Reyes-Dawson v Goddu

2009 NY Slip Op 30438(U)

February 20, 2009

Supreme Court, New York County

Docket Number: 107687/08

Judge: Louis B. York

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SCANNED ON 2/27/2009

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 107687/2008

REYES-DAWSON, MARGUERITE

VS

GODDU, JOSEPH

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 27 2009

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 2/20/09

LOUIS B. YORK 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: IAS PART 2

----------x

Marguerite Reyes-Dawson

Plaintiff

v

Joseph Goddu, Cynthia Z. Goddu, Edmund Lewis, Edmund Lewis Ltd., Edmund Lewis Contracting and Painting Incorporated d/b/a Edmund Lewis Painting and Contracting of Manhattan, and James Wagman Architect,LLC,

Index No. 107687/08

Defendants

----------x

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

York, J.:

Defendant James Wagman Architect, LLC (hereinafter JWA) moves to dismiss the plaintiff's complaint as against it pursuant to CPLR §§ 3211(a)(1) and (7) and Rule 214 (6), as barred by the applicable three year statute of limitations. The application must be and is granted.

Plaintiff is the owner of premises at 357 West 122nd Street, Manhattan. The Goddu defendants own the adjacent premises at 359 West 122nd Street. They share a party wall that is the focus of the dispute. The complaint alleges that "[i]n or about October, 2002, defendants installed a fireplace in the party wall" and that "[JWA] was the architect hired to oversee the installation of the fireplace in defendants' Joseph Goddu and Cynthia Goddu's premises." (Ex A, plaintiff's verified amended complaint, at ¶¶ 93 and 94) The complaint adds that "[u]pon information and belief, the work to be performed ... was at all times subject to the supervision and inspection of defendant, JWA, as architect, and defendants Edmund Lewis Painting and Contracting of Manhattan, Edmund Lewis Ltd., and Edmund Lewis and the contractors and on-site representatives." (Id, ¶ 99) The complaint further asserts "[t]hat JWA, as

architect, was careless and negligent in failing to properly supervise and inspect the installation of the fireplace, as it was obligated to do." (Id, ¶ 105)

The complaint also alleges that "[i]n or aboutMay, 2003, the plaintiff herein commenced an action, entitled *Reyes-Dawson v Goddu, et al.*," in this Court under Index # 110261-03, arising out of the fireplace installation complained of in the instant case. JWA was not named as a defendant in that action. The instant complaint asserts one cause of action against JWA, sounding in professional malpractice and negligence.

CPLR Rule 214(6) provides that an action to recover damages for non-medical malpractice must be brought within three years, whether the action is grounded on contract or tort. JWA establishes prima facie entitlement to dismissal of the action since the complaint, on its face, asserts that the fireplace was installed in or about October 2002, so that JWA's obligation to properly supervise and inspect the installation of the fireplace ended upon the completion of the work in October 2002.

Plaintiff, in her affidavit in opposition to the motion, refers to her earlier action, and says that the parties to that action, on May 1, 2006 entered into a National Arbitration and Mediation Post-Mediation Settlement Agreement. She claims that when she entered into that agreement she was unaware that the wooden beams and joists of her property had "actually been cut by the defendants, compromising the structural integrity of ... (her) property." (Affidavit in opposition, ¶ 17) She asserts that the defendants in that action represented that "to the best of the knowledge of the Goddus and Edumund Lewis, the beams of the Dawsons allegedly jutting into the chimney flues of the Goddus have not been cut." (Id, ¶ 18) Despite the May 1, 2006 Agreement, she asserts that "[s]ubsequent to the execution of the settlement agreement, in or

about February, 2006, I discovered that... the installation of the fireplace and flue was illegal." (Id, ¶ 21) She adds that the New York City Department of Buildings, on February 22, 2006 determined that "[a]s currently installed, the fireplace at 359 West 122nd Street is not compliant with Code Requirements." (Id, ¶ 22 and Exhibit "B" to affidavit.) In February 2008 plaintiff had an engineer inspect the installation and render a report that revealed the beams and joists had been severed, damaged and compromised. (Id, ¶¶ 29 and 30)

Plaintiff urges first that the time of completion of construction is the accrual point for a cause of action only where there is contractual privity between the parties, and also claims that, on the advice of her lawyer, the wrongful conduct of a professional in rendering services to his client resulting in injury to a party outside the relationship gives rise to a cause of action in simple negligence rather than malpractice. She also asserts, on the advice of counsel, that a cause of action for injury to property arises only when the damage is apparent.

Second, plaintiff urges that JWA should be estopped from asserting the statute of limitations as a defense. Third, plaintiff argues that the motion should be denied because there are issues of fact regarding the accrual date of plaintiff's causes of action. Plaintiff wants discovery to learn "if and when JWA submitted any fraudulent documents falsely certifying any portion of the subject construction, as that date would bear relevance on any resulting accrual of any malpractice claims." (Id, ¶ 61.

Analysis

Plaintiff's assertion that the cause of action arose not upon completion of the work but at a later date because she was not in privity with JWA is based on *Credit Alliance Corporation v Arthur Andersen & Co. (* 122 Misc. 2d 1045 [Supreme Court, NY County, 1983]). That case is

distinguishable. There the court held that the cause of action of a lender, who relied upon accounting statements prepared by defendant, could not arise until the statements were received (and allegedly relied upon) by the lender, that is, that there was no damage until that date. However, in this case, the claimed damage of cutting the beams and joists was complete upon the completion of the work. *Cubito v Kreisberg* (69 A.D.2d 738 [2nd Dept, 1979]), is similarly distinguishable. In that case, the cause of action was held to accrue when personal injury was caused to a tenant of the premises on which the architect worked. In both cases then, the cause of action was not complete until there was damage.

In similar fashion, plaintiff's reliance on *Mark v Eshkar* (194 AD 2d [st Dept, 1993]) is misplaced. In that case the parties shared a party wall, and did a gut renovation that resulted in minor damage to the wall, for which defendant made payment to plaintiff in 1984. However, in 1989, larger cracks, allegedly structural, appeared. The Appellate Division, First Department, held that damage occurred when the damage became apparent. In the instant case, there is no claim that the damage became apparent. Rather, plaintiff is relying on the report of engineers and on the mere fact that the Department of Buildings reported that the installation was not in compliance with code requirements.

Plaintiff's reliance upon the cases of *Russell v Dunbar* (40 AD2d 952 [2nd Dept, 2007]): *Alamio v Town of Rockland* (302 AD2d 842, 844 [3rd Dept, 2003']; and *Mandell v Estate of Frank L. Tiffany* (263 AD2d 827 [2nd Dept, 1999]) is likewise misplaced because those cases simply stand for the proposition that a cause of action for damage to property accrues when the damage is apparent. On the contrary, *Alamo* and *Mandell* undercut the plaintiff's theory. In both, the Appellate Division, Third Department. found the causes of action were barred by the

statute of limitations because the damage in each was apparent at a sufficiently early date so that the statute of limitations barred their belated assertion. In *Mandell,* the Third Department said that "the injury — the cutting of trees — must be deemed to have occurred, if at all, no later than 1984 'when the damage [was] apparent'". 263 AD2d 827, 829. In similar fashion, the claimed cutting of beams occurred, if at all, in 2002, and was then apparent to anyone competent to look. In May 2003 the plaintiff started her first action arising out of the construction of the fireplace. That earlier complaint alleges, in part:

> 9. The parties share a wall ...
> 11. The wall is approximately eight inches wide.
> 12. Plaintiff is entitled to the exclusive title, possession and control of the four inches on their (sic) side of the party wall.
> 13. Nevertheless, the Defendants, without any legal right or permission have build (sic) a structure on said four inches.

The plaintiff sought at least $1,250,000 in damages in that action. Plaintiff could well have hired engineers to inspect the fireplace upon its completion, or before she started the first action, or when she started complaining to the Department of Buildings about the fireplace. She did not do so. Rather, she waited until 2008, not long before starting the instant lawsuit. If the report of the engineers is the first event bringing awareness to her, she could indefinitely postpone the institution of this action until whatever year she finally elected to hire engineers to inspect. However, the cutting for the fireplace, including the claimed cutting of beams, was complete in 2002 and like the cutting of trees in *Mandell, supra,* was there, was complete, apparent, and could be seen immediately by anyone with the technical competence to see. This is not a case, as was true in *Mark v Eshkar, supra,* where time was needed for larger cracks to develop and to be seen. The complaint herein also asserts that there is nothing separating the flue

in the fireplace from plaintiff's wooden beams and four inch masonry well, in violation of the New York City Department of Buildings' standards. This also is a condition that was complete upon completion of the fireplace and again was a condition that was apparent and capable of being seen by anyone technically competent.

JWA is referred to in the Sixth Cause of Action alleged in the complaint in this case, principally as follows:

> 102. The defendants did not exercise reasonable care in installing the fireplace in the immediate vicinity of plaintiff's property, but on the contrary were careless and negligent in their installation, in that the defendants cut and destroyed plaintiff's beams and wooden joists, exposed plaintiff's property to unsafe and hazardous conditions, caused extensive damage to plaintiff's property, compromised the integrity and safety of the party wall, and otherwise failed to perform the installation in a proper manner.
> 103. The negligence of the defendant (sic) consisted in so carelessly and negligently installing the fireplace and flue in the party wall ...
> ...
> 105. That the defendant, James Wagman Architect, LLC, as architect, was careless and negligent in failing to properly supervise and inspect the installation of the fireplace, as it was so obligated to do.

The allegations of the Sixth Cause of Action against JWA sound only in negligence, not in contract. Thus, they differ from those in *Board of Mgrs v Vector Yardarm Corporation* (172 AD2d 303 [1st Dept, 1991'), relied on by plaintiff, where the court held that a breach of contract claim against an architect accrued on the date that the final certificate of occupancy is issued. Rather, this case is closer to the facts in *Gelwicks v Campbell* (257 AD2d 601 [2nd Dept, 1999]), a negligence action. The defendant, an engineer, certified in December, 1992 that a septic system was properly constructed. The Westchester County Department of Health countersigned the certificate on January 4, 1993. Plaintiffs purchased the property with the septic system in July

1996. In 1997 they discovered serious defects in the septic system and commenced an action which was held to be barred by the three year statue of limitations. Plaintiffs, who were not in privity with the architect, claimed that their cause of action accrued when their damages became apparent in 1997. The Second Department held that the cause of action accrued when the defendant completed work, that is, no later than January 4, 1993 when the certificate of compliance was countersigned.

The complaint in this action alleges that the work on the fireplace was completed in or about October of 2002 and that JWA was negligent in supervising and inspecting that installation, that is that it's work was completed in or about October of 2002. There is no claim asserted that it's work was completed at any subsequent date. Even applying the rule that the cause of action accrues when the damages become apparent, the plaintiff either knew, or in the exercise of reasonable diligence should have known, of that which was apparent to anyone with technical competence to see, when she instituted the first action in 2003. She obviously had complaints about the fireplace work and she could have expressed them promptly to the Department of Buildings, but she apparently waited years to do so. She could have hired an engineer to inspect, but she delayed doing so until 2008. She cannot profit from her inaction in investigating when at the same time she proceeded to litigation. It is noteworthy that JWA was not named as a defendant in plaintiff's earlier action.

The Court intends no comment on the causes of action asserted by plaintiff against the other defendants. Assertions are made by plaintiff on this motion that may have force with respect to some or all of the other defendants. But here there may not be any estoppel against JWA because there is no claim that JWA made a false representation to the plaintiff, as is

claimed with respect to other defendants in the settlement of the earlier action. Nor has the plaintiff adverted to the existence of facts which could enable her to resist dismissal that could well be unearthed by discovery.

Accordingly, the motion is hereby granted and it is hereby

ORDERED that the complaint is severed and dismissed as against defendant James Wagman Architect, LLC and shall continue against the other defendants, and the Clerk of the Court is directed to enter judgment in favor of favor of defendant James Wagman Architect, LLC against the plaintiff.

Dated: February 20 , 2009

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

FEB 27 2009

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NEW YORK