

State Farm Fire & Cas. Co. v J. & K. Parris Constr., Inc.
2007 NY Slip Op 30863(U)
April 10, 2007
Supreme Court, Suffolk County
Docket Number: 0006847/2004
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/27/06 (#003)
10/30/06 (#002,004)
ADJ. DATE 12/19/06
Mot. Seq. # 002 - MG
 # 003 - MG
 # 004 - XMotD

-----X	STUART D. MARKOWITZ, P.C.
STATE FARM FIRE & CASUALTY COMPANY	: Attorneys for Plaintiff
a/s/o MATTHEW EDMONDS,	: 575 Jericho Turnpike, Suite 210
	: Jericho, New York 11753
	:
Plaintiff,	: AHMUTY, DEMERS & McMANUS
	: Attorneys for Deft. J & K Parris
	: 200 I.U. Willets Road
- against -	: Albertson, New York 11507
	:
	: CONGDON FLAHERTY O'CALLAGHAN
J. & K. PARRIS CONSTRUCTION, INC., ISLAND	: Attorneys for Deft. Island Wide Mechanical
WIDE MECHANICAL SYSTEMS, INC. & RICHARD:	: 333 Earle Ovington Boulevard, Suite 502
MORANO CUSTOM PLUMBING & HEATING,	: Uniondale, New York 11553-3625
INC .	:
	: MIRANDA SOKOLOFF SAMBURSKY, et al.
	: Attorneys for Deft. Morano Plumbing
Defendants.	: 240 Mineola Boulevard
-----X	Mineola, New York 11501

Upon the following papers numbered 1 to 68 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; Notice of Cross Motion and supporting papers 33 - 50; Answering Affidavits and supporting papers 51 - 64; Replying Affidavits and supporting papers 65 - 68; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Richard Morano Custom Plumbing & Heating Inc. for an order granting summary judgment in its favor, the motion by the defendant Island Wide Mechanical Systems Inc. for leave to amend its answer and for summary judgment and the cross-motion by the defendant J&K Parris Construction Inc. for leave to amend its answer and for summary judgment are determined as follows.

In 1997, the defendant J&K Parris Construction Inc (Parris) entered into a joint venture agreement with First Narrows Lane Corporation to construct a single family home in Bridgehampton. Parris acted as the general contractor and entered into oral agreements with the defendants Richard Morano Custom Plumbing & Heating Inc (Morano) and the defendant Island Wide Mechanical Systems Inc (Island Wide) as subcontractors. In 1998, the house was completed and the plaintiff's subrogor Matthew Edmonds purchased the property from Parris and First Narrows. In January 2003, a pipe in the attic burst causing extensive damage to the home and its contents. The plaintiff State Farm Fire & Casualty Company subsequently commenced this subrogation action against the defendants in March 2004 asserting causes of action for negligence, breach of warranty and breach of contract. The plaintiff alleges that the defendants were negligent because they failed to properly insulate the pipes in the attic, failed to include antifreeze in the system and failed to use a freeze stat that would have turned on the recirculating pump to prevent the pipes from freezing. Following discovery, Morano moves for summary judgment on the grounds that the action is untimely. Island Wide and Parris move and cross-move for leave to amend their answers to assert the statute of limitations as a defense and for summary judgment.

