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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**
**TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***
**Justice of the Supreme Court**

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**TOWN OF OYSTER BAY,**

**Plaintiff(s),**

**-against-**

**J. D. POSILLICO, INC.,**

**Defendant(s).**

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**Index No. 13429/09**

**Motion Submitted: 1/19/10**
**Motion Sequence: 001, 002**

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant's motion for an order pursuant to CPLR §3211(a)(4), (5) and (7) dismissing plaintiff's verified complaint and plaintiff's cross-motion for an order transferring this action to the Hon. Justice Edward W. McCarty III are both denied.

22 NYCRR § 202.3(a) provides that "[e]xcept as otherwise may be authorized by the Chief Administrator or by these rules, every action and proceeding shall be assigned and heard pursuant to the individual assignment system." 22 NYCRR § 202.3(b) provides for random assignment of cases upon the filing of an RJI and "[t]he judge thereby assigned shall be known as the 'assigned judge' with respect to that matter and, except as otherwise provided in subdivision (c) of this section, shall conduct all further proceedings therein." 22 NYCRR § 202.3(c)(5) provides that "[t]he Chief Administrator may authorize the transfer of any action or proceeding and any matter relating to an action or proceeding from one judge to another in accordance with the needs of the court." All prior litigation involving

"sewer damage" previously referred to Justice McCarty has been resolved. There are no cases pending before Justice McCarty with which to consolidate or otherwise join the instant action. Moreover, the Administrative Judge has declined plaintiff's letter application to transfer this action. The Court has considered the remaining arguments to transfer this action to Justice McCarty and finds them to be without merit. The cross-motion for an order transferring this action to Justice McCarty is denied.

Plaintiff's verified complaint alleges one cause of action for continuing public nuisance relating to work the defendant performed commencing in 1977 as part of a joint venture in connection with a public works contract with County of Nassau under which the defendant agreed to construct sanitary sewers in and along various streets within the Town of Oyster Bay. Plaintiff's complaint alleges the defendant's work created a continuing public nuisance that has caused plaintiff to make repairs and will cause plaintiff to make future repairs to its roadways.

The salient allegations of the complaint are as follows:

Defendant commenced construction of the sewer lines in various streets within the Town of Oyster Bay beginning in and about 1977. Defendant completed its actual sewer construction work sometime in 1978. The defendant committed faulty workmanship under said contracts by failing to properly excavate and backfill the sewer trenches; failing to properly supervise the work performed by defendant's employees; failing to provide adequate subadjacent support to plaintiff's roadways, curbs, gutters and other facilities both during and after actual construction operations. The defendant's faulty excavation and backfilling procedures resulted in a permanent loss of subterranean support of the roadways and facilities of the plaintiff. This loss of support ultimately resulted in lowering of the crown of the roadbed overlying the sewer trenches. As a consequence, stationary surface sewer manholes were elevated above the lowered street pavement. This posed a significant impediment to proper vehicular travel and impaired routine snow removal operations. Storm water run off was degraded because of depressions in the road surface resulting in water ponding on the roadways further compromising safe vehicular passage. Overlying curb, gutter and sidewalks settled and cracked exposing pedestrian traffic to significant risk of physical injury. The plaintiff has and will in the foreseeable future, suffer continuing damage to its roadways and facilities. Defendant's faulty workmanship resulted in permanent defects in plaintiff's roadways facilities which created significant interference with the public health, the public safety, the public peace, the public comfort and the public convenience. A public nuisance was created during the period of actual work by the sewer contractor. The faulty excavation and backfilling by the defendant during the installation of the sewers resulted in the destruction of the earthen support under the plaintiff's roadways. The backfill in and around the sewer trenches has gradually and continually eroded generating the aforementioned highway defects.

