

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
PAUL HERRICK, ESQ. and RABIN, PANERO  
& HERRICK, LLP,

Plaintiffs,

-against-

STATEWIDE ABSTRACT CORP.,

Defendant.

DECISION and ORDER

Sequence No. 1

Index No. 63036/12

-----X  
CONNOLLY, J.

The following documents were read in connection with the defendant, Statewide Abstract Corp.'s, motion to dismiss the complaint pursuant to CPLR § 3211 (a) (1) and (5):

Defendant's Notice of Motion, Affirmation, Exhibits	1-22
Defendant's Memorandum of Law	23
Plaintiff's Affirmation in Opposition, Exhibits	24-33
Plaintiff's Memorandum of Law	34
Defendant's Reply Affirmation, Exhibits	35-37

The plaintiffs, Paul Herrick, Esq. and Rabin, Panero & Herrick, LLP (collectively referred to as "Herrick"), commenced this action against defendant, Statewide Abstract Corp. ("Statewide"), seeking indemnification or contribution for damages assessed against Herrick as a result of a special jury verdict rendered against it in the amount of \$252,652.00, plus interest, costs, and disbursements, for legal malpractice arising from Herrick's representation of its former clients, Luis X. Rojas and Maria Rojas ("Rojas"), in the purchase of a parcel of real property. Although both parties to this action were named defendants in the prior action, the plaintiff's complaint and the cross-claim asserted by Herrick against Statewide for contribution and indemnification were dismissed on the merits prior to trial. Herrick was the only remaining defendant at trial.

Statewide moves to dismiss this action pursuant to CPLR § 3211 (a) (1) and (5) on grounds that a defense is based upon documentary evidence and the cause of action may not be maintained because of collateral estoppel and res judicata. For the reasons set forth below, the Court finds the issues raised in this action are the same as those raised, fully litigated, and decided in the prior action, and the plaintiffs' claims, which sound in indemnification and contribution, arise out of the

same transactions actually litigated and resolved in the prior proceeding and therefore, the within action is barred under the principles of res judicata and collateral estoppel.

### **FACTUAL BACKGROUND/PROCEDURAL HISTORY**

Herrick, an attorney, represented Luis and Maria Rojas, who were the plaintiffs in the prior action, in all aspects of the purchase transaction of a parcel of property located at 16 Montana Place, White Plains, New York, from negotiation of the contract of sale through the closing of title. Along with the contract of sale, the purchasers were provided with a survey depicting the property to be purchased. The contract of sale included a legal description of the property attached as Schedule "A," which described the property as a "parcel of land, situate, lying and being in the Town of Greenburgh, County of Westchester, State of New York, known and designated as part of Lot No. 8 as shown on the certain Map . . . ."

In connection with the purchase, Herrick, on behalf of Rojas, ordered a title search and report of the subject property through Statewide and requested that Statewide certify title to Rojas' title insurer, Stewart Title Insurance Company. Herrick provided Statewide with the Schedule "A" legal description of the property and a survey that described the property as a "portion of Lot #8." Statewide used these documents to conduct its title examination and prepare its title report of the property. This same legal description was included in the title insurance policy issued by Stewart Title, as well as a bargain and sale deed delivered to Rojas from the sellers at the closing held on June 6, 2005. Statewide's title report stated in several places, including in the Schedule B Title Exceptions and in copies of two deeds by which the sellers acquired the property in 2003, that the subject property to be conveyed was only a portion of Lot No. 8. The parcel conveyed to Rojas at closing consisted of approximately .45 acres of land improved by a residential home. The remaining parcel, which the sellers retained, consisted of approximately .34 acres of unimproved land that had been conveyed to the sellers by quitclaim deed in 2003.

Rojas resided at the property until 2007, when they decided to relocate for employment reasons. As part of the relocation process, Rojas' employer offered the services of a relocation company to purchase the property. The relocation company ordered a title search and report, wherein it was revealed that Rojas did not own the entirety of the parcel of land located at 16 Montana Place, in that only a "portion of Lot No. 8," referred to as the house parcel, was conveyed to Rojas, with the sellers retaining title to the remaining parcel containing unimproved land. Upon discovering that the property consisted of only a portion of Lot No. 8, the relocation company would not accept title to the property.

Rojas thereafter commenced a lawsuit against various defendants, including Statewide, Herrick, Stewart Title, the sellers, the sellers' attorney, and the real estate brokers and agents involved in the 2005 Rojas purchase transaction. The action was entitled, *Luis X. Rojas and Maria Rojas v. Andrew Paine, et. al.*, Westchester County Supreme Court Index Number 27830/07. The Rojas complaint alleged that, despite the fact that the sellers owned two parcels comprising Lot No. 8, the contract of sale and deed purported to sell only a portion of the subject property, the house

parcel. The complaint alleged the defendants failed to disclose that the subject property was illegally subdivided by deed into the house parcel and remaining parcel without the permission, consent, or authorization of the Town of Greenburgh, and that due to materially false representations about the true nature and condition of the title issues involving the subject property, Rojas only received the house parcel at the time of closing. Rojas alleged that the illegal subdivision of the parcel created an objection to title, rendering title unmarketable. As is relevant herein, Rojas asserted a cause of action against Herrick for legal malpractice, and asserted three causes of action against Statewide, sounding in breach of contract, negligence, and breach of insurance agreement.

Rojas claimed that Statewide breached its contract with them by failing to properly perform, investigate, and report upon title issues. Rojas also claimed that Statewide negligently, recklessly, and carelessly failed to properly perform, investigate, and report upon title issues and failed to raise an exception to title relative to the illegal subdivision and encroachments. In its answer to the Rojas complaint, Herrick asserted a cross-claim against Statewide for contribution and indemnification, alleging that if the plaintiffs were damaged, such damages were caused by the negligent, intentional, or reckless conduct, acts, or omissions of Statewide and therefore, Herrick would be entitled to judgment over against Statewide for any judgment plaintiff may recover against Herrick.

Following motions to dismiss by the various defendants, the only remaining defendant at the time of trial was Herrick. By decision and order entered on June 29, 2010, the Hon. William J. Giacomo, J.S.C., granted Statewide summary judgment dismissing Rojas' claims for negligence and breach of insurance contract. The court initially denied Statewide summary judgment on the breach of contract cause of action, stating "[i]n view of the fact that the tax lot issue was subsequently discovered . . . there is clearly a question of fact regarding whether Statewide breached its contract with plaintiffs to perform a proper title search which included a notation that the portion of Lot 8 being purchased by plaintiffs was part of a larger lot for which there was no filed subdivision in the Town of Greenburgh." It further held that "[u]nder the contract for searching titles the defendant may be liable for any damages which its negligence may have imposed upon the plaintiff," and that "liability can arise in the event the search is performed in a negligent manner."

Thereafter, Statewide moved to reargue Justice Giacomo's denial of summary judgment on Rojas' breach of contract claim. The motion was opposed by Rojas, who argued Statewide should be held liable for failing to properly conduct a title search and report title defects. Defendant Herrick also opposed Statewide's motion and moved for summary judgment against the plaintiffs. In Paul Herrick's affidavit dated December 22, 2010, he argued:

"The title report prepared by Statewide . . . was defective in several significant respects. First, the title report failed to disclose that the property plaintiffs had contracted to purchase did not conform with the legal description and was only a portion of the tax lot owned by sellers, Andrew and Karen Paine ("the Paines"). Second, the title report included an outdated tax map, which did not include current information regarding the tax lot associated with the Paines' property. As a result of these errors of omission

by Statewide, I was unable to advise my client regarding their options under the contract, including their option to terminate the transaction upon receipt of the title report.”

By decision and order dated September 30, 2011, the court granted reargument to Statewide, and upon reargument, dismissed Rojas’ breach of contract claim against Statewide. The court opined:

“First, Schedule A to the deed clearly identifies the subject property as on a ‘portion of Lot 8,’ as opposed to the entire tax lot. Accordingly, Statewide examined the title records and issued a title report pertaining to that portion of Lot 8 as described in Schedule A. Secondly, the title report did include a copy of the quitclaim deed to the Paine’s who retained the remaining portion of Lot 8. Therefore, Statewide fulfilled its contractual obligations to Plaintiffs by examining title and issue a title report for the parcel being conveyed to Plaintiff—namely, the portion of Lot 8.”

The September 30, 2011 decision and order also denied Herrick’s motion for summary judgment. The court found issues of fact remained whether Herrick exercised reasonable skill and knowledge in the real estate transaction in light of the Schedule A description, which specifically stated the sale was for only a portion of lot 8, and whether such failure, if any, was the proximate cause of Rojas’ damages.

Rojas and Herrick appealed the September 30, 2011 decision and order, however, Rojas withdrew their appeal. Herrick’s appeal of the September 30, 2011 decision dismissing plaintiff’s breach of contract claim against Statewide is fully submitted and is awaiting an oral argument date from the Appellate Division, Second Department.

Herrick made an application to stay the trial pending the appeal, which was denied. Accordingly, on June 12, 2012, the matter was referred to the Hon. Bruce L. Tolbert, J.S.C., for trial. Before the trial commenced, Herrick indicated that it intended to concede it was negligent in its representation of Rojas, and submit the issues of proximate cause and damages to the jury. At that time, Statewide moved to dismiss Herrick’s cross-claim for contribution and indemnification. Statewide argued that because the June 29, 2010 and September 30, 2011 decisions and orders dismissed all of Rojas’ causes of action against Statewide, and resolved in its favor the issue of whether Statewide provided Herrick and Rojas with a faulty title report, Herrick’s cross-claim should be dismissed as a matter of law. Herrick opposed the motion. After hearing oral argument, Justice Tolbert granted the motion and dismissed Herrick’s cross-claim against Statewide, leaving Herrick as the only remaining defendant.

Before the trial began, Herrick stipulated that it was negligent in its representation of Rojas in that it failed to advise Rojas that the property they purchased was subject to an illegal subdivision. However, the issues of proximate cause and damages were submitted to the jury. Following a seven-

day trial, upon finding that “but for” Herrick’s negligence Rojas would not have sustained damages, the jury returned a verdict in favor of Rojas against Herrick for legal malpractice in the sum of \$252,652.00, plus interest, costs, and disbursements.

Herrick now commences the instant action against Statewide, seeking contribution and indemnification. The complaint alleges that Statewide negligently performed a search of the public records, and due to Statewide’s faulty title search, Herrick was not informed that the property upon which the house parcel was located constituted only a portion of the tax lot. Herrick alleges that had it been properly informed by Statewide that the property was located on only a portion of the tax map, Herrick would have advised Rojas to exercise their contractual rights to rescind the contract and refuse to purchase the property.

Statewide moves to dismiss the complaint pursuant to CPLR § 3211 (a) (1) and (5) on grounds that a defense is based upon documentary evidence and the cause of action may not be maintained because of collateral estoppel and res judicata. Herrick opposes the motion, arguing that it relied upon Statewide’s faulty title report in counseling Rojas to purchase the property, which resulted in the damages sustained by Rojas. Herrick claims it was forced to concede liability and accept responsibility for the acts of its agent, Statewide, in preparing a defective title report, and that the issue of Statewide’s liability to Herrick was never determined in the prior action.

### **DISCUSSION/ANALYSIS**

A party may move for judgment dismissing one or more causes of action upon the grounds of collateral estoppel and/or res judicata pursuant to CPLR §3211 (a) (5). Further, a party may move to dismiss a cause of action pursuant to CPLR §3211 (a) (1) where the movant has a defense founded upon documentary evidence. “The doctrines of res judicata and collateral estoppel are employed to facilitate a prompt and nonrepetitious judicial process” (Kreindler, New York Law of Torts §19:40 [West’s NY Prac Series 2012]).

#### **Collateral Estoppel**

“Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity” (*Buechel v Bain*, 97 NY2d 295, 303 [2001]). “This doctrine applies only ‘if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action’” (*City of New York v Welsbach Electric Corp.*, 9 NY3d 124,128 [2007] citing *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]).

The crux of plaintiff’s complaint is that Statewide performed a faulty title search in that it failed to inform Herrick that the property upon which the house parcel was located constituted only a portion of the tax lot. Herrick alleges that had it been properly informed by Statewide that the



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