

**Projector 80, LLC v Hanington Engineering
Consultants, Inc.**

2006 NY Slip Op 30378(U)

March 6, 2006

Supreme Court, New York County

Docket Number: 0112117/2007

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

Index Number : 112117/2007

PROJECTOR 80, LLC

VS.

HANINGTON ENGINEERING

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 12/4/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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


MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 25 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/6/08



HON. NICHOLAS B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 56

-----X
PROJECTOR 80 LLC,

Plaintiff,

Index No. 112117/07

-against-

HANINGTON ENGINEERING CONSULTANTS, INC.,
EDWARD JAMES HANINGTON, P.E., ALAN C.
WANZERBERG ARCHITECT, A.I.A., BARONE
STEEL FABRICATORS INC., MARTACK
CORPORATION, REDSTONE STUDIOS LTD.,
MICHAEL REDSTONE, J. VULPIS & SON, INC.
AND INTERIOR BUILDING SERVICES
INCORPORATED,

Defendants.

-----X
Richard B. Lowe III, J.:

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover damages for faulty work at a building renovation project, defendant Interior Building Services, Incorporated (IBS) moves for summary judgment, pursuant to CPLR 3211 (a) (5), to dismiss the action based on the expiration of the statute of limitations.

I. Background

IBS entered into a written contract with plaintiff Projector 80, LLC on September 6, 1998, pursuant to which IBS was to perform substantial renovations to plaintiff's property, a six-story building located at 3 East 80th Street, New York, New York. The total contract price was \$2,963,000. IBS subcontracted elements of the work out to several of the defendants.

Plaintiff alleges that it came to its attention that IBS was performing "delayed, incomplete, inappropriate and poor workmanlike construction" and had "demanded and received payments to which [it was] not entitled." Complaint, ¶ 23. As a result, plaintiff terminated the

contract in March 2000. Upon its dismissal from the site, IBS provided plaintiff with a “punch-list” of items to be completed by the subcontractors. Plaintiff thereafter contracted directly with the various subcontractors, who were directed to complete the project, and correct the work, allegedly mismanaged by IBS.

In August 2002, one of the units which had been created as part of the renovations was sold. In July 2003, the owner of the unit began to remodel the unit’s interior. When the unit owner opened the interior walls, it was discovered that, according to plaintiff, “significant and hazardous structural defects existed throughout” the unit. Complaint, ¶ 31.

These defects in workmanship are attributed to IBS, and plaintiff here sues to recover as damages the cost of remedying the problems, which plaintiff maintains were willfully and deliberately concealed from it by IBS. IBS is included in plaintiff’s causes of action for negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, restitution, and fraudulent concealment. IBS is not specifically named in plaintiff’s cause of action for breach of contract, but it is assumed that the use of the word “defendants” therein includes IBS.¹

Plaintiff commenced this action on September 6, 2007. IBS moves for summary judgment dismissing the complaint pursuant to CPLR 213 (2), on the ground that the action was untimely when brought, due to the fact that the contract was terminated in March 2000, when IBS ceased all work at the site, which is more than six years after the expiration of the statute of limitations for breach of contract.

Plaintiff’s defense is based on the doctrine of equitable estoppel. It claims that IBS knew

¹IBS obviously recognizes this, by basing its present motion on CPLR 213 (2), which deals with the statute of limitation for breach of contract.

of the defects in its workmanship, and knew that these defects were not apparent to the eye, and yet, held back its knowledge from plaintiff. Plaintiff characterizes IBS's actions as "active concealment," because "IBS actively represented to [plaintiff] that the punch-list contained all defects and incomplete items of construction." Plaintiff's Memorandum of Law, at unnumbered page 3.

II. Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); see also *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. See *Alvarez v Prospect Hotel*, 68 NY2d 320, *supra*; *Kesselman*, *supra*. In the present case, plaintiff has failed to raise a question of fact sufficient to defeat IBS's claim that the statute of limitations expired prior to the commencement of this action.

The Court of Appeals has stated that equitable estoppel precludes a defendant from reliance on the statute of limitations as a defense "where it is the defendant's affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *Zumpano v Quinn*, 6 NY3d 666, 673 (2006), quoting *General Stencils v Chiappa*, 18 NY2d 125, 128 (1966); see also *Putter v North Shore University Hospital*, 7 NY3d 548 (2006). "A plaintiff seeking to apply the doctrine of equitable estoppel

must establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit [internal quotation marks and citation omitted].” *Putter v North Shore University Hospital*, 7 NY3d at 552. However, the plaintiff must show that his or her delay was caused by a “reasonable reliance on deception, fraud or misrepresentations.” *Id.* at 553. Further, “[t]he uncommon remedy of equitable estoppel ‘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 Services, Inc.*, 8 NY3d 478, 491-492 (2007), quoting *Zoe G. v Frederick F.G.*, 208 AD2d 675, 675-676 (2d Dept 1994). In fact, the “wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations.” *Zumpano v Quinn*, 6 NY3d at 675.

Plaintiff’s argument is that, by giving plaintiff a punch-list that did not disclose that IBS’s already-completed work was defective, IBS actively concealed the inadequacy of that work, i.e., the “initial wrongdoing.” See *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, *supra*. IBS counters that plaintiff terminated the contract with IBS because it was aware of the alleged inadequacy of IBS’s work, so that plaintiff cannot claim that it was not on notice of any other inadequacies in that work. IBS argues that “it cannot be reasonably disputed by plaintiff that it had knowledge or otherwise believed that IBS breached one or more of its contractual obligations to plaintiff at the time the parties entered into the termination agreement².” IBS Reply Aff., at 2. IBS also suggests that, since plaintiff waited four years to bring this action after it became aware of the allegedly defective work, it is guilty of laches, and so, cannot rely on the doctrine of

²Presumably, IBS is referring to the punch-list as a termination agreement, as no other agreements have been alleged by either parties.

equitable estoppel. IBS has also alluded to the rule which says that an alleged fraud claim cannot be based on the same actions as underlie the cause of action for breach of contract. *See Ross v Louise Wise Services, Inc.*, 8 NY3d 478, *supra*.

This court finds that the punch-list of work yet to be completed was not an affirmative concealment of the allegedly defective work IBS had already completed; it was merely a list of work which was required to complete the project going forward. IBS was not obligated to make a “public confession” that the work it had already completed was defective. Further, plaintiff was on notice that IBS’s work was unacceptable and defective when it terminated the agreement, and it was not reasonable for plaintiff to assume that completed work which it could not see was any better in quality. Thus, plaintiff’s reliance on the punch-list as a guarantee of the quality of IBS’s already-completed work was not reasonable. Therefore, despite the fact that plaintiff was not aware of the problem until 2003, IBS did not actively conceal its allegedly defective work, and plaintiff cannot rely on equitable estoppel to avoid the bar of the statute of limitations.

IBS focused its motion on the six-year statute of limitations contained in CPLR 213 (2), which pertains to actions for breach of contract, and argues for dismissal without reference to any of the other causes of action in which it is named. However, plaintiff’s failure to proceed within the six-year statute also requires that the remaining causes of action be dismissed as untimely, resulting in the dismissal of the entire complaint as to IBS.

Accordingly, it is

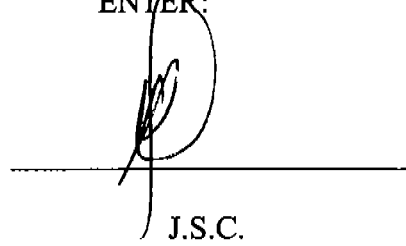
ORDERED that defendant Interior Building Services, Incorporated’s motion for summary judgment dismissing the complaint is granted, and the complaint is hereby severed and dismissed as against this defendant, with costs and disbursement to this defendant as taxed by the Clerk of

the Court upon an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 6, 2006

ENTER:



J.S.C.

HON. RICHARD B. LOWE, III

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE