

Vitale v S&P 26 Dev. Assoc. LLC

2009 NY Slip Op 31983(U)

August 26, 2009

Supreme Court, New York County

Docket Number: 603065/08

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN

PRESENT:

PART 57

Justice

Index Number : 603065/2008

VITALE, FARO

VS.

S&P 26 DEVELOPMENT ASSOCIATES LLC

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 603065-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for dismiss

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

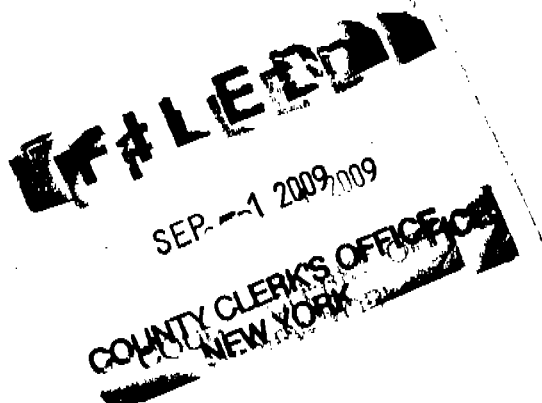
1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined as
per decision order dated 8-26-09.



Dated: 8-26-09

MJ

MARCY S. FRIEDMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

FARO VITALE,

Plaintiff,

- against -

S&P 26 DEVELOPMENT ASSOCIATES LLC,

Defendant.

Index No.: 603065/08

DECISION/ORDER

x

In this action, plaintiff Faro Vitale, the owner of a building located at 761 Avenue of the Americas in Manhattan, sues defendant S&P 26 Development Associates LLC, the owner of the adjoining building at 759 Avenue of the Americas, for damage allegedly caused to plaintiff's building by construction on defendant's property. Defendant moves to dismiss the complaint, pursuant to CPLR 3211(a), on the ground, among others, that the causes of action are barred by the statute of limitations.

Plaintiff's first cause of action alleges that his property was damaged as a result of defendant's removal of a party wall. The removal was performed pursuant to a demolition permit issued in 2001, and the work was completed, as evidenced by a letter of completion, in 2004. Defendant argues that this cause of action is governed by a three year statute of limitations, and is untimely because the action was not commenced until 2008.

Where injury is caused by a construction contract to which the plaintiff is not a party, the plaintiff is relegated to an action for negligence. (See City School Dist. of City of Newburgh v

[* 3]
Hugh Stubbins & Assocs., 85 NY2d 535 [1995].) The statute of limitations for injury to property based on negligence is three years. (See CPLR 214[4].) As a general rule, a tort cause of action

“cannot accrue until an injury is sustained.” (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993].) In cases involving damage from construction by an adjoining property owner, the Appellate Division of this Department has held that the injury was sustained, and the cause of action accrued, when the injury became visible or apparent after the construction. (See Mark v Eshkar, 194 AD2d 356, 357 [1st Dept 1993] [cause of action for damage to party wall accrued not at time of adjoining property owner’s construction which resulted in “relatively minor damage to the wall,” but years later when larger structural cracks became manifest]; Russell v Dunbar, 40 AD3d 952, 953 [2d Dept 2007] [damage was “apparent,” and cause of action accrued, when plaintiff noticed damage to apartment ceiling from water inside wall]. Compare Johnson v Marianetti, 202 AD2d 970 [4th Dept 1994] [injury occurred when adjoining property owner altered drainage pipe, causing ground water to be diverted onto plaintiff’s property]; City of Niagara Falls v Rudolph, 97 AD2d 971 [4th Dept 1983] [injuries were sustained when HVAC system was installed, not later when system was uncovered and defective work was first discovered].)¹

Here, the complaint pleads that the damage to the party wall occurred at the time of the

¹In contrast, where a cause of action for property damage arises out of defective performance of a construction contract, as where the plaintiff is a party to the contract rather than a bystander, the cause of action will accrue upon completion of the construction work. (See e.g. City School Dist. of City of Newburgh, 85 NY2d at 538; Gelwicks v Campbell, 257 AD2d 601 [2d Dept 1999].) This authority is inapplicable here as the adjoining property owner performed the work under a contract to which plaintiff was a stranger.

As discussed above, however, there is authority holding that even where the plaintiff is not a party to the construction contract and brings a cause of action for property damage based in negligence, the cause of action may, in appropriate circumstances, accrue from the completion of the construction work.

[* 4]
demolition in 2001. (See Complaint, ¶ 12 [“While removing the party wall, defendant damaged the structural integrity of the wall belonging to plaintiff’s property and never remedied same”; ¶

¶4 [“While removing the party wall, defendant damaged the wall belonging to plaintiff’s

property by causing holes and cracks . . . and never remedied same”].) While plaintiff alleges “continuing weakening” of plaintiff’s wall (*id.*, ¶ 20), it is clear from the face of the pleading that the damage was first apparent in 2001. As the cause of action for damage to the party wall was brought more than three years later, it is time-barred.

Plaintiff’s second cause of action alleges that, also in July 2001, following the demolition of the party wall, defendant erected a new brick wall that encroaches up to 18 inches on plaintiff’s property. (Complaint, ¶¶ 26-28.) Contrary to defendant’s contention, this action is not subject to dismissal on the face of the pleadings, based on RPAPL 611. This statute imposes a one year statute of limitations for actions to remove a wall that encroaches six inches upon an adjoining property, and a two year statute of limitations for damage actions based on encroachments not exceeding six inches. (See *Sova v Glasier*, 192 AD2d 1069 [4th Dept 1993].) RPAPL 611 is inapplicable as the complaint alleges an encroachment of greater than six inches.

Rather, the three year statute of limitations for property damage applies. However, it is well settled that “an encroaching structure is a continuing trespass which gives rise to successive causes of action.” (*509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48, 52 [1964]; *Bloomingdale’s, Inc. v New York City Tr. Auth.*, 52 AD3d 120, 123 [1st Dept 2008], *affd* ___ NY3d ___, 2009 NY Slip Op 04743 [2009].) Such an action is wholly barred by the expiration of such time (ten years) as would create an easement by prescription. (*509 Sixth Ave. Corp.*, 15 NY2d at 52.) In addition, the statute of limitations runs against each successive trespass, and

thus will bar recovery for injuries that occurred more than three years prior to the commencement of the action. (See Bloomingtondale's, 52 AD3d at 123; Cranesville Block Co. v Niagara Mohawk

Power Corp., 175 AD2d 444 [3d Dept 1991].) Plaintiff's second cause of action is therefore

barred only to the extent that it seeks damages that occurred more than three years before this action was commenced.

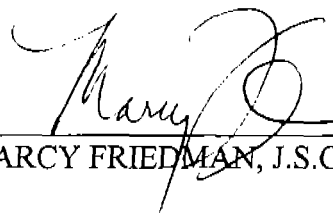
Plaintiff's third cause of action pleads that plaintiff sustained damages as a result of defendant's construction, also in July 2001, of a wall (other than the allegedly encroaching wall) which is located only thirteen inches away from a wall on plaintiff's property and therefore created a "trap-like condition for which, plaintiff has been issued several citations." (Complaint, ¶ 41.) This cause of action for damage to property, whether denominated a nuisance or other tort, is subject to CPLR 214(4) and accrued when the damage was apparent. As the damage was apparent at the time of the construction of the wall, the cause of action is barred by the three year statute of limitations.

It is accordingly hereby ORDERED that defendant's motion is granted to the extent of dismissing the first and third causes of action, and dismissing the second cause of action to the extent that it seeks damages for more than three years prior to the commencement of the action.

This constitutes the decision and order of the court. The parties shall appear for a preliminary conference in Part 57 of this Court on October 1, 2009 at 11:00 a.m.

Dated: New York, New York
August 26, 2009

FILED
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COUNTY CLERK'S OFFICE
NEW YORK



MARCY FRIEDMAN, J.S.C.