Where a nuisance arises solely from negligence, the nuisance and negligence elements may be so intertwined as to be practically inseparable and any attempt to separate them is a useless task. A single harm may be characterized as either negligence or nuisance. (See ***McFarlane v. City of Niagara Falls***, 247 N.Y. 340, 160 N.E. 391 (1928); ***Morello v. Brookfield Construction Co.***, 4 N.Y.2d 83, 149 N.E.2d 202, 172 N.Y.S.2d 577 [1958]). Nuisance has been defined as a conscious and deliberate act involving the idea of continuity or recurrence. Some degree of permanence ordinarily is an essential element of the concept of nuisance. (See ***81 NYJur2d § 22,*** citing ***Town of Hempstead v. S. Zara & Sons Contracting Co., Inc.***, 173 A.D.2d 536, 570 N.Y.S.2d 137 [2d Dept., 1991]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." (***Sokoloff v. Harriman Estates Development Corp.***, 96 N.Y.2d 409, 414, 754 N.E.2d 184, 729 N.Y.S.2d 425 (2001); see ***Polonetsky v. Better Homes Depot***, 97 N.Y.2d 46, 54, 760 N.E.2d 1274, 735 N.Y.S.2d 479 (2001); ***Leon v. Martinez***, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). On a motion to dismiss, the plaintiff had no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint (see ***Stuart Realty Co. v. Rye Country Store, Inc.***, 296 A.D.2d 455, 745 N.Y.S.2d 72 (2d Dept., 2002); ***Paulsen v. Paulsen***, 148 A.D.2d 685, 686, 539 N.Y.S.2d 433 (2d Dept., 1989); **Palmisano v. Modernismo Publs.,,** 98 A.D.2d 953, 954, 470 N.Y.S.2d 196 [4th Dept., 1983]). While it is true that allegations in a complaint are to be taken as true when considered on a motion to dismiss pursuant to CPLR § 3211, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration. (***Morris v. Morris***, 306 A.D.2d 449, 763 N.Y.S.2d 622 (2d Dept., 2003); ***Maas v. Cornell University***, 94 N.Y.2d 87, 721 N.E.2d 966, 699 N.Y.S.2d 716 [1999]).

"To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land (see ***Domen Holding Co. v. Aranovich***, 1 N.Y.3d 117, 123, 802 N.E.2d 135, 769 N.Y.S.2d 785 [2003]). The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance" (see ***Domen Holding Co. v. Aranovich, supra,*** citing ***Restatement [Second] of Torts § 821D, Comment b***; see also ***Nussbaum v. Lacopo***, 27 N.Y.2d 311, 315, 265 N.E.2d 762, 317 N.Y.S.2d 347 (1970)]. No perfect definition of nuisance exists. Each case must be decided on its own facts. See ***Metropolitan Life Ins. Co. v. Moldoff***, 187 Misc. 458, 63 N.Y.S.2d 385 (App. Term, 1st Dept. 1946, per curium); ***Pamac Realty Corp. v. Bush***, 101 Misc.2d 101, 102, 420 N.Y.S.2d 614 (Civ. Ct., N.Y. County 1979).

Looking at the four corners of the complaint and giving it every benefit of the doubt, the plaintiff has alleged a viable cause of action.

On a motion to dismiss a cause of action pursuant to CPLR §3211(a)(5) on the ground that it is time-barred, the defendant bears the initial burden establishing *prima facie* that the time in which to sue has expired. The statute of limitations for the plaintiff's claim is either three years pursuant to CPLR §214(4) (injury to property) or six years pursuant to CPLR §213(1) (six-year statute of limitations to an action for which no limitation is specifically prescribed by law). Defendant argues that the plaintiff's cause of action has accrued since J. D. Posillico's work was substantially completed more than thirty (30) years ago. Evidentiary facts must be presented to establish that the cause of action falls within an exception to the statute of limitations. (See ***Cimino v. Dembeck***, 61 A.D.3d 802, 876 N.Y.S.2d 893 (2d Dept., 2009); ***Savarese v. Shatz***, 273 A.D.2d 219, 