

**Hudson Ins. Co. v AK Constr. Co., LLC**

2010 NY Slip Op 31909(U)

July 13, 2010

Supreme Court, New York County

Docket Number: 602106/09

Judge: Richard F. Braun

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

**HON. RICHARD F. BRAUN**  
**J.S.C.**

PRESENT: \_\_\_\_\_

PART 23

Index Number : 602106/2009

HUDSON INSURANCE COMPANY

vs

AK CONSTRUCTION CO LLC, *et al.*

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 4/15/10

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion to *for DISMISS*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is denied, and it is further*

*ORDERED that plaintiff is awarded \$100 motion costs against defendant AK Construction Co, LLC, to abide the award.*

*This constitutes the decision and order of this Court. See separate Opinion.*

**FILED**

JUL 19 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: New York New York

ENTER: *[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

----- X

HUDSON INSURANCE COMPANY

Plaintiff,

-against-

AK CONSTRUCTION CO. LLC, PANASIA  
ESTATES, INC. AND HEMENT MEHTA

Defendants.

----- X

Index No. 602106/09

**OPINION FILED**  
JUL 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**RICHARD F. BRAUN, J.:**

This is an action for a declaratory judgment (CPLR 3001) in relation to subrogation for property damage, consisting of six theories under which a declaration is sought: breach of contract; breach of implied and express warranties; misrepresentation; negligent, reckless, or intentional conduct as to the statute of limitations; negligent, reckless, or intentional failure to preserve subrogation rights; and for attorneys' fees and costs. Defendant AK Construction Co. LLC moves to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (5) and (7). Defendants Panasia Estates, Inc. and Hement Mehta move to dismiss the plaintiff's complaint, pursuant to CPLR 3211 (a) (1), (2), and (7).

On a motion pursuant to CPLR 3211, a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1<sup>st</sup> Dept 2004]). CPLR 3001 authorizes a court to render a declaratory judgment, but only where a present, genuine legal

controversy exists (*see New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-531 [1977]; *Mt. McKinley Ins. Co. v Corning Inc.*, 33 AD3d 51, 57 [1<sup>st</sup> Dept 2006]). CPLR 3001 provides that, if a court declines to render a declaratory judgment, the court shall state its grounds. In a declaratory judgment action in deciding a motion to dismiss the complaint for failure to state a claim, “the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him. (citations omitted)” (*Law Research Serv. v Honeywell, Inc.*, 31 AD2d 900, 901 [1<sup>st</sup> Dept 1969]).

Plaintiff issued a builders risk policy of insurance to defendant Panasia Estates, Inc. covering commercial property that said defendant owned. Defendant Panasia Estates, Inc. entered into a series of contracts pursuant to which defendant AK Construction Co. LLC performed construction and renovation work. On or about July 12, 2003, defendant Panasia Estates, Inc. made a claim with plaintiff for water damage to the interior of the building due to a rainstorm. Plaintiff denied coverage asserting that the damage resulted from deterioration and other causes not covered by the policy. Plaintiff did not assert that the damage to defendant Panasia Estates, Inc.’s building was the result of defendant AK Construction Co. LLC’s construction activities on the roof, because then plaintiff would have had to provide coverage.

Plaintiff’s claims are contingent in that, if plaintiff’s denial of defendant Panasia Estates, Inc.’s claim is found to be erroneous because it is found that defendant AK Construction Co. LLC’s roof activity caused the water damage, plaintiff would have to pay defendant Panasia Estates, Inc. Plaintiff would then be entitled to seek subrogation recovery from defendant AK Construction Co. LLC. Plaintiff seeks a declaratory judgment with respect to plaintiff’s alleged rights against

defendant AK Construction Co. LLC. Plaintiff also contends that defendant Panasia Estates, Inc. should have acted to preserve plaintiff's possible subrogation rights against defendant AK Construction Co. LLC. Plaintiff also seeks to hold defendant Hement Mehta individually liable.

In his deposition testimony, defendant Hement Mehta states that he manages the property of defendant Panasia Estates, Inc. and invested in defendant AK Construction Co. LLC. Defendant Hement Mehta is neither a party to defendant Panasia Estates, Inc.'s insurance policy, nor is he an insured. Therefore, even if Hement Mehta was an officer, director, and member of defendant Panasia Estates, Inc., and member and investor of defendant AK Construction Co. LLC, as plaintiff contends, he has no personal liability. Because there is no justiciable controversy as to him, there is no subject matter jurisdiction over him (CPLR 3211 [a] [2]; *Nasa Auto Supplies v 319 Main St. Corp.*, 133 AD2d 265, 266 [2<sup>nd</sup> Dept 1987]), and the complaint fails to state a cause of action as to him (CPLR 3211 [a] [7]; *id.*; *see Ramunno v Skydeck Corp.*, 30 AD3d 1074 [4<sup>th</sup> Dept 2006]). Thus, the complaint against him should be dismissed (*see Elkort v 490 W. End Ave. Co.*, 38 AD2d 1, 2 [1<sup>st</sup> Dept 1971]).

Defendants AK Construction Co. LLC and Panasia Estates, Inc.'s motions were not granted, based on plaintiff's claim under the doctrine of anticipatory subrogation (*Krause v American Guar. & Liab. Ins. Co.*, 22 NY2d 147, 152-153 [1968]). Such a claim may be brought either as a direct claim (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d at 175), or by impleader. Pursuant to CPLR 1007, a defendant is permitted to implead any person who is or may be liable to him for the plaintiff's claim, which language is broad enough to encompass contingent claims based on subrogation (*id.*; *Consolidated Edison Co. of N.Y. v Royal Indem. Co.*, 41 AD2d 37, 38-40 [1<sup>st</sup> Dept 1973]).

Neither the doctrine of laches nor the statute of limitations serves as a bar in this action (*see*

*Matter of Linker*, 23 AD3d 186, 189 [1<sup>st</sup> Dept 2005]). Laches arises out of the “neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. (citation omitted). The essential element of this equitable defense is delay prejudicial to the opposing party (citation omitted).” (*Matter of Barabash*, 31 NY2d 76, 81 [1972] [internal quotation mark omitted].)

Defendants AK Construction Co. LLC and Panasia Estates, Inc. have not demonstrated that plaintiff has taken such an excessive amount of time to assert its rights that defendants AK Construction Co. LLC and Panasia Estates, Inc. have been prejudiced by plaintiff’s delay.

Pursuant to CPLR 213 (2), a six year statute of limitations is applicable to “an action upon a contractual obligation or liability express or implied....” As plaintiff asserts, the claims against defendants AK Construction Co. LLC and Panasia Estates, Inc. are based on damage to real property and derive from the construction contract between defendants AK Construction Co. LLC and Panasia Estates, Inc.. Accordingly, CPLR 213 (2) is applicable. The statute of limitations began to run on July 12, 2003. This action was commenced on July 8, 2009, just short of the six year period. The statute of limitations had not run.

Thus, defendant AK Construction Co. LLC’s motion was denied. Pursuant to CPLR 8106 and 8202, plaintiff has been awarded a total of \$100 motion costs against defendant AK Construction Co. LLC, to abide the event. Defendants Panasia Estates, Inc. and Hement Mehta’s motion was granted to the extent of dismissing plaintiff’s complaint as against him.

Dated: New York, New York  
 July 13, 2010

**FILED**  
 \_\_\_\_\_  
 RICHARD F. BRAUN, J.S.C.

JUL 19 2010

NEW YORK  
 COUNTY CLERK'S OFFICE