report the sale of the property and to pay the appropriate New York City Transfer Tax (“transfer tax”) pursuant to New

York City Administrative Code § 11-2102 (Doc. 1 ¶ 4-5). Williams informed plaintiffs at that time that the total transfer tax owed was \$46,312.50 and that no further amounts would be due to the City (Doc. 1 ¶ 5). The parties executed a Hold Harmless Agreement (“the agreement”), pursuant to which Williams promised to indemnify and hold harmless plaintiffs from any liability or claims made against them in connection with the transfer tax, and any amount underpaid by Williams pursuant to the RPT, including interest, penalties and reasonable attorneys’ fees (Doc. 1 ¶ 6).

On June 16, 2017, due to an alleged tax classification discrepancy, the City issued a further assessment with interest and penalties against the property in the amount of \$46,980.04 (Doc. 1 ¶ 8). Although the notification was sent to Dillon at an address where she no longer resided, plaintiffs later learned about the additional assessment on June 1, 2018 and, upon being so apprised, they notified Williams to provide the payment, but he refused (Doc. 1 ¶ 9-11). As a result, plaintiffs paid the additional assessment, as well as the related accrued penalties and interest, totaling \$57,193.20 (Doc. 1 ¶ 11-12). On July 30, 2019, plaintiffs commenced this action against Williams by filing a summons with notice, alleging, *inter alia*, that Williams breached the agreement and that they are thus entitled to recover \$57,193.20 (Doc. 1 ¶ 13-16). A complaint was subsequently filed on September 4, 2019 (Doc. 3).

Williams filed the instant motion on October 18, 2019 (Doc. 22-24). Williams argues, *inter alia*, that, insofar as this action was commenced on July 30, 2019, more than seventeen months after the expiration of the parties’ contractually agreed statute of limitations, which expired on February 2, 2018, dismissal of the complaint is required (Doc. 23 ¶ 1). In support of his motion, Williams submits the agreement, which provides, in pertinent part, that:

“Purchaser shall be indemnified and held harmless from any liabilities or claims made upon Purchaser relating to the NYC Transfer Tax only and Seller agrees to hold the Purchaser[]

harmless and free and to indemnify the Purchaser from and against all losses, liabilities, judgments, damages, costs and expenses, including but not limited to, reasonable attorney fees and disbursements, that the Purchaser actually incurred or suffered as a result of the Seller underpaying the New York City Transfer Tax at Closing, as well as any interest and penalties due and assessed by New York City, provided only; however, that Purchaser must first provide Seller with any such notice from New York City and provide Seller and reasonable opportunity to cure said matter, and only if Seller fails to take action to cure any such issue would be entitled to the indemnification pursuant to this Agreement. Seller shall pay any additional such City Transfer Tax along with interest and penalties assessed thereon if required by law to New York City. *This provision shall survive Closing until the sooner of the statutory limit by New York City or the transfer of title by Purchaser*” (emphasis added) (Doc. 24, Exhibit B).

Williams represents that such statutory limit is defined by the New York City Administrative Code § 11-2116 (b), which provides, in relevant part, that “no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return” (Docs. 23 ¶ 6; 24, Exhibit C). As reflected by a New York City Financial Statement of Account (Doc. 24, Exhibit D), the original RPT was filed on February 2, 2015 (Doc. 23 ¶ 7-9). Thus, claims Williams, plaintiffs were required to commence the action on or before February 2, 2018 to fall within the statutory time period defined by the agreement (Doc. 23 ¶ 7-9).

In opposition to the motion, plaintiffs argue, *inter alia*, that the purported documentary evidence fails to conclusively establish that their claims are time barred because it is unclear from the agreement whether the New York City Administrative Code § 11-2116 (b) applies (Doc. 35 at 11). In light of this ambiguity, plaintiffs maintain that their claims are governed by CPLR 213 (2) (Doc. 35 at 11-12). Moreover, they contend that, under Williams’ interpretation of the provision in the agreement, if the City had waited three years to issue the additional assessment, the statute of limitations would have expired on that same day, which “flies in the face of a contractually agreed upon statute of limitations being upheld if it is deemed reasonable as drafted” (Doc. 35 at 15). Assuming, *arguendo*, that Administrative Code § 11-2116 (b) applies, plaintiffs argue that the statute of limitations should begin to run from the date that the City issued the notice on June

16, 2017 because it was only then that they possessed a legal right to demand payment (Doc. 35 at 13). Additionally, plaintiffs maintain that the motion should be denied under these circumstances because “[t]he Court has the power to toll the statute of limitations due to the flagrant misrepresentations of [d]efendant regarding the transfer tax due on the [p]roperty, which [p]laintiffs reasonably relied upon” and which “induced [p]laintiffs to enter into the [a]greement” (Doc. 35 at 15-16).

LEGAL CONCLUSIONS:

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The Court accepts] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted]). A claim may be dismissed on the ground that it fails to state a cause of action (*see* CPLR 3211[a][7]). Moreover, dismissal is warranted, pursuant to CPLR 3211(a)(1), if “the documentary evidence utterly refutes plaintiff[s]’ factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538 [1st Dept 2019]).

“CPLR 3211(a)(5) authorizes dismissal when, *inter alia*, an action is time-barred by the applicable statute of limitations” (*Dae Hyun Chung v Google, Inc.*, 2019 NY Slip Op 31418[U], 2019 NY Misc LEXIS 2549, *9 [Sup Ct, NY County 2019] [emphasis added]). “On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the

complaint as true and resolve all inferences in favor of the plaintiff” (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks and citations omitted]; see *Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017]). If this initial burden is met, “[t]he burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period” (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019] [citation omitted]; see *Stranger v Shoprite of Monroe, NY*, 2019 NY Slip Op 30383[U], 2019 NY Misc LEXIS 653, *9 [Sup Ct, NY County 2019]).

This Court finds that Williams has failed to establish his prima facie burden of demonstrating that this action is time-barred. Generally, “an action [based] upon a contractual obligation or liability, express or implied” is subject to a six-year statute of limitations (CPLR 213 [2]; see *Demian v Calmenson*, 156 AD3d 422, 423 [1st Dept 2017], *lv denied* 31 NY3d 902 [2018]). However, “parties may agree to a statute of limitations shorter than that set forth in the CPLR, provided that the agreement is in writing and the shortened period is reasonable” (*Assured Guar. [UK] Ltd v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 304 [1st Dept 2010], *affd* 18 NY3d 341 [2011]). Although Williams maintains that this action is barred by the parties’ agreed-upon three-year statute of limitations, as set forth in New York City Administrative Code § 11-2116 (b), this code is never mentioned in the agreement, and it is unclear whether the reference to “the statutory limit by New York City” in the agreement implicates the statute. Given this ambiguity, Williams cannot prevail on a motion based on CPLR 3211 (a) (5) (see *Vardaris Tech v. Am. Guar. & Liab.*, 2004 NYLJ LEXIS 1358, [2004 NYLJ LEXIS 1358](#) *7-8 [Sup Ct, Kings County, 2004]; compare *C.D. City, Inc. v Maryland Cas. Co.*, 4 AD3d 382, 383 [2d Dept 2004]).

Importantly, New York City Administrative Code § 11-2116 (b) precludes *the City* from making an assessment of additional tax after three years from the filing of a return. It does not, as Williams suggests, impose a three-year statute of limitations for actions based on an additional tax assessment. Thus, resolving all inferences in plaintiffs' favor, the complaint is not subject to dismissal under CPLR 3211(a)(5).

That branch of Williams' motion seeking dismissal pursuant to CPLR 3211(a)(1) (documentary evidence) and CPLR 3211(a)(7) (failure to state a cause of action) is also denied insofar as they are premised on Williams' assertion that the agreement sets forth a clear statute of limitations.

The remaining arguments are either without merit or need not be addressed given the findings above.

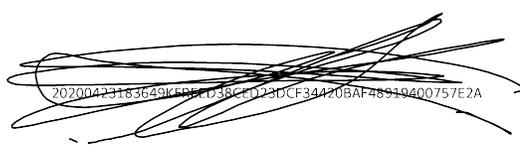
Therefore, given the foregoing, it is hereby:

ORDERED that defendant Michael Steven C. Williams' motion, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order, with notice of entry, upon defendant within 30 days of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 80 Centre Street, Room 280, on July 28, 2020, at 2:30 p.m., unless notified by this Court of a change; and it is further

ORDERED that this constitutes the decision of the Court.



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KATHRYN E. FREED, J.S.C.

4/23/2020

DATE

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