

MICHAEL C. SENISCH)
)
 Plaintiff,)
)
 v.) C.A. No. N26C-06-211 SSA
)
)
 W. ROBERT COMEGYS, individually)
 and as Listing Agent,)
)
 MICHAEL L. MCGAVISK, individually)
 and as Broker of Record,)
)
 Defendants.)

Decided: September 1, 2026

Plaintiff's Motion to Amend Complaint: Granted
Defendant Comegys' Motion to Dismiss: Granted

Litigants are not entitled to a second bite at the apple by re-filing under a new legal theory, with a new judge, after a claim is denied. For the past five years, Plaintiff has pursued another lawsuit in this Court, with an impending trial date.¹ The Court will refer to that litigation as the original action throughout this decision. After the Judge in the original action denied his ability to file a fourth Amended Complaint to add claims related to an alleged discrepancy in the size of his home, Plaintiff filed this lawsuit. Eight years after the purchase of his home, Plaintiff seeks

¹ C.A. No. N21C-11-197 JEA.

to bring an individual Defendant back into Court, after having previously agreed to dismiss all claims against him.

At the outset, the Court must address a procedural matter. Plaintiff filed a Motion for Leave to File a Proposed Second Amended Complaint.² The request is granted pursuant to Rule 15(a). For the reasons that follow, the Amended Complaint is dismissed.

The Original Action

The original action concerns the sale of a residential property in 2018.³ Plaintiff was the buyer. The Complaint has been amended three times. The substance of the original action is breach of contract, fraud, fraudulent misrepresentation, and negligent construction related to the Seller's Disclosure.

On April 12, 2022, Plaintiff stipulated to the dismissal, with prejudice, of Defendant Comegys. Comegys is a principal of BCC Investment Properties, LLC.⁴ BCC remains a defendant in the original action. Earlier this year, a Judge of this Court considered Plaintiff's fourth request "to add fraud allegations against BCC

² D.I. 24.

³ See Complaint C.A. No. N21C-11-197 JEA.

⁴ See Amended Complaint in this case at ¶¶ 6, 39.

related to the square footage of his home”⁵ to the original action. The request was denied on February 9, 2026.

The Judge assigned to the original action determined the request to amend was “futile.”⁶ The Court determined “Senisch has had ample time to discover and litigate such a significant discrepancy in the square footage of his home.”⁷ The Judge found a second reason these proposed claims would be futile “based on the incorporation clause of the Agreement of Sale by which Senish disclaims any reliance on any representations outside of that document.”⁸

This Action

This litigation, again brought by Mr. Senisch, relates to the sale of the same residential property. Plaintiff’s Amended Complaint assert a claim pursuant to the Delaware Consumer Protection Act against Mr. Comegys. The 34-page initial Complaint,⁹ did not mention the original action. The initial Complaint made no reference to the stipulation of dismissal against Comegys four years ago, in the original action.

⁵ *Senisch v. BCC Investment Properties, LLC*, 2026 WL 372893 *2 (Del. Super.).

⁶ *Id.* at *3.

⁷ *Id.* at *4.

⁸ *Id.*

⁹ C.A. No. N26C-06-211 SSA, D.I. 1.

Comegys moved to dismiss this action on grounds that it is barred by *res judicata*, is time-barred, and fails to state a claim.¹⁰ Comegys also asks this Court to impose sanctions. The cat out of the bag with Defendant's Motion to Dismiss, Plaintiff's Proposed Second Amended Complaint acknowledges the original action but seeks to differentiate it. In supplemental briefing, Plaintiff argues *res judicata* and the statute of limitations do not apply because of "the facts and information reasonably available to Plaintiff before Comegys's 2022 dismissal..."¹¹

Statute of Limitations

It is undisputed that the applicable limitations period is three years.¹² Tolling is possible, in limited circumstances. In this case, Plaintiff bears the burden of establishing tolling, as he seeks to assert its application.¹³ Plaintiff invokes the discovery rule, wherein "the statute is tolled where the injury is 'inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of.'"¹⁴ For application of this doctrine "there must have been no observable or objective factors to put a party on notice of an injury."¹⁵

¹⁰ D.I. 13.

¹¹ D.I. 28. at p. 7.

¹² 10 Del. C. § 8106; D.I. 28 at p. 9.

¹³ *Banner v. Hockessin Chase, L.P.*, 2022 WL 1537382 * 5 (Del. Super.) *citing Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478 (Del. Super.).

¹⁴ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319-320 (Del. 2004) *quoting Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838 (Del. 2004).

¹⁵ *Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478 * 8 (Del. Super.) *quoting In re Dean Witter Partnership Litigation*, 1998 WL 442456 at *5 (Del. Ch.).

Res Judicata

“[R]es judicata extends to all issues which might have been raised and decided in the first suit as well as to all issues that were actually decided.”¹⁶ This doctrine is best understood as promoting efficiency and it “prevent[s] vexatious litigation.”¹⁷ Based upon the guidance from the Delaware Supreme Court in the *LaPoint*¹⁸ decision, if the following factors apply, then this claim is barred:

- (1) The original court had jurisdiction over the subject matter and the parties;
- (2) The parties are the same, or in privity;
- (3) The original action or its issues are the same as the instant case;
- (4) There was an adverse decision;
- (5) The decision in the prior action was final.

Analysis

These issues are straightforward. Plaintiff has been the homeowner since 2018. He concedes that the statute of limitations is a bar unless tolling is applicable.¹⁹ Tolling pursuant to the discovery doctrine is not applicable to a discrepancy (by half) related to the size of the home which Plaintiff has owned for

¹⁶ *Lapoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191-2 (Del. 2009).

¹⁷ *Id.* at p. 191.

¹⁸ *Id.* citing *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1092 (Del. 2006).

¹⁹ See Plaintiff’s Supplemental Brief, at p. 9. “Absent tolling, the November 28, 2018 purchase would place the claim facially outside the three-year limitations period.”

eight years. The facts within the Amended Complaint do not enable Plaintiff to carry his burden of establishing the statute of limitations period was tolled.

Plaintiff claims breach of the Delaware Consumer Protection Act because he maintains “historical professional records” reflect a discrepancy in square footage from how the home was marketed.²⁰ Plaintiff claims the size discrepancy was inherently unknowable to him until Tyler Technologies conducted a reassessment of the property. Plaintiff alleges the Tyler Technologies reassessment prompted him to investigate “objective governmental or professional-record information contradicting the marketed square-footage representation.”²¹

Plaintiff’s claim is that the home was marketed to him as 5,995 feet. The Complaint alleges historical residential records reflect approximately 3,375 square feet. According to Plaintiff, another sale record reflects 3,325 available square feet.

Despite Plaintiff’s allegation that this was all unknown to him until the Tyler Technologies report, his Amended Complaint acknowledges “Plaintiff and his wife, [were] assisted by a licensed Redfin real estate agent...”²² Despite that assistance through the sale process, paragraph 27 of Plaintiff’s Amended Complaint asserts “these historical “Residential” IDX records were not available to him (Plaintiff)

²⁰ Comegys also argues Plaintiff fails state a claim. As this decision dismisses pursuant to statute of limitations and res judicata, that will not be addressed.

²¹ Plaintiff’s Supplemental Briefing at p. 11.

²² Amended Complaint, ¶ 13.

before settlement because they were accessible *only through licensed real estate professionals*.”²³

Plaintiff asserts the discrepancy recently became known to him “through governmental sources and a licensed Delaware real estate professional.”²⁴ Therefore, Plaintiff utilized accessible governmental sources and a real estate agent—both were also available to him in 2018. Finally, and at its most basic, the Complaint alleges a discrepancy in the size of the home by half. The Court finds that is observable. It was observable as of 2018. The statute of limitations is a bar to this claim and tolling is unavailable on the facts as alleged by Plaintiff.

The Court also finds *res judicata* applies. This case against Comegys alleging a violation of the Delaware Consumer Protection Act was filed in the same Court as the original action, satisfying the first factor. Plaintiff’s later filings reveal Comegys was both in the original action and Comegys is in privity with a defendant remaining in the original action. Not only does the original action involve the same real estate transaction, but Plaintiff also sought to add these very same claims, packaged differently, just months ago. The Judge in the original action considered the request to add these claims and issued a written decision, denying the request. The decision

²³ Amended Complaint, p. 27.

²⁴ Amended Complaint ¶ 31.

denying the fourth motion to amend the complaint was final. For these reasons, *res judicata* also bars this claim.

Sanctions

Comegys seeks Rule 11 sanctions. Rule 11(c)(1)(A) applies to sanctions made by motion. The Rule requires the motion requesting sanctions be served upon the opposing party but not immediately filed with the Court. This is designed to provide time for the opposing party to consider and withdraw the filing.

The Court recognizes the time and expense incurred by Comegys in defending this action. The Court is particularly troubled by the filing of the initial Complaint without any reference to the pending litigation or this Court's denial of his motion on February 9, 2026. Having said that, there are specific procedural requirements the Court must honor for sanctions requested under this posture. Certainly, this Court could issue a rule to show cause, pursuant to Rule 11(b). However, at this point, this case is dismissed. It is the Court's intention that the parties prepare for their upcoming day in Court and therefore a Rule to Show Cause will not be issued. The Motion to Dismiss is granted.

IT IS SO ORDERED.

/s/Sonia Augusthy
Judge Sonia Augusthy