

**72 Grand Partners, LLC v WYS Design Partnership
Architects, P.C.**

2007 NY Slip Op 31626(U)

June 11, 2007

Supreme Court, New York County

Docket Number: 0602068/2005

Judge: Karen Smith

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

PRESENT: HON. KAREN SMITH
Justice

PART 62

Index Number : 602068/2005
72 GRAND PARTNERS, LLC
VS
WYS DESIGN PARTNERSHIP
Sequence Number : 004
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE 6/14/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

and two "Cross-Motions"
this motion to confirm referee's report and
dismiss the complaint herein

PAPERS NUMBERED

1
2
3
4-6

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

2 Notices of "Cross-Motion", Affidavits, Exhibits and Memoranda

Cross-Motions: Yes No

Upon the foregoing papers, it is ordered that this motion and two "Cross-Motions" are decided
in accordance with the attached Memorandum decision and order.

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

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/11/07

HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
72 GRAND PARTNERS, L.L.C.,

Plaintiff,
-against-

Index no.: 602068/2005
Motion seq.: 004
Motion date: 06/14/2007

WYS DESIGN PARTNERSHIP ARCHITECTS, P.C.
LZA ASSOCIATES ENGINEERS & ARCHITECTS, P.C.,
and LI-SALTZMAN ARCHITECTS, P.C.
Defendants.

DECISION AND ORDER

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant WYS Design Partnership Architects P.C.'s (hereafter referred to as "WYS") motion to confirm a referee's report and dismiss the complaint herein is granted and the motions by defendants LZA Associates Engineers & Architects, P.C. (hereafter referred "LZA") and Li-Saltzman Architects, P.C. (hereafter referred to as "Li-Saltzman") (each of which was improperly denominated as a "Cross-Motion") seeking additional findings and summary judgments dismissing the complaint as against LZA and Li-Saltzman, respectively are granted without opposition.

Plaintiff (hereafter referred to as "72") brought the instant action sounding in tort and breach of contract against all the defendants. WYS moved to dismiss the action pursuant to CPLR 3211(a)(5) contending that the action was one for professional malpractice governed by a three-year statute of limitations and that it had not performed any professional services for 72 for more than three years prior to the commencement of the action. Both LZA and Li-Saltzman answered the complaint. However, each asserted, *inter-alia*, the affirmative defense of the

expiration of the statute of limitations in their respective answers.

On or about March 29, 2006, the Hon. Sherry Klein Heitler issued a decision and order on WYS's motion. The underlying facts of the case are set out at length in Justice Heitler's decision and will not be restated at length herein. In Justice Heitler's decision, she stated: "While the parties do not dispute that CPLR 214(6) governs, and that the applicable statute of limitations period is three years, the parties disagree on when the statute began to run, and/or whether there was a tolling of the statute of limitations." Accordingly, Justice Heitler referred the matter to a referee to hear the issue of when WYS ceased performing services for 72 and to issue a report and recommendations to the court. Sometime after Justice Heitler's decision, the matter was reassigned to Justice Karen S. Smith's part. On or about June 6, 2006, the parties entered into a stipulation extending the authority of the referee to hear and report upon the last date that LZA and Li-Saltzman provided services to 72. The parties' stipulation was thereafter "So- Ordered" by Justice Smith. Pursuant to the orders of the court, this matter was heard by a referee. All parties were represented and heard by the referee. The referee recited credible testimony of the various parties which established that WYS ceased rendering professional services to 72 on March 15, 2001 and that LZA and Li-Saltzman ceased providing services for 72 before that date. However, in the "Findings of Fact" portion of his report, the referee only makes a specific finding that WYS ceased providing services on behalf of 72 on March 15, 2001.

WYS, now moves for confirmation of the report and the dismissal of the complaint as against it based upon the expiration of the statute of limitations. LZA and Li-Saltzman have each moved, by papers improperly denominated a separate "Cross-Motion" to WYS's motion, to have this court make additional factual findings to the effect that their services to 72 ceased at or prior

to March 15, 2001 and, thereafter, to confirm the referee's report and grant them summary judgment dismissing the complaint as against them based upon the expiration of the three year statute of limitations.

72 has only submitted partial opposition to WYS's motion and no opposition to the motions of LZA and Li-Saltzman. 72 does not oppose the finding of the Referee. However, 72 now contends that its first cause of action against WYS is premised upon; "... WYS's inability to comply with its obligations under the contract" (Affirmation in Opposition, Paragraph 11). Therefore, 72 argues that this cause of action is governed by a six year statute of limitations for breach of contract.

The prior decision of Justice Heitler is the law of this case. In that decision Justice Heitler found that none of the parties disputed that the matter was governed by a three year statute of limitations. 72's remedy was to either move to re-argue or appeal Justice Heitler's determination. Having failed to do so, 72 cannot now seek to assert that a six year statute of limitations applies. Accordingly, it is;

ORDERED that WYS's motion to dismiss the complaint as against it is granted, and it is further;

ORDERED that LZA's and Li-Saltzman's motions asking the court to make additional findings of fact to the effect that their services to 72 ceased at or before the date the WYS's services ceased and granting summary judgment to LZA and Li-Saltzman dismissing the complaint herein as against each of them are granted without opposition, and it is further;

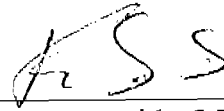
ORDERED upon service of a copy of this order, together with notice of entry hercof and such other forms and fees and the clerk may reasonably require, upon the county clck's office at

60 Centre Street, New York, New York, the Clerk shall dismiss the complaint herein as against WYS and also enter summary judgment dismissing the complaint herein as against LZA and Li-Saltzman.

The foregoing constitutes the decision and order of this court.

Dated: June 14, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE