2008 NY Slip Op 32691(U)

ANTHONY LAZZARINO, Individually and as Successor-in-Interest to Windwood/Glen Productions, Inc.

v.

WARNER BROS. ENTERTAINMENT, INC., WARNER BROS. PICTURES, INC., UNIVERSAL STUDIOS, INC., UNIVERSAL PICTURES COMPANY, INC., HYPNOTIC, THE KENNEDY/MARSHALL COMPANY, FRANK MARSHALL, HENRY MORRISON, DOUGLAS LIMAN, THE ESTATE OF ROBERT LUDLUM, JEFFREY M. WEINER, As Personal Representative, MARCUM & KLIEGMAN, L.L.P., and JEFFREY M. WEINER, Individually, Defendants.

Index No.: 602029/2005, Motion Seq. No. 007.

Supreme Court of the State of New York, New York County.

September 15, 2008.

Anthony Lazzarino, New York, NY, Pro Se Plaintiff.

Mitchell Schuster, Esq., Thomas L. Friedman, Esq., Meister Seelig & Fein LLP, Two Grand Central Tower, New York, NY, Attorneys Or the Estate of Robert Ludlum.

Marshall Beil, Esq., McGuire Woods LLP, New York, NY, Attorney for Warner Bros. Defendants and Defendant Henry Morrison.

Richard Dannay, Esq., Cowan, Licbowitz & Latman, P.C., New York, NY, Attorney for Universal Defendants, Marshall Defendants, and Liman Defendants, Attorneys for Defendants.

FRIED, J.

Before me are two motions for summary judgment. For the reasons stated below, all counts of the amended complaint are dismissed, except for one breach of contract count against defendant Henry Morrison, which remains. The remainder of the action is stayed.

The original complaint in this action was filed on June 6, 2005 by plaintiff Anthony Lazzarino, individually and as successor-in-interest to Windwood/Glen Productions, Inc., ("Lazzarino"), alleging breach of contract and tortious interference with contract against Defendants Warner Bros. Entertainment, Inc. and Warner Bros. Pictures, Inc. (collectively, "Warner"), Universal Studios, Inc. and Universal Pictures Company, Inc. (collectively, "Universal"), the Estate of Robert Ludlum ("Ludlum"), Jeffrey M. Weiner, Individually and as

Personal Representative of the Ludlum Estate and Marcum & Kleigman, L.L.P. (collectively, the "Wiener defendants"), Hypnotic and Douglas Liman (collectively, the "Liman defendants"), Kennedy/Marshall Company and Frank Marshall, (collectively, the "Marshall defendants"), and Henry Morrison ("Morrison").

To be more precise, the original complaint asserted one count of breach of contract against Morrison, Ludlum, and Warner; and seven counts of tortious interference each against Morrison, Ludlum, the Liman defendants, Warner, the Marshall defendants, Universal, and the Wiener defendants.

I described the factual allegations of the original complaint, including the relationships between the parties, with some care in my October 30, 2006 memorandum decision, *Lazzarino v. Warner Brothers Entertainment, Inc.,* 13 Misc.3d 1230(A), 831 N.Y.S.2d 354 (Sup. Ct. Oct 30, 2006) (the "October 2006 decision"). I will assume the reader's familiarity with it.

At the heart of Lazzarino's complaint[1] is the allegation that, under a 1981 agreement with Orion Pictures Company— Warner's predecessor in interest Lazzarino had a "right to match" the sale price of film rights to *The Bourne Identity* by Warner to a third party (the "Orion-Windwood agreement").[2] tinder an agreement concurrently executed with Ludlum, the author of *The Bourne Identity,* Warner acquired the film rights (the "Orion-Ludlum agreement"). A 1982 settlement agreement (the "1982 settlement") resolved a subsequent dispute between plaintiff on the one hand and Ludlum and Morrison, Ludlum's literary agent, on the other. According to Lazzarino, under the 1982 settlement, Ludlum and Morrison were obligated to do whatever was required to "effectuate the terms" of the Orion-Windwood agreement.

Some years later, Warner and Ludlum entered into agreements, by which Warner assigned the film rights back to Ludlum. One was signed on March 12, 1987 (the "1987 agreement"), and the last one on May 4, 1999 (the "1999 agreement"). Ludlum then sold the film rights to Universal in a November 2, 1999 agreement executed by Ludlum and Universal (the "1999 Ludlum-Universal agreement"). Around June 14, 2002, Universal released the blockbuster film, *The Bourne Identity,* starring Matt Damon.

In my October 2006 decision, I substantially denied a motion to dismiss the original complaint, concluding that: (1) plaintiff had stated a claim for breach of contract against Morrison and Ludlum, based on the 1982 settlement; (2) plaintiff could amend his complaint to add a cause of action against Warner for breach of implied covenant of good faith and fair dealing; (3) although the statute of limitations had run on the breach of contract claim against Warner, the contract claim was not dismissed based on plaintiff's equitable estoppel defense, because the facts necessary to prove equitable estoppel were in the possession of defendants; and (4) plaintiff had stated a timely claim for tortious interference with contract against Morrison and Ludlum.[3] I gave plaintiff leave to file an amended complaint.

On January 4, 2007, plaintiff filed an amended complaint in 14 counts: (1) breach of contract against Ludlum (Counts I and II); (2) breach of contract against Universal (Count

III); (3) breach of contract against Morrison (Counts IV and V); (4) breach of contract against Warner (Count XII); (5) breach of implied covenant of good faith and fair dealing against Warner (Counts XIII and XIV); (6) tortious interference with contract against Morrison (Counts VI and VII)[4]; (7) tortious interference with contract against the Liman defendants (Count VIII); (8) tortious interference with contract against the Marshall defendants (Count IX); and (9) tortious interference with contract against the Weiner defendants (Counts X and XI). A motion to dismiss Counts X and XI by the Wiener defendants *was granted;* a final judgment in their favor was issued on July 12, 2007.

On February 2, 2007, Universal and the Liman and Marshall defendants tiled an Answer, in which they asserted affirmative defenses that the complaint failed to state a claim and was barred by the statute of limitations. Warner and Morrison also filed Answers.

In an Order dated June 8, 2007, I granted a motion by all remaining defendants (Mot. Seq. No. 005) to limit initial discovery to the statute of limitations and equitable estoppel issues only: *i.e.,* "whether plaintiff was induced by fraud, misrepresentations, or deception by any of the defendants to refrain from filing a timely action, including whether defendants concealed from him the existence of the alleged 1986, 1987, or 1999 Ludlum agreements."[5]

Limited discovery ensued; defendants produced over 1800 pages of documents; plaintiff produced 518 pages of documents. Defendants took plaintiff's deposition; plaintiff did not request depositions from defendants.

The discovery period has now closed. Defendants have filed two separate motions for summary judgment. The first is a motion to dismiss the tortious interference claims against the Lillian and Marshall defendants as barred by the statute of limitations, and to dismiss the contract claim against Universal for failure to state a claim (Motion Seq. No. 007). In the second motion, in which all remaining defendants join, Warner, Morrison, and Ludlum move to dismiss the complaint as barred by the statute of limitations (Motion Seq. No. 008).

Plaintiff has filed an opposition to both motions. To be more accurate, plaintiff has filed two submissions opposing defendants' motions, without indicating which of them corresponds to each motion. One of plaintiff's submissions is entitled, in part, an "Answer to Defendants' Notices of Motion for Summary Judgment and Memoranda of Law in Support Thereof," and the second one is called an "Affidavit in Support of Memorandum of Law in Answer to Defendants' Motion to Dismiss the Complaint." I will call the first plaintiff's "Memorandum" and the second his "Affidavit."

Plaintiff has styled his Memorandum as a cross-motion to dismiss pursuant to C.P.L.R. § 3212. In it, he makes various accusations against the defendants' attorneys, their clients, and non-parties, including a "conspiracy to defraud, obstruction of justice and obstructive interference with plaintiff's rights under the federal law for equitable access and even-handed dealings in this Court." (Plf's Memo. at 5.) He alleges "the Court's cooperation" with defendants' alleged wrongdoing and lists four decisions of this Court that he alleges to be "collusive and/or otherwise disingenuous." Plaintiff "requests this Court to

recuse itself, i.e. (Federal Question) and allow the disingenuous, fraudulent quagmire of a case to be laid out before the Federal Court and the light of day." (Plt's Memo. at 5.) Plaintiff also repeals various allegations he made in his original complaint concerning General Electric and his former attorneys, which were dealt with in my October 2006 decision, (October 2006 Decision at 25.)

To the extent that plaintiff asks me to recuse myself, I decline to do so, as I find no basis to do so.

At oral argument, in response to my inquiry, plaintiff clarified his allusion to a "federal question" in the Memorandum. He explained that he intends to file a federal lawsuit against the same parties and then asked me to stay this action "until [I] get the federal papers." (Trans. at 47 (Mar. 25, 2008.)

Summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." C.P.L.R. § 3212. "A party moving for summary judgment is obligated to prove through admissible evidence that she is entitled to judgment as a matter of law." *Pastoriza v. State,* 108 A.D.2d 605, 606 (1st Dept. 1985). The party opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980).

"In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under [C.P.L.R. §] 3211(a)(7), [my] task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." *Campaign for Fiscal Equity, Inc. v. State,* 86 N.Y.2d 307, 318 (1995) (internal quotations omitted). "[D]ismissal is warranted only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law." *Wilhelmina Models, Inc. v. Fleisher,* 19 A.D.3d 267, 268-69 (1st Dept. 2005).

Motion for Summary Judgment by Warner, Morrison, and Ludlum (Sequence #008)

(a) *Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing Claims Against Warner*

Defendants ask me to dismiss the contract claims against Warner as barred by the statute of limitations.

Count XII alleges that Warner breached the Orion-Windwood agreement by entering into the 1987 and 1999 agreements with Ludlum, without plaintiff's consent, which provide for the reversion or film rights back to Ludlum after Warner had made a mini-series based on *The Bourne Identity.* (Compl. ¶ 226.) Counts XIII and XIV allege that Warner breached an implied covenant of good faith and fair dealing with respect to the Orion-Windwood agreement, by entering into the 1987 and 1999 agreements without plaintiff's consent, and by authorizing the Liman defendants to package the film project between 1996 and May 1999. (Compl. ¶¶ 228, 231.)

As my October 2006 decision explains in detail, the six-year statute of limitations has run on any contract claim against Warner based on Lazzarino's alleged "right to match" in the Orion-Windwood agreement. The statute on that claim had to have started running when Ludlum allegedly executed the last agreement with Warner involving the film rights on May 4, 1999. (Compl. ¶ 108.) This was over six years before plaintiff filed this lawsuit, on June 6, 2005. The statute of limitations has also necessarily run on plaintiff's claim for breach of an implied covenant of good faith and fair dealing against Warner, which is based on the same events.

Plaintiff has not contested defendants' contention that the statute of limitations has run on these claims. Rather, plaintiff has asserted that defendants "have acted in concert to create a cover scenario of the incidents and events in order to conceal the truth, misrepresent the involvement and dealings of principals, by virtue of ongoing fraud and deceit." (Plf. Aff. at 2.)

Under the doctrine of equitable estoppel, a defendant may be estopped from pleading the statute of limitations where a plaintiff "was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Simcuski v. Saeli,* 44 N.Y.2d 442, 448-49 (1978). Equitable estoppel is an "uncommon remedy," which is "triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient." *Ross v. Louise Wise Servs., Inc.,* 8 N.Y.3d 478, 491 (2007). Assuming that the plaintiff can show that such conduct occurred, the plaintiff then has the burden of showing that the action was brought within a reasonable time after the facts giving rise to the estoppel ceased to be operational. *Simcuski,* 44 N.Y.2d at 450. To sum up: an equitable estoppel defense requires a plaintiff to show two things: (1) defendants induced the plaintiff by some fraud or deception not to file the action; and (2) plaintiff filed suit within a reasonable time after the veil of deception was lifted.

Plaintiff was given ample time to conduct discovery about the equitable estoppel issues. I have carefully reviewed all of the parties' submissions. Plaintiff has not submitted any evidence in support of either prong of his equitable estoppel defense, and defendants' submissions support their contention that the equitable estoppel defense does not apply here.

As to the first clement of equitable estoppel: plaintiff has not pointed to any evidence that Warner and the other defendants committed some fraud or deception so as to induce him not to file this action, such as concealing from him the existence of the 1987 and 1999 agreements. Attached to plaintiff's Affidavit are various documents, including: (a)

documents relating to the Orion-Windwood agreement, (b) a rejected proposed settlement agreement with some of the defendants, (c) documents purporting to show that plaintiff could have produced a film based on *The Bourne Identity* in Russia, (d) correspondence and news clippings from the late 1950's and 1960's concerning other film projects, and (e) a letter from Warner to plaintiff's then-attorney, dated August 12, 2005, stating that Warner had no record of any agreements between Orion and Ludlum before 1986. None of these documents tend to show that Warner and the other defendants committed fraud or deception to prevent plaintiff from discovering that Warner and Ludlum were entering into new agreements concerning the film rights in the mid-1980s and in 1999.

Moreover, the evidence submitted by defendants indicates that Universal's acquisition of the film rights to *The Bourne Identity* was publicly disclosed in the trade press as early as mid-1999. (Beil Aff. Exs. P, S.) At his deposition, Lazzarino admitted that he was familiar with these sorts of publications, (Lazzarino Trans. at 23-26, 69.)

Defendants also submitted evidence that, at least by 2001, Lazzarino knew that Warner was involved in the film project. (Lazzarino Trans. at 33-37.) Lazzarino testified that he had a conversation with Warner's general counsel in 2000 or 2001, in which he was told that Warner had entered into new agreements with Ludlum concerning *The Bourne Identity* back in 1982 or 1983, (Lazzarino Trans. at 36-43.) Plaintiff has not alleged that the Warner representative made a misrepresentation during this conversation, and it does not indicate that Warner concealed the existence of the 1987 and 1999 agreements.

Lazzarino has also testified that lie spoke with someone "high up" at Universal's general counsel's office after the film came out in June 2002. Plaintiff has not alleged, however, that the Universal representative made a misrepresentation during that conversation or concealed the existence of the 1987 and 1999 agreements, Lazzarino has testified only that this person told him that Lazzarino's name never came up in discussions about the film. (Lazzarino Trans. at 137-39.)

The undisputed evidence is that defendants publicly revealed Universal's involvement in the film project at least since mid-1999, and plaintiff was in fact aware that Warner had entered into new contracts with Ludlum concerning the film rights at least by 2000 or 2001. Plaintiff has submitted no evidence that defendants engaged in fraud or misrepresentation to prevent him from learning about the contracts at issue. Consequently, plaintiff has not raised a disputed issue of fact in support of his allegation that Warner and the other defendants committed some fraud or deception so as to induce him not to file this action earlier.

Plaintiff also falls short of the second element of equitable estoppel, because he has not provided a reason why he waited over four-and-a-half years after the alleged veil of deception was lifted to bring this lawsuit.

Lazzarino testified at his deposition that he learned from friends in the industry in early 2000 that Universal was going to make the film, (Lazzarino Trans. at 26-29.) Around November 6, 2000, he learned that defendant Frank Marshall would produce the film, (Lazzarino Trans.

at 60-63.) At that point he believed that his rights had been violated. (Lazzarino Trans. at 72.) He began talking to lawyers. (Lazzarino Trans. at 64-66.) The Universal film was released in June 2002. Plaintiff continued speaking with attorneys from 2000 through 2005. (Lazzarino Trans. at 64-66, 70-76, 81-89.) A draft complaint was prepared by the end of 2004. (Lazzarino Trans. at 89.) Plaintiff filially filed this complaint in June 2005.

In other words, plaintiff was convinced he had a cause of action at least by November 2000, but he did not bring suit until June 2005, and he has not offered a good reason for having waited that long. I conclude that, as a matter of law, plaintiff did not bring this suit within a reasonable time. Consequently, plaintiff's equitable estoppel defense fails, and Warner is entitled to summary judgment on the contract-based causes of action. Accordingly, Counts XII, XIII and XIV are dismissed.

(b) *Breach of Contract Claims Against Ludlum and Morrison*

Defendants also move to dismiss the three contract claims against Ludlum and Morrison as barred by the six-year statute of limitations.

Count I alleges that Ludlum breached the Orion-Windwood agreement by failing to offer plaintiff his right to match when Ludlum sold the film rights to Universal. (Compl. ¶ 186.) This allegation appeared for the first time in the amended complaint. Plaintiff never sought permission to add this allegation, and permission has never been granted; I find no reason to grant permission now. Therefore, Count I is dismissed.

Count II alleges that Ludlum breached the 1982 settlement when he entered into agreements with Warner Bros. Television (WBTV) and Warner Bros. Television Production (WBTP), with the intent of extinguishing plaintiff's right to match.[6] (Compl. ¶ 189.) Count IV alleges that Morrison breached the 1982 settlement by negotiating the 1987 and 1999 Ludlum agreements. (Compl. ¶ 195.)

Since the 1987 and 1999 agreements between Warner and Ludlum were executed on or before May 4, 1999, any negotiations must have taken place more than six years before this lawsuit was filed, Therefore, the statute of limitations has run on both of these claims. Since the equitable estoppel defense has failed, as discussed above, Counts II and IV must be dismissed.

Count V alleges that Morrison breached the 1982 settlement, by negotiating Ludlum's sale of the film rights to Universal in November 1999. (Compl. ¶ 198.) As plaintiff filed suit less than six years later, this claim is not barred by the six-year statute of limitations. Therefore, there is no basis upon which to dismiss Count V.

(c) *Tortious Interference Claim Against Morrison*

Counts VI and VII assert that Morrison tortiously interfered with the Orion-Windwood agreement when he negotiated the "amendments to the Orion-Ludlum agreements" and when he negotiated with Universal and the Liman and Marshall defendants on Ludlum's behalf in connection with the November 1999 sale of film rights. (Compl. ¶¶ 202, 207.)

The original complaint also contained a tortious interference count against Morrison, and that count was sustained against a motion to dismiss. As plaintiff has not made the argument that the motion to dismiss Counts VI and VII is barred by collateral estoppel, such an argument may have been waived.[7] But even if I were independently to consider whether defendants are collaterally estopped from seeking dismissal of these counts, I would conclude that they are not collaterally estopped, since the issues raised in the amended complaint are distinct and separate from those raised in the original complaint.

Unlike Counts VI and VII of the amended complaint, the original complaint had alleged only one count of tortious interference against Morrison: Count II. That count alleged generally that Morrison "deliberately interfered" with ""[v]alid contracts" between Lazzarino, Ludlum and Warner, and that his actions caused either Ludlum or Warner to breach a contract, causing damages to plaintiff, "commencing on June 14, 2002." (Orig. Compl. ¶¶ 53-57.) Unlike Counts VI and VII of the amended complaint, Count II of the original complaint did not specify how or when Morrison interfered, or with what contract he interfered. The original complaint nowhere alleged that Morrison negotiated the 1987 and 1999 agreements with Warner or the 1999 Ludlum-Universal agreement on Ludlum's behalf. In my October 2006 decision, based on the allegation that Lazzarino's damages from the tortious interference began on June 14, 2002, I concluded that Count II was timely.

The amended complaint tells a different story. Plaintiff alleges not one, but two counts of tortious interference by Morrison and alleges particular conduct by Morrison that amounts to tortious interference. In Count VI, the allegedly tortious conduct is negotiating "amendments to the Orion-Ludlum agreements" with Warner on Ludlum's behalf; in Count VII, the tortious conduct is negotiating the sale of film rights with Universal and the Liman and Marshall defendants on Ludlum's behalf. Plaintiff does not specify any tortious conduct by Morrison after these agreements were executed, and he omits the allegation in the original complaint that his damages from Morrison's tortious conduct began on June 14, 2002.

Based on this distinct set of allegations, I reach a different conclusion. The tortious conduct alleged in Count VI of the amended complaint occurred no later than May 4, 1999, when the 1999 agreement between Warner and Ludlum was executed. The conduct alleged in Count VII occurred no later than November 2, 1999, when the alleged negotiations culminated in the sale of the film rights to Universal by Ludlum. Therefore, these tortious interference claims against Morrison arose at least by November 1999 four-and-one-half years before plaintiff filed this lawsuit on June 6, 2005. Plaintiff has submitted no evidence that Morrison fraudulently prevented him from discovering the injury, so the equitable estoppel defense

does not apply. Accordingly, the three-year statute of limitations has run on these tortious interference claims against Morrison. Counts VI and VII are dismissed.

Motion for Summary Judgment by Universal, the Liman Defendants, and the Marshall Defendants (Sequence #007)

(a) *Breach of Contract Claim Against Universal*

Count III alleges that Universal was a "third party purchaser" of Orion's film rights under the Orion-Windwood agreement, and that it breached the Orion-Windwood agreement by failing to pay plaintiff his share of the gross receipts from *The Bourne Identity.* (Compl. ¶¶ 191-92.) Universal contends that it cannot be charged with having breached the Orion-Windwood agreement, because Universal is neither a party to nor an assignee of that agreement. Plaintiff has not challenged the authenticity of the Orion-Windwood agreement, as submitted by defendants. Plaintiff has not alleged that Universal is a party to any other-contract with himself Therefore, Count III is dismissed.

(b) *Tortious Interference Chums Against the Liman and Marshall Defendants*

In Counts VIII and IX, the complaint alleges that the Liman defendants intentionally procured a breach of the Orion-Windwood agreement by Ludlum, by negotiating with Ludlum and Universal for the sale of the film rights. Plaintiff also makes the surprising allegation that Ludlum, not Warner, was Orion's successor in interest to the rights and obligations of the Orion-Windwood agreement. Compl. ¶¶ 210, 214.) (Since the parties previously agreed that Warner, not Ludlum, succeeded to Orion's rights and obligations under the Orion-Windwood agreement, I suppose that plaintiff may be referring here to the Orion-Ludlum agreement.)

In any case, these counts are barred by the three-year statute of limitations. These claims arose at least by November 1999, when the negotiations culminated in the sale by Ludlum of the film rights to Universal. Plaintiff has not pointed to any tortious conduct by these defendants after that time. This action was not filed until June 6, 2005 — over (our-and-one-half years after the claims arose. Therefore, the statute of limitations has run. Plaintiff has submitted no evidence that these defendants fraudulently prevented him from discovering the injury, so the equitable estoppel defense does not apply. Counts VIII and IX are dismissed.

Finally, plaintiff's application for a stay is granted, as there appears to be no principled reason not to grant his request.

In conclusion, it is

ORDERED that the motion to dismiss by Universal and the Liman and Marshall defendants (Motion Seq. No. 007) is granted, and Counts VIII and IX of the complaint are severed and dismissed; and it is further

ORDERED that the motion to dismiss by Warner, Morrison, and Ludlum (Motion Seq. No. 008) is granted in part, and Counts I, II, IV, VI, VII, XII, XIII, and XIV of the complaint arc severed and dismissed; and it is further

ORDERED that further prosecution of and proceedings in the remainder of this action, which consists only of Count V, shall be stayed, except for an application to vacate or modify the stay, until an application is made by order to show cause by either party to vacate or modify the stay; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in accordance with this decision.

[1] All complaint citations will be to the amended complaint, rather than to the original complaint, unless otherwise noted.

[2] Warner, according to the complaint, inherited the rights and obligations of Orion to the Orion-Windwood agreement and the Orion-Ludlum agreement.

[3] This motion to dismiss was filed only by Warner, Morrison, Ludlum and the Wiener defendants. The other defendants did not join in.

[4] Plaintiff dropped his tortious interference claim against Ludlum in the amended complaint.

[5] In a separate Order dated June 8, 2007, I granted a motion by Warner, Ludlum, the Wiener defendants, and Morrison (Mot. Seq. No. 004) to strike portions of plaintiff's amended complaint to accord with the C.P.L.R. and my instructions.

[6] As I noted in my October 2006 decision, the relationship between Warner on the one hand and WBTV and WBTP on the other has not yet been clarified in this litigation. Accordingly, I will continue to treat them as the same entity for purposes of this motion.

[7] A party may waive its right to assert collateral estoppel or res judicata if he fails to assert it. *Pace v. Perk,* 81 A.D.2d 444, 462 (2d Dept. 1981) (defendants waived res judicata or collateral estoppel defenses by failing to assert them in their answers or in a timely-filed motion to dismiss).