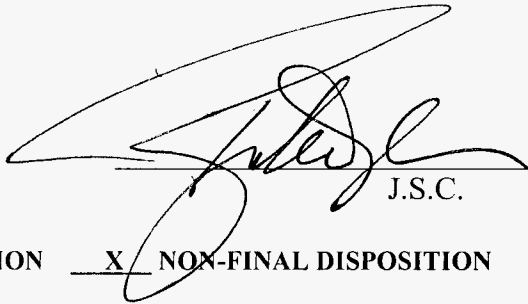
Motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see, Glaser v County of Orange*, 20 AD3d 506 [2d Dept 2005]; *Crystal House Manor v Totura*, 5 AD3d 425 [2d Dept 2004]; *Tarantini v Russo Realty Corp.*, 273 AD2d 458 [2d Dept 2000]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co v City of New York*, 60 NY2d 957; *see, Public Adm of Kings County v Hossain Constr. Corp.*, 27 AD3d 714 [2d Dept 2006]; *Arcuri v Ramos*, 7 AD3d 741 [2d Dept 2004]). Here, although the note of issue has been filed, this action is not yet on the trial calendar and no trial date has been set. The plaintiff claims that it has been prejudiced because it would have asked additional questions at the depositions of the defendants regarding their contracts. However, the plaintiff asserted breach of contract claims in its complaint and therefore could have asked any necessary questions regarding the contracts among the parties. In addition, Morano asserted the statute of limitations as a defense in its answer. Therefore, the plaintiff has failed to demonstrate any prejudice or surprise from the proposed amendments. Under these circumstances, the motion and cross-motion for leave to amend are granted (*see, Arcuri v Ramos, supra; Board of Educ. v Eugene J. Donahue Assoc.*, 298 AD2d 482 [2d Dept 2002]; *Lane v Beard*, 265 AD2d 382 [2d Dept 1999]).

The branch of the cross-motion by Parris for summary judgment is untimely as it was not made within 120 days of the filing of the note of issue and Parris has made no showing of good cause for the delay (*see, CPLR 3212[a]; Brill v City of New York*, 2 NY3d 648; *Chung v Rosenthal*, 29 AD3d 849 [2d Dept 2006]). Moreover, the cross-motion is improper since a cross-motion can only be made for relief against a moving party and the plaintiff is not a moving party (*see, Gaines v Shell-Mar Foods*, 21 AD3d 986 [2d Dept 2005]; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004]). While the pending motions of the co-defendants for similar relief may have been a sufficient basis to consider the untimely motion had the motions and cross motion been nearly identical, in this case they were not (*see, Bressingham v Jamaica Hospital Med. Center*, 17 AD3d 496 [2d Dept 2005]). The cross-motion asserts additional legal arguments not raised in the other motions. The court notes that Parris, unlike the subcontractors, was a party to the contract with Edmonds and the action was commenced within six years of the contract. Accordingly, the cross-motion for summary judgment by Parris is denied.

It is well settled that in cases against architects or contractors, the accrual date for statute of limitations purposes is completion of performance (*see, City School Dist. of Newburgh v Hugh Stubbins & Assoc.*, 85 NY2d 535, 538; *Cabrini Medical Center v Desina*, 64 NY2d 1059; *State of New York v Lundin*, 60 NY2d 987). Here, the work on the house was completed in 1998 and this action was not commenced until 2004. Therefore, the plaintiff's causes of action for negligence and breach of warranty as against Morano and Island Wide are untimely (*see, CPLR 214[4]; UCC § 2-725*).

The plaintiff contends, however, that it may proceed on its breach of contract claims against Morano and Island Wide because Edmonds was a third party beneficiary of the oral contracts between the subcontractors and Parris. "Generally it has been held that the ordinary construction contract – i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party – does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries" (*Board of Mgrs. v Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665 quoting *Port Chester Elec. Constr. Corp v Atlas*, 40 NY2d 652, 656; *see, Perron v Hendrickson/Scalamandre/Posillico*, 283 AD2d 627 [2d Dept 2001]). Here, Edmonds did not even purchase the property until after Parris hired the subcontractors and they completed their work. The record is devoid of any evidence that the defendants intended that Edmonds be a beneficiary of the subcontracts (*see, Amin Realty v K&R Constr. Corp.*, 306 AD2d 230 [2d Dept 2003]; *Regatta Condo. Assoc v Village of Mamaroneck*, 303 AD2d 739 [2d Dept 2003]; *Pile Foundation Constr. Co v Berger Lehman Assoc.*, 253 AD2d 484 [2d Dept 1998]; *Cahill v Lazarski*, 226 AD2d 572 [2d Dept 1996]; *Board of Mgrs. v Schorr Bros. Dev. Corp.*, *supra*). Accordingly, the motions by Morano and Island Wide for summary judgment are granted.

Dated: APR 10 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION