

**150 Centreville, LLC v Lin Assoc. Architects,
P.C.**

2009 NY Slip Op 30802(U)

April 3, 2009

Supreme Court, Queens County

Docket Number: 16481/2007

Judge: David Elliot

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

	x	
150 CENTREVILLE, LLC, et al.		Index Number <u>16481</u> 2007
		Motion Date <u>December 2,</u> 2008
-against-		
		Motion Cal. Number <u>28</u>
LIN ASSOCIATES ARCHITECTS, P.C., et al.		Motion Seq. No. <u>1</u>
	x	

The following papers numbered 1 to 16 read on this motion by defendants Lin + Associates Architects, P.C. (Associates) and Emily Lin pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them based upon the expiration of the statute of limitations; and this cross motion by plaintiffs 150 Centreville, LLC and DeMartino Building Company, Inc. to stay this action pursuant to CPLR 2201 pending the resolution of the probate proceeding in the Surrogate's Court, Queens County, concerning the last will and testament of Concetta DeMartino, and for leave for the guardian appointed by the court for the property management of Joseph DeMartino, an alleged incapacitated person, to intervene in the action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
Notice of Cross Motion - Affidavits - Exhibits...	8-13
Answering Affidavits - Exhibits.....	14-16

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs commenced this action by filing a copy of the summons with notice with the County Clerk on June 29, 2007. Defendants Associates and Lin served a notice of appearance and demand for a complaint on July 26, 2007. After extensions of time, plaintiffs served a complaint on or about October 23, 2007. In the complaint, plaintiffs allege that in or about January 2001, they engaged defendants to provide architectural and design services in

connection with the design and construction of a multi-building residential development project, including the drafting of architectural plans for the project and securing the approval of the plans from the New York City Department of Buildings (DOB). Plaintiffs allege that defendants committed professional malpractice and breach of contract insofar as defendants negligently prepared architectural plans, failed to revise the plans, in a timely fashion, to remedy the objections raised by the DOB with regards to them, and failed to secure the DOB's approval of the revised architectural plans in a timely fashion. Plaintiffs also allege that they required financing for the project, and that their loan commitment was conditioned upon the DOB's approval of the project after a full review of the plans. Plaintiffs further allege that as a consequence of defendants' delays in properly performing their professional and contractual duties, the loan commitment expired, leaving them without a source of financing for the project. Plaintiff seeks to recover monetary damages.

Defendants Associates and Lin served a joint answer denying the material allegations of the complaint and asserting various affirmative defenses, including one based upon the expiration of the statute of limitations.

In support of that branch of their cross motion, plaintiffs assert by virtue of an order issued in the special proceeding entitled Matter of Application of DeMartino (Sup Ct, Queens County, Index No. 1281/2006), Concetta DeMartino and Joseph DeMartino were found to be the "owners" of plaintiff 150 Centreville, LLC.¹ Plaintiffs also assert that Concetta DeMartino died on January 31, 2005, and that her last will and testament is the subject of a pending probate proceeding in the Surrogate's Court, Queens County. Plaintiffs further assert that to the extent that Concetta DeMartino was an "owner" of plaintiff 150 Centreville,

1

The court-appointed property management guardian for Joseph DeMartino, an alleged incapacitated person, made a motion concerning the ownership of 150 Centreville, LLC. By order dated December 3, 2007, the court granted the motion, deeming the "owners" of 150 Centreville LLC to be those persons named as grantors conveying "the two parcels of real property owned by 150 Centreville, to 150 Centreville, LLC to wit: a) CONCETTA DeMARTINO - sole grantor of 150-24 Centreville Street, Howard Beach, New York, and b) JOSEPH DeMARTINO, the incapacitated person ..., as surviving tenant by the entirety of his late wife, CONCETTA DeMARTINO, grantors of 95-35 150th Road, Howard Beach, New York."

LLC, the Estate of Concetta DeMartino likewise may have an interest in plaintiff 150 Centreville, LLC, and, therefore, her Estate may have an interest in the instant action. Plaintiffs argue that the instant action should be stayed pending the resolution of the probate proceeding. In addition, plaintiffs assert that to the extent Joseph DeMartino also is an "owner" of plaintiff 150 Centreville, LLC, and a guardian has been appointed to manage Joseph DeMartino's property, the guardian should be granted leave to intervene as a party herein.

A limited liability company is an "unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business" (Limited Liability Company Law § 102[m]). Section 202 of the Limited Liability Company Law enumerates the powers conferred on all limited liability companies, including the right to sue (Limited Liability Company Law § 202[a]). A limited liability company may be member-managed or manager-managed (see Limited Liability Company § 401[a]), and unless the articles of organization provide for managers, the limited liability company is managed by its members. To the extent management of the limited liability company is vested in its members, however, such vesting of authority is "subject to any provisions in ... the operating agreement ... granting or withholding the management powers or responsibilities of one or more members" (Limited Liability Company Law § 401[a]).

Not surprisingly, plaintiffs make no claim that plaintiff 150 Centreville, LLC lacks standing to maintain the action (see e.g. Yew Prospect, LLC v Szulman, 305 AD2d 588 [2003]). Rather, it appears that they wish to stay this action so plaintiff 150 Centreville, LLC can consult with its members as to decisions regarding prosecution of this suit. Plaintiffs, however, make no showing that plaintiff 150 Centreville, LLC is managed by its members, or that to the extent plaintiff 150 Centreville, LLC is so managed, that its members have the power to decide issues related to such prosecution, or that a personal representative of its deceased member has the power to exercise the powers formerly held by the deceased member. Thus, plaintiffs have failed to show that the property management guardian of Joseph DeMartino, the personal representative of the Estate of Concetta DeMartino, or the heirs of Concetta DeMartino, have any management rights regarding plaintiff 150 Centreville, LLC, including the right to make decisions regarding the prosecution of this suit.

The granting of a stay of an action pending determination of another action is a matter of discretion (see Pollack v Long Island Lighting Co., 246 App Div 765, 765 [1936]). Plaintiffs have failed

to show that a stay will not have the deleterious effect of indefinitely prolonging resolution of this action.

Furthermore, intervention generally is permitted only where the proposed intervenor has a real and substantial interest in the outcome of the proceeding (see Reliance Ins. Co. of New York v Information Display Technology, Inc., 2 AD3d 701 [2003]; Sieger v Sieger, 297 AD2d 33 [2002], lv to appeal dismissed 99 NY2d 651 [2003]; Perl v Aspromonte Realty Corp., 143 AD2d 824 [1988]). Plaintiffs fail to show that the property management guardian for Joseph DeMartino desires to intervene as a party plaintiff in this action. Plaintiffs notably provide no affidavit of the guardian in support of the motion. In any event, a member of a limited liability company cannot be a plaintiff in an action brought on behalf of an LLC, except to enforce the member's right against or liability to the LLC (see Tzolis v Wolff, 10 NY3d 100 [2008]; East Quogue Jet, LLC v East Quogue Members, LLC, 50 AD3d 1089 [2008]). Under such circumstances, the cross motion is denied.

With respect to the motion by defendants for summary judgment, it is well established that the 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," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]) or credibility assessment (see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

CPLR 214(6) provides that an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, must be commenced within three years "regardless of whether the underlying theory is based in contract or tort." "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 Brushton-Moira Cent. School Dist. v Thomas Assoc., 91 NY2d 256, 261 [1998]; County of Rockland v Kaeyer, Garment & Davidson Architects, 309 AD2d 891 [2003]; IFD Constr. Corp. v Corddry Carpenter Dietz & Zack, 253 AD2d 89, 92 [1999]; Board of Mgrs. of Yardarm Beach Condominium v Vector Yardarm Corp., 109 AD2d 684, 686 [1985]; N. R. S. Constr. Corp. v Board of Educ., Cent. School Dist. No. 2, Towns of

Yorktown, New Castle & Cortlandt, 82 AD2d 876 [1981]). The completion of an architect's obligations must be viewed in light of the particular circumstances of the case (see Board of Educ. of Tri-Val. Cent. School Dist. at Grahamsville v Celotex Corp., 88 AD2d 713, 714 [1982], affd 58 NY2d 684 [1982])" (Frank v Mazs Group, LLC, 30 AD3d 369 [2006]).

The allegations in the complaint sound in professional malpractice. Defendants contend that the claims are time-barred under the applicable three-year statute of limitations (CPLR 214[6]). Defendants assert that they entered into a revised agreement with plaintiff 150 Centreville, LLC, on or about June 5, 2001, to provide certain architectural design services and expediting services in connection with the project, and that under the agreement, defendants were required to file new building applications with the DOB and, after construction, to file a certificate of occupancy for the premises. Defendants further assert that changes were made to the design of the intended structure, but that, on or about January 13, 2004, defendants obtained DOB's approval of the architectural drawings they filed under application number 401284926, and that permits were issued under the same application number on March 26, 2004. According to defendants, they performed all the required services by March 26, 2004, at the latest, and met all DOB requirements to enable plaintiffs to begin construction of the project as of that date. Defendants, therefore, argue that the action is untimely, having been commenced more than three years after March 26, 2004.

In support of the motion, defendants offer a copy of the pleadings, the affidavit of defendant Emily Lin, an architect licensed to practice in New York and a principal of defendant Associates, a professional corporation engaged in the business of providing architectural services, and various documents, including copies of letters dated "Rev. June 5, 2001, March 1, 2000" and January 8, 2004.

Plaintiffs argue that their claim is timely, having been commenced within three years of July 2, 2004, the date when defendants' revised plans were approved by the DOB and their professional relationship with defendants ended. They offer the affidavit of Frank DeMartino, the "project executive" for the project, a copy of computer printouts from the DOB website, and a letter, dated June 15, 2004, from the Community Preservation Corporation.

The motion by defendants is denied. Defendants have failed to meet their burden of demonstrating entitlement to judgment as a matter of law (see Winegrad v New York Univ. Med. Center,

64 NY2d 851 [1985]). It is unclear whether the letter dated "Rev. June 5, 2001, March 1, 2000" represents the actual, complete agreement between the parties inasmuch as the letter is unsigned by either plaintiff, includes a proposal to obtain work permits at a price to be "discuss[ed]," and ambiguously states the agreement "is base [sic] on the standard AIA Document B151-1997" without specifically incorporating the terms of such AIA document.

In addition, the letter, dated January 8, 2004 from defendant Emily Lin to Frank DeMartino indicates that "[a]ccording to our contractual agreement, answering any objections from the DOB is under our basic service. We have met with the DOB examiner on September 13 and 15, 2004 to clear the 'side yard' and 'attic calculation' objections; thus, we will not charge you extra for the service." Because the date of the letter precedes the dates made reference to in the body of the letter, it is unclear when the referenced meeting with the DOB examiner took place, and hence whether defendants provided professional services on behalf of plaintiffs after March 26, 2004.

Furthermore, the uncertified copies presented by defendants of the printouts from the website of the DOB, even if considered to be admissible evidence (see generally Secretary of the Department of Housing and Urban Development v Torres, 2 Misc 3d 53, 54-55 [App Term, 2d Dept 2003]; Bernstein v City of New York 14 Misc 3d 1225[A] [2007]; Proscan Radiology of Buffalo v Progressive Casualty Ins. Co., 12 Misc 3d 1176[A] [2006]; Miriam Osborn Memorial Home Assn. v Assessor of City of Rye, 9 Misc 3d 1019, 1027-30 [2005]), raise questions as to when the architectural plans were approved. Although one of the copies states "Last Action: PLAN EXAM - APPROVED 01/13/2004 (P)" (Defendants' Exhibit "C," annexed to the Lin affidavit dated September 5, 2008), it and the other copies (Defendants' Exhibits "D" and "E," annexed to the Lin affidavit dated September 5, 2008) also state that "AUDIT ACCEPTED 07/02/2004." Defendant Emily Lin asserts that the letter "P" in the parenthesis next to the phrase "Last Action" is a DOB code for the approval of plans after review by DOB. She fails, however, to explain the meaning of the "AUDIT ACCEPTED" notations vis-a-vis the "P" notation in relation to the filing and DOB approval of the application.

Accordingly, the motion by defendants and the cross-motion by plaintiffs are denied.

Dated: April 3, 2009

J.S.C.