

**Southern Wine & Spirits of Am., Inc. v Impact Envtl.
Eng'g, PLLC**

2009 NY Slip Op 33405(U)

November 5, 2009

Supreme Court, New York County

Docket Number: 650489/08

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK

PART 39

PRE

Index Number : 650489/2008

SOUTHERN WINE & SPIRITS OF

vs.

IMPACT ENVIRONMENTAL

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 650489/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The

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
Nov 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

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NOV 05 2009
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 11/5/09

BARBARA R. KAPNICK S.C.
J.S.C.

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):

Handwritten initials

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----X
SOUTHERN WINE & SPIRITS OF AMERICA,
INC., SOUTHERN WINE & SPIRITS OF NEW
YORK, INC. and SYOSSET PROPERTY
PARTNERS, LLC,

Plaintiffs,

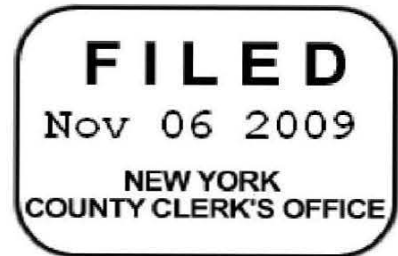
- against -

IMPACT ENVIRONMENTAL ENGINEERING, PLLC,
IMPACT ENVIRONMENTAL CONSULTING INC.,
IMPACT ENVIRONMENTAL REMEDIATION, INC.,
IMPACT ENVIRONMENTAL SOLUTIONS CORP., and
IMPACT ENVIRONMENTAL CLOSURES, INC.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 650489/08
Motion Seq. No. 001



In this action, plaintiffs Southern Wine & Spirits of America, Inc., Southern Wine & Spirits of New York, Inc., and Syosset Property Partners, LLC (collectively, "Southern") seek to recover damages against defendants Impact Environmental Engineering, PLLC, Impact Environmental Consulting Inc., Impact Environmental Remediation, Inc., Impact Environmental Solutions Corp., and Impact Environmental Closures, Inc. (collectively, "Impact") for breach of contract (first cause of action) and negligence/gross negligence (second cause of action).

Defendants now move to dismiss the Complaint on the ground that plaintiffs have failed to comply with a condition precedent to filing this lawsuit. Specifically, the General Terms and Conditions annexed to the parties' agreements (and incorporated by reference therein) provide, in relevant part, as follows:

The CLIENT shall make no claim for professional negligence, either directly or in a third-party claim against [Impact Environmental Consulting, Inc. ("IEC")] unless the CLIENT has first provided IEC with a written certification executed by an independent design professional currently practicing in the same discipline as IEC. The certification shall: a) identify the name of the professional; b) specify each and every act or omission that the certifier contends is a violation of the standard of care identified in this Agreement; c) state in complete detail the basis for the certifier's opinion that each such act or omission constitutes such a violation. This certificate shall be provided to IEC not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any arbitration or judicial proceeding [emphasis supplied].

Plaintiffs do not dispute that such a written certification was not provided prior to the filing of this action on December 11, 2008, but argue that this Court should find that they complied with the condition precedent by providing a written Certification to Impact on February 6, 2009, more than thirty (30) days prior to plaintiffs' filing of an Amended Complaint on or about March 31, 2009.

While plaintiffs correctly note that "[a] claim asserted in an amended pleading is [generally] deemed to have been interposed at the time the claims in the original pleading were interposed," (CPLR § 203 [f]), and that plaintiffs' claims in the Amended Complaint may thus "relate back" to the original Complaint for purposes of the Statute of Limitations, the filing of an Amended Complaint cannot cure plaintiffs' failure to comply with their contractual requirement to provide the certification "to IEC not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any ... judicial proceeding."

Accordingly, based on the papers submitted and the oral argument held on the record on September 23, 2009, this Court finds that plaintiffs have failed to comply with a condition precedent to the filing of this action, and thus the Complaint must be dismissed.

The Clerk may enter judgment accordingly without costs or disbursements.

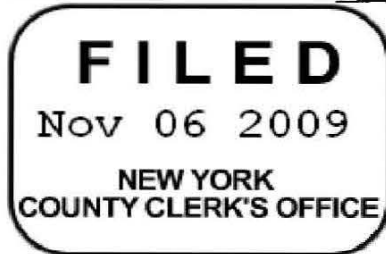
Plaintiffs' request that this Court expressly provide that said dismissal is without prejudice to their right to commence a new action subject to the protections of CPLR § 205(a) is denied.¹

This constitutes the decision and order of this Court.

Date: November 5, 2009



Barbara R. Kapnick
J.S.C.



BARBARA R. KAPNICK
J.S.C.

¹ Pursuant to CPLR § 205(a),

[i]f an action is timely commenced and is terminated in any other manner than ... a final judgment upon the merits, the plaintiff, ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period...

However, it is not clear from the papers submitted whether or not plaintiffs' claim for negligence was timely commenced at the time of commencement of the instant action.