

Shikhman v Daddi

2005 NY Slip Op 30458(U)

July 5, 2005

Sup Ct, Richmond County

Docket Number: 13642/04

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK By: PHILIP G. MINARDO
COUNTY OF RICHMOND: DCM PART 6**

-----X **DATE: July 5, 2005**
ISAAK SHIKHMAN and SOFYA SHIKHMAN,

Plaintiffs,

-against-

GEORGE DADDI,
RAPID ENTERPRISES, INC.,
WOHL & O'MARA, LLP.
and JOHN DOES 1-10,

Defendants.

DECISION & ORDER

Index No. 13642/04
Motion Nos. 345 - 001
1021 - 002

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The following papers Numbered 1 to 11 were used on these motions this 7th day of April, 2005:

	Papers Numbered
Notice of Motion to Dismiss Complaint and Affirmation in Support	1
Memorandum of Law in Support of Motion to Dismiss	2
Plaintiffs' Affirmation in Opposition to Motion	3
Plaintiffs' Memorandum of Law in Opposition to Motion	4
Reply Affirmation in Support of Motion to Dismiss	5
Reply Memorandum of Law in Support of Motion to Dismiss	6
Notice of Cross Motion for Summary Judgment and Affirmation in Support	7
Plaintiffs' Affirmation in Opposition to Cross Motion	8
Affirmation in Partial Opposition to Cross Motion	9
Memorandum of Law in Partial Opposition to Cross Motion	10
Affirmation in Reply and in Support of Cross Motion	11

Upon the foregoing papers, the motion (No. 345) to dismiss the complaint as against defendant Wohl & O'Mara, LLP. pursuant to CPLR 3211, and the cross motion (No. 1021) for summary judgment dismissing the complaint as against defendant George Daddi are denied.

The plaintiff homeowners commenced this action to recover money damages resulting from the improper construction of a retaining wall and swimming pool which extends beyond the boundaries of plaintiffs' real property located at 50 Lyman Place, Staten Island, New York and

encroaches upon the neighboring property.

Insofar as it appears on the papers presently before the Court, plaintiffs retained the defendant architect, George Daddi (“Daddi”), and the defendant builder, Rapid Enterprises, Inc., to design and construct a one-family residence with a swimming pool and a soil retaining wall. It is alleged that one or both of these defendants subsequently retained defendant Wohl & O’Mara, LLP (“Wohl & O’Mara”) to survey plaintiffs’ property and install a series of survey markers and boundary stakes which were intended to delineate the boundaries of plaintiffs’ property. Due to the “mislocation” of the retaining wall and swimming pool, allegedly discovered in May 2002, plaintiffs have been unable to obtain a certificate of occupancy for their premises.

In moving to dismiss (1) on Statute of Limitations grounds, (2) for failure to state a cause of action and (3) on a defense founded upon documentary evidence, defendant Wohl & O’Mara maintains, *inter alia*, that both the first cause of action (for negligence) and the sixth cause of action (for breach of contract as a third-party beneficiary) are barred by the three-year Statute of Limitations applicable to professional malpractice actions (CPLR 214[6]). In support, defendant relies upon an unauthenticated excerpt from the survey prepared by Wohl & O’Mara which purports to show the final location of the complained of improvements encroaching upon the neighbors’ property as they existed on April 26, 2001¹. According to movant, any alleged acts of negligence or breach of contract regarding its survey must have taken place prior to this date and, therefore, an action, as here, which was commenced more than three years later on December 16, 2004 is time-barred.

In opposition, plaintiffs maintain that Wohl & O’Mara has failed to submit any evidence in admissible form to establish that the Statute of Limitations has expired or that a land surveyor is a member of a profession to which the three-year limitations period governing professional

malpractice actions applies (CPLR 214[6]). In the alternative, plaintiffs' maintain that the motion is premature because no discovery has taken place and they have not had the opportunity to determine the "full scope of activities performed" by Wohl & O'Mara, or ascertain the days on which those activities took place.

It is well settled that when a party moves to dismiss a cause of action on the ground that it is barred by the Statute of Limitations, the movant bears the initial burden of establishing the affirmative defense by prima facie proof that the time within which to sue has expired. Once this burden is satisfied, the burden shifts to the opposing party to adduce evidentiary facts establishing that the case falls within a recognized exception to the Statute of Limitations (*see Assad v City of New York*, 238 AD2d 456 [2nd Dept 1997], *lv dismissed* 91 NY2d 848).

Here, movant's assertion that the three-year Statute of Limitations for malpractice actions applies to land surveyors is unsupported by any citation of controlling authority (*cf. Tool v Boutelle*, 91 Misc2d 464 [Sup Ct Albany Co 1977]). Under these circumstances, this Court would be loathe to expand CPLR 214(6) to include livelihoods not clearly intended by the legislature to fall within the shorter, three-year period of limitations. Moreover, even if the shorter period was to apply, movant has failed to demonstrate that the so-called "continuous treatment" exception is factually inapplicable to this case, as the full extent and timing of its rendition of services cannot be determined in the absence of discovery (*see* CPLR 3211[d]).

Turning to defendant's alternative grounds for dismissal, assuming *arguendo* the truth of plaintiffs' material allegations of fact and affording them the benefit of every possible inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *Morone v Morone*, 50 NY2d 481), the first and sixth causes of action are legally sufficient to withstand dismissal, while the purported documentary evidence is alone insufficient to negate the rendition of subsequent

services (*see* CPLR 3211[d]).

In cross-moving for summary judgment, defendant Daddi also maintains that plaintiffs' claims of negligence and breach of contract are barred by the three-year Statute of Limitations applicable to "professionals" such as architects (CPLR 214[6]). In the alternative, Daddi seeks to convert his cross claims against Wohl & O'Mara into third-party claims for contribution and/or indemnification.

In opposition, plaintiffs contend that Daddi's application was improperly brought as a cross motion and is untimely under CPLR 2215 (*see* CPLR 2103[b][2]). Although no prejudice resulting from this alleged procedural irregularity has been asserted by plaintiffs, they do maintain that the supporting affirmation of cross movant's attorney is of no probative value, and that there is no other admissible evidence to establish that the Statute of Limitations on their causes of action against him have expired. In addition, plaintiffs maintain that the Statute of Limitations has not expired with respect to Daddi's ongoing failure to obtain a Certificate of Occupancy for the subject property or issue a final Certificate of Completion for the architectural services which he performed.

In opposing the alternative relief sought in the cross motion, Wohl & O'Mara asserts that since plaintiffs seek damages solely for economic loss, as a matter of law, defendant Daddi may not seek contribution from the co-defendant. Moreover, since it is claimed that none of the causes of action asserted against Daddi are predicated on a theory of vicarious liability, it is alleged by Wohl & O'Mara that no cause of action for indemnification will lie against it.

It is well settled that "[a] professional malpractice cause of action asserted against an architect accrues upon completion of performance, when the architect's professional relationship with the owner ends" (County of Rockland v Kaeyer, Garment & Davidson Architects, P.C.,

309 AD2d 891, 891 [2nd Dept 2003]), and that is governed by a three-year Statute of Limitations (CPLR 241[6]; Matter of Kliment, 3 NY3d 538, 539-540).

In the instant matter, it is undisputed that Daddi is a member of a “profession” within the meaning of CPLR 241(6). However, this defendant’s purported reliance on the same survey proffered by defendant Wohl & O’Mara is alone insufficient to demonstrate as a matter of law that his work for plaintiffs must have been completed by April 26, 2001, particularly in view of the uncontroverted failure to obtain a Certificate of Occupancy (*see* CPLR 3212[f]). While the personal affidavit annexed to this defendant’s reply papers is an attempt to cure this evidentiary deficiency, its untimely interposition precludes consideration by the Court on the present motion (*see* Migdol v City of New York, 291 AD2d 201 [1st Dept 2002]; Voytek Tech. v Rapid Access Consulting, 279 AD2d 470 [2nd Dept 2001]; Ritt v Lenox Hill Hosp., 182 AD2d 560 [1st Dept 1992]).

In view of this Court’s denial of Wohl & O’Mara’s motion to dismiss the complaint as against it, Daddi’s further application for alternative relief in the event of dismissal is denied as academic.

Accordingly, it is

ORDERED, that the motion and cross motion are denied in their entirety.

This shall constitute the decision and order of the court.

E N T E R,

J.S.C.

¹ In their opposition papers, plaintiffs concede that both the swimming pool and retaining

wall were constructed on or before April 26, 2001.