SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

TRIAL/IAS PART 23

Justice.

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THE BANK OF NEW YORK,

Plaintiff,

- against-

Index No.: 021993/08
Motion Sequence...01
Motion Date...09/08/09

AFFORDABLE HOUSING GROUP OF NEW YORK, INC. and GARY MARCUS,

Defendants.

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AFFORDABLE HOUSING GROUP OF NEW YORK, INC. and GARY MARCUS,

Third-Party Plaintiffs,

-against-

ROBINSON, MULLER & SCHIAVONE ENGINEERS, BUTT OTRUBA-O'CONNOR and COUNTY OF NASSAU,

Third-Party Defendants.

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Papers Submitted:
Notice of Motion and Affirmation.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Affirmation in Reply.....x

Affirmation in Reply.....x
Sur-Reply Affirmation.....x
Memorandum of Law (3).....x

Upon the foregoing papers, the motion pursuant to CPLR § 3211(a)(5) and (a)(1) and (7) by Third-Party Defendant, Robinson, Muller & Schiavone Engineers [hereinafter RM&S] to dismiss the Third-Party complaint as to said Defendant is **GRANTED** as hereinafter provided.

The underlying action arises from the Defendants' default under the terms and conditions of a loan agreement dated August 20, 2004 pursuant to which The Bank of New York Mellon, formerly known as The Bank of New York, lent Affordable Housing Group of New York, Inc. [hereinafter Affordable] the principal sum of $3,700,000 in connection with the construction of a senior citizen housing facility for the Town of Hempstead. The facility, known as Golden Age Housing, is located at 1888 Foster Meadow Drive, Elmont, New York and was constructed by Stoneridge Homes, Inc. [hereinafter Stoneridge] utilizing plans developed by RM&S and Third-Party Defendant, Butt Otruba-O'Connor, Architects [hereinafter BO]. After litigation of the underlying matter, The Bank of New York was granted summary judgment against the Defendants/Third-Party Plaintiffs, Affordable and Gary Marcus[1] in the sum of $4,067,361.74 as set forth in the judgment filed September 19, 2008.

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[1]As asserted in the complaint in the underlying action, Gary Marcus was the unconditional guarantor of Affordable's obligations under the terms of a building loan agreement dated on or about August 20, 2004.

Pursuant to the so-ordered decision of Judicial Hearing Officer, Ira Gammerman, dated September 15, 2008, the third-party action, wherein Affordable and Gary Marcus sought recovery against Nassau County, architects, BO and civil engineers, RM&S, was severed and continued.

The third-party complaint asserts claims against BO and RM&S[2] sounding in professional malpractice and indemnification/contribution. The Third-Party Plaintiffs allege that they sustained damages as a result of inadequacies in design and construction of the project. Specifically, the basement of the senior citizen center was flooded on two occasions [October, 2005 and July, 2007] when a nearby storm water detention pond, allegedly owned and operated by Nassau County, situated on the Belmont Racetrack property, breached its berm and water flowed across Hempstead Turnpike, through the Western Nassau Water Authority property, into the lower elevation at the rear of the senior center. Because Nassau County, the alleged owner of the Belmont Racetrack and surrounding property, failed to take any measures to rectify the flooding condition, the Third-Party Plaintiff, Affordable, maintains it expended its own resources to repair the damage caused by the October 2005 flooding event. Further, Affordable avers that the second flood in July, 2007 caused extensive damage to the building and its mechanical systems as a consequence of which Affordable was caused to default under the terms of its loan with The Bank of New York.

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[2]Pursuant to RM&S' contract with Stoneridge [June 30, 2003], RM&S was retained to render civil engineering services involving, *inter alia*, design, sewer connections, design of water distribution system, surveying, access improvement plans and irrigation plans.

RM&S moves to dismiss the third-party complaint as time barred and for failure to state a cause of action relying on CPLR § 3211(a)(5) and (a)(7).

An allegation that a party failed in the proper performance of services related primarily to its profession is a claim of professional malpractice. *Boslow Family Ltd. Partnership v Kaplan & Kaplan, PLLC*, 52 A.D.3d 417 [1st Dept. 2008], *lv to appeal denied* 11 N.Y.3d 707 [2008]. A claim for professional malpractice against an engineer or architect accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship. *M.G. McLaren, P.C. v Massaud Engineering, L.S., P.C.*, 51 A.D.3d 878 [2nd Dept. 2008]; *Gelmac Quality Feeds, Inc. v Ronning,* 23 A.D.3d 1019, 1020-21 [4th Dept. 2005], *reargument denied* 26 A.D.3d 904 [4th Dept. 2006]. In determining the date of accrual, the completion of the engineers' obligations must be viewed in light of the particular circumstances of the case. *Wawarsing v Camp, Dresser & McKee, Inc.*, 49 A.D.3d 1100, 1101 [3rd Dept. 2008]; *Frank v Mazs Group, LLC*, 30 A.D.3d 369, 370 [2nd Dept. 2006].

Where, as here, a party moves to dismiss a compliant pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the statute of limitations, that party bears the initial burden of establishing the affirmative defense by *prima facie* proof that the time in which to sue has expired. *Assad v City of New York*, 238 A.D.2d 456 [2nd Dept. 1997]. Once the movant makes such a showing, the burden falls to the opponent to aver evidentiary facts establishing that the action was timely commenced or falls within an exception to the

statutory period. *Savarese v Shatz,* 273 A.D.2d 219, 220 [2nd Dept. 2000]. The Third-Party Plaintiffs have failed to meet this burden. While they maintain that their professional malpractice claim against RM&S accrued upon filing of the Certificate of Occupancy [Completion] dated March 21, 2006, the record is devoid of any basis to conclude that RM&S performed any acts or was guilty of any omissions subsequent to completion of its design services on May 19, 2005. The time records submitted by the movant, which the Third-Party Plaintiffs do not refute, substantiate that RM&S' final walk through/inspection of the project occurred on May 13 and May 16 and that Letters of Conformance were written by them to the Town of Hempstead Engineering Department on May 19, 2005 certifying respectively that "the site improvements" and "roof drains" for the project were "constructed in substantial conformance to the approved plans." At the very latest, therefore, the professional relationship between RM&S and Stoneridge terminated upon the completion of the final walk through and writing of the letters on May 19, 2005.

In response to RM&S' *prima facie* showing that the three year limitations period [CPLR § 214(b)] had expired prior to commencement of the action, the Third-Party Plaintiffs fail to proffer any evidence to indicate that a professional relationship between them and RM&S continued beyond May 19, 2005. There is, in the Court's view, no basis to support the Third-Party Plaintiffs' claim that the statute of limitations did not begin to run until a Certificate of Completion was issued on March 21, 2006, which would make the third-party action, commenced on August 12, 2008, timely.

The only substantiation offered to buttress the Third-Party Plaintiffs' claim is a draft due diligence report [February 2008] prepared for the Town of Hempstead Planning & Economic Development Department by Cameron Engineering & Associates, LLP which states that "[t]he building was reportedly completed and being made ready for occupancy sometime in 2006" and the aforementioned Certificate of Completion [no. 200516764] *vis a vis* the installation of one hydraulic passenger elevator at a cost of $65,000. Contrary to the Third-Party Plaintiffs' assertions, neither the Certificate of Completion nor the draft Engineer's Report constitute viable evidence of an ongoing professional relationship between them and RM&S sufficient to contradict RM&S' showing that its services *vis a vis* the project were completed on May 19, 2005. The Third-Party Plaintiffs have failed to rebut RM&S' showing that the third-party action, commenced on August 12, 2008, is untimely.

Even viewing the Third-Party Plaintiffs' submissions their most favorable light, (*Cron v Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366 [1998]) the Third-Party Plaintiffs have failed to allege any conduct on the part of RM&S within the three years preceding commencement of this action that would support their claim of professional malpractice. Significantly, RM&S was under no contractual obligation to prepare/file a Certificate of Occupancy [Completion] with respect to the project.

With respect to its CPLR § 3211(a)(7) defense, RM&S urges that there can be no recovery for economic damages arising from the engineer's purported negligence. The engineering design services at issue herein were rendered pursuant to a contract between

RM&S and Stoneridge: a contract to which neither Affordable nor Gary Marcus was a party. Although on a motion to dismiss for failure to state a cause of action, the facts pleaded are presumed to be true and accorded every favorable inference, allegations consisting of bare legal conclusions, as well as factual claims that are contradicted by documentary evidence, are not entitled to such consideration. *Asgahar v Tringali Realty, Inc.*, 18 A.D.3d 408, 409 [2nd Dept. 2005].

Since the damages sought by the Third-Pparty Plaintiffs relate to the alleged loss of profit expected from the project, i.e., economic loss damages, a claim for contribution based upon common law is not available. As the court stated in *Children's Corner Learning Center v Miranda Contracting Corp.,* 64 A.D.3d 318, 323 [1st Dept. 2009], "the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein." Similarly, there is no basis to sustain the cross-claim asserted by the Third-Party Defendant, County of Nassau against RM&S for contribution.

The right to common law indemnification arises in favor of one who is compelled to pay for the wrong of another. The predicate for such indemnity is vicarious liability without fault on the part of the indemnitee. *Barry v Hildreth,* 9 A.D.3d 341, 342 [2nd Dept. 2004]. A party who has itself actually participated in the alleged wrongdoing cannot receive the benefit of the doctrine. *Rockefeller University v Tishman Const. Corp. of New York*, 232 A.D.2d 155, 156 [1st Dept. 1996], *leave to appeal denied* 8 N.Y.2d 811 [1997].

The facts as alleged do not support a claim for common law indemnification.

In the absence of a contractual agreement between the Third-Party Plaintiffs and RM&S in which RM&S agreed to indemnify the Third-Party Plaintiffs for any claim stemming from its work, the Third-Party Plaintiffs' claim for contractual indemnity is untenable. *Moss v McDonald's Corp.*, 34 A.D.3d 656, 657 [2nd Dept. 2006]; *Board of Managers of Bay Club Condominium v Bay Club of Long Beach, Inc.*, 15 Misc.3d 282, 827 N.Y.S.2d 855, 2007 N.Y. Slip Op. 27013.

Accordingly, the Third-Party Defendant RM&S' motion to dismiss the third-party complaint as to said defendant is **GRANTED** and the third-party complaint and all cross-claims asserted against RM&S are hereby **DISMISSED** pursuant to CPLR § 3211(a)(5) and (a)(7).

All matters not decided herein are hereby **DENIED**.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
October 20, 2009

ENTER:

HON. RANDY SUE MARBER, J.S.C.