At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on May 22, 2007.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

THE BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT

Plaintiff,

v.

DODGE CHAMBERLIN LUZINE WEBER ASSOCIATES ARCHITECTS, INTEGRATED BUILDING SYSTEMS ENGINEERING, CONSULTANTS, P.C.; VIKING MECHANICAL, INC. and DOES 1-20,

Defendants,

DECISION AND ORDER ON MOTION

RJI No.: 33-06-4131
Index No.: 2004-4164

APPEARANCES: **STEPHEN CIOTOLI, ESQ., OF O'HARA & O'CONNELL**
For Plaintiff

KENNETH G. VARLEY, ESQ., OF DONOHUE, SABO, VARLEY & HUTTNER, LLP
For Defendants Dodge Chamberlin Luzine Weber Associates Architects and Integrated Building Systems Engineering Consultants, P.C.

The defendants, Dodge Chamberlin Luzine Webber Associates Architects (DCLW) and Integrated Building Systems Engineering Consultants, P.C. (IBS), move for summary judgment dismissing the complaint against them. The plaintiff alleges a breach of contract and negligence

against these defendants concerning the design and installation of an HVAC system in its high school building. Plaintiff alleges that the system was defective and resulted in mold damage in its library.

The defendants first move for summary judgment on the ground that the action is barred by the statute of limitations. CPLR §214 provides that the statute of limitations for an action against a design professional is three years from completion of the work. *See, CPLR §214(6).* The defendants claim that because construction was completed no later than April of 2001 and the amended complaint was filed in November of 2004, it is outside the statute. The defendants' argument, however, ignores the doctrine of continuous relationship. A cause of action to recover damages for professional malpractice against an architect for defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship. *See, Frank v. Mazs Group, LLC*, 30 AD3d 369 (2d Dept. 2006). The doctrine of continuous representation serves as a toll while the professional continues to represent the client with respect to the same matter in which the malpractice occurred. *See, Shumsky v. Eisenstein*, 96 NY2d 164 (2001). The doctrine recognizes that a person seeking professional assistance has the right to repose confidence in the professional's ability and good faith and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. *See, Greene v. Greene*, 56 NY2d 86 (1982). The record here shows that these defendants, in fact, continued representation in a professional relationship with the plaintiff beyond April of 2001. Kevin Murray of defendant IBS investigated the mold problem in September of 2003 and made recommendations. He prepared a report using the same project number as the original project, and that investigative and corrective

work constituted continued representation. In addition, the modification of the HVAC system was part of a district wide energy conservation project contained within an energy performance contract for several of the district school buildings, including the high school. The energy performance contract was part of phase 2 and phase 3 of a larger project which continued at several district buildings until 2004. This case is analogous to *Greater Johnson City School District v. Cataldo & Waters Architects, PC,* also a case that involved work on energy conservation projects at eight school buildings, where the plaintiff school district sought and received continued service, advice and expertise from the defendant in solving the problems. *See, Greater Johnson City School District v. Cataldo & Waters Architects, PC,* 159 AD2d 784 (3rd Dept. 1990). While the defendant architect disputed the claim, the court concluded that the conflicting arguments presented a triable issue of fact not determinable by a motion. *See, id.* Likewise it has been held that an architect's professional responsibility and potential liability to its client, the plaintiff, was not terminated until completion of the project. *See, City of New York v. Castro-Bianco Piscioneri & Associates*, 222 AD2d 226 (1st Dept. 1995). In that case, the court rejected the architect's argument that a certain phase of the project had been completed, and that was when the statute of limitations began to run. *See, id*. In addition, the Certificate of Substantial Completion upon which the defendants rely is incomplete and unsigned. The plaintiff has offered a signed certificate with the seal of the architect with the dates of the signatures being in July of 2002. Based upon the foregoing, the amended complaint naming these defendants in November of 2004 was timely and that the causes of action are not barred by the statute of limitations.

The defendants next move for summary judgment, arguing that the complaint fails to state a cause of action against them and they seek dismissal on the merits. The defendants have met their initial burden by establishing their entitlement to summary judgment through the tender of admissible proof; the burden then shifts to the plaintiff as the non-moving party to raise an issue of fact. *See, Hunt v. Kosterelis***,** 27 AD3d 1178 (4th Dept. 2006). The non-moving party must do so through the submission of admissible non-speculative evidence. *See, Majchrzak v. Harry's Harbor Place Grill, Inc*., 28 AD3d 1109 (4th Dept. 2006). The defendants met their burden concerning their claim that they bore no responsibility for the mold problem. In response, the plaintiff has provided a letter from architect Richard Bald, who opines that defendant DCLW failed to provide professional service meeting the standard of care when it approved final payment for its contractor without the contractor providing required documentation and that this failure contributed to the conditions that caused mold to occur in the high school library. This letter was not in affidavit form nor was it sworn to. In addition, the plaintiff offered the affidavits of the plaintiff's superintendent of buildings and grounds energy management supervisor, who discuss the May of 2000 results of the balance test performed by New York Technologies Corporation, which states that defendant IBS received the balance test, which confirmed that too little air was being pushed through the system. Defendant IBS was advised at the time that the unit should be reviewed again and that the test should be revised and be resubmitted, which never occurred. In addition, plaintiff relies on the contract documents that provide that these defendants had the primary supervisory and inspection responsibility for the contractor's work on the project. The defendants correctly argued that the Bald letter was insufficient since an unsworn report of such an expert does not satisfy the plaintiff's summary

judgment burden to submit an affidavit of merit from an expert competent to testify to evidentiary facts that would support the claim of professional malpractice. *See, Zweng v. DeBelliss & Semmens*, 22 AD3d 845 (2d Dept. 2005). Thereafter, the plaintiff provided an affidavit from Mr. Bald which contained the same analysis and conclusion as stated in his letter.[1] Based upon the submissions, the plaintiff has met its burden to raise an issue of fact with respect to both defendants' liability, the defendants' motion on this ground is denied as well.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendants' motion for summary judgment dismissing the complaint against them is denied**.**

ENTER

Dated: June 12, 2007
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

[1] Although the defendants argued in their correspondence that the Court should not accept the plaintiff's papers inasmuch as they constituted a "sur reply", defense counsel conceded at oral argument that the Bald affidavit contains the same information as was contained in the initial submission in his letter, but simply in admissible form. Based upon that concession, the Court accepts the plaintiff's papers.

[* 6]