

Murphy v GHD, Inc.
2019 NY Slip Op 33476(U)
November 27, 2019
Supreme Court, New York County
Docket Number: 153468/2019
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO.
153468/2019

KEVIN MURPHY, AMANDA MURPHY,

Plaintiffs,

MOTION DATE
11/27/2019

- v -

MOTION SEQ. NO.
001

GHD, INC., STERNS & WHEELER, LLC., STEARNS &
WHEELER, LLC., GHD, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20

were read on this motion to/for

DISMISSAL

Motion to dismiss by Defendants GHD, Inc., Sterns & Wheeler, LLC, d/b/a GHD, Inc. and GHD, INC., f/k/a Stearns & Wheeler, LLC, (collectively, "GHD Defendants") to dismiss the complaint, pursuant to CPLR 214-d and 3211 (a) (1), (7) & (h), is granted for the reasons stated herein.

BACKGROUND

In the instant action, Plaintiff Kevin Murphy alleges that, on February 11, 2015, he sustained personal injuries when – in the course performing work for his employer the Orangetown Sewage Department – he fell into a sewage tank. Following Plaintiff's injury, Plaintiff's litigation counsel apparently undertook an investigation and learned that, in around 2007, GHD Defendants had worked on remodeling the subject sewage tank. In sum and substance, Plaintiff alleges that GHD Defendants breached a duty "to exercise reasonable and prudent care in the development, testing, design, manufacture and inspection, of the subject sewage tank so as to avoid exposing others, including plaintiff KEVIN MURPHY, to foreseeable and unreasonable risks of harm." (Affirm in Supp., Ex. D [Complaint] ¶ 50 et seq.).

The claims in this action were previously brought under a separate index number (151182/2018) and before another judge sitting in this county. In that case, The Honorable Lynn R. Kotler, J.S.C ("Justice Kotler") noted, in a decision dated November 2, 2018, that there was

“no dispute that plaintiffs' claims against the defendant arise from professional malpractice occurring more than ten years prior to the commencement of this action.” (Affirm in Supp., Ex. B [Kottler Decision] at 1.) As such, Justice Kotler found that, pursuant to CPLR 214-d, Plaintiff was required to serve Defendants with a notice of claim as a “condition precedent to the commencement of this action”—which Plaintiff had not done. Accordingly, Justice Kotler dismissed the action, noting that Plaintiff would then have a six-month grace period to refile the action, pursuant CPLR 214-d.

In accordance with the prior order, Plaintiff having now served GHD Defendants with a notice of claim on December 12, 2018 and having refiled the action on April 3, 2019 (see NYSCEF #1), GHD Defendants now move to dismiss the complaint in this action, arguing, in sum and substance, that Plaintiff has failed to meet CPLR 214-d and 3211 (h)'s heightened pleading standard by showing that a “substantial basis in the law exists to believe that the performance” of GHD Defendants' remodeling work was negligent and that it proximately caused Plaintiff's injuries.

As will be further explained, this Court finds that Plaintiff has failed to establish a “substantial basis” for this action to proceed, and, as such, this Court grants the instant motion by GHD Defendants to dismiss the complaint.

DISCUSSION

CPLR 3211 (h) states:

“A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action ... is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to [CPLR 214-d], **shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists** to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.”

(emphasis added). CPLR 214-d and 3211(h) were added by the Legislature in 1996 to reform New York's tort law, which, at the time, “tended to facilitate marginal claims against design professionals based on defects arising long after their work was completed and the improvements for which they were initially responsible had been in the owner's possession and subject to the owner's use and maintenance.” (*Castle Vil. Owners Corp. v Greater New York Mut. Ins. Co.*, 58 AD3d 178, 183 [1st Dept 2008] [Lippman, P.J.]; *see also* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 214-d [2019] [“The purpose of CPLR 214-d is to provide ‘an expedited procedural device to quickly dispose of cases brought against a design professional more than ten years after completion that lack a basis in

substantial evidence.” [quoting Legislative Memorandum at 2614].) As the First Department has further explained:

“The ‘substantial basis’ standard set forth in CPLR 3211(h) constitutes a departure from the standard ordinarily applicable to the review of CPLR 3211 motions to dismiss for failure to state a cause of action. Rather than determine whether the allegations of the complaint when viewed most favorably to the plaintiff fall within any cognizable legal theory, **a court reviewing the sufficiency of a complaint under CPLR 3211(h) must look beyond the face of the pleadings to determine whether the claim alleged is supported by ‘such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact’** (Senate Mem. in Support at 2614). While under this standard a plaintiff need not demonstrate that the claim is supported by a preponderance of the evidence, a fair inference to be drawn from the legislative history is that CPLR 3211(h) was intended to heighten the court’s scrutiny of the complaint and thereby make it easier to dismiss a CPLR 214-d action than other types of negligence actions.”

(*Castle Vil. Owners Corp.*, 58 AD3d at 183 [emphasis added; internal citations and quotation marks omitted].)

According to Plaintiff’s notice of claim, Plaintiff asserts that GHD Defendants proximately caused his injuries by failing to construct the subject sewage tank in accordance with customary industry standards, in that GHD Defendants failed to install guardrails along the approximately twenty-foot ledge from which Plaintiff fell. (Affirm. in Supp., Ex. C [Notice of Claim] ¶ 3.) As GHD Defendants point out, upon Plaintiff’s service of his notice of claim, Plaintiff had “the right to serve a demand for discovery and production of documents and things for inspection, testing, copying or photographing” and “the right to the examination before trial of such licensed architect, engineer, land surveyor or landscape architect.” (CPLR 214-d [4].) Plaintiff does not contest GHD Defendants’ assertion that he has not availed himself of CPLR 214-d (4)’s pre-action disclosure provision. Rather, Plaintiff—through an affirmation by his counsel—asserts: (1) that the notice of claim and complaint, coupled with the affidavit of plaintiff, attached as Exhibit 1 to Plaintiff’s opposition papers, “should be deemed sufficient basis for this matter to move forward”; and (2) in the alternative, this Court should grant Plaintiff “a limited 90-day extension in which to conduct discovery” and potentially retain “an expert who, with additional discovery, should be able to provide more [of] a ‘substantial basis’, should the Court require same.” (Affirm in Opp. ¶¶ 9-10.)

The Court finds that the conclusory assertions in the notice of claim, the complaint, and Plaintiff’s affidavit submitted in opposition to the instant motion fail to establish “that a substantial basis in law exists to believe” that GHD Defendants committed professional malpractice and proximately caused Plaintiff’s injuries. As a preliminary matter—although Plaintiff suggests that he might be inclined to do so if given additional time—Plaintiff has failed to submit an affidavit from an engineering expert opining that GHD Defendants failed to meet the standard of care. (Compare *Castle Vil. Owners Corp.*, 58 AD3d at 184, with *Kenny v Turner*

Const. Co., 107 AD3d 412, 413-14 [1st Dept 2013].)¹ Plaintiff fails to mention any applicable building code, statute or industry standard with which GHD Defendants failed to comply.

In addition, this Court rejects Plaintiff's request for a 90-day extension to now conduct discovery in order to "provide more [of] a 'substantial basis'" in a potential second bite at the apple by Plaintiff. This Court reiterates that Plaintiff does not deny that he failed to avail himself of his rights to pre-action discovery, pursuant CPLR 214-d (4), which accrued immediately upon serving the notice of claim. Whether Plaintiff was aware of those rights when he filed his first action, Justice Kotler having dismissed Plaintiff's first action on November 2, 2018, Plaintiff was certainly well aware of the statutory rights and requirements from at least that date and has had ample time to obtain the necessary information and consult with an expert. Plaintiff's belated request for additional time to meet his burden of specificity would be a waste of judicial economy and would be contrary to the intent of the last sentence of CPLR 3211 (h), requiring that the Court "grant preference in the hearing of such motion."

¹ The Court notes that in the action before Justice Kotler, Plaintiff's counsel asserted—in papers dated August 6, 2018—that it had retained the services of an engineer to assist in the investigation of the matter. Plaintiff's counsel—the same law firm that represented Plaintiff in the action before Justice Kotler—makes no mention of that engineer's retention status in its opposition papers to the instant motion.

CONCLUSION

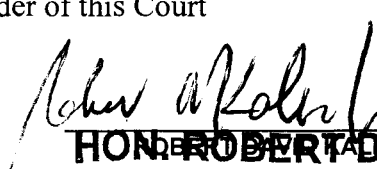
Accordingly, it is hereby

ORDERED that the motion by Defendants GHD, Inc., Sterns & Wheeler, LLC, d/b/a GHD, Inc. and GHD, INC., f/k/a Stearns & Wheeler, LLC, (collectively, "GHD Defendants") to dismiss the complaint, pursuant to CPLR 214-d and 3211 (a) (1), (7) & (h), is granted, the complaint is dismissed in its entirety as against said GHD Defendants, with costs and disbursements to said GHD Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said GHD Defendants; and it is further

ORDERED that, within 10 days of the NYSCEF filing date of the decision and order on this motion, counsel for said GHD Defendants shall serve a copy of this order with notice of entry on all parties and the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

The foregoing constitutes the decision and order of this Court

<u>11/27/2019</u>			
DATE		HON. ROBERT D. KALISH	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	J.S.C.
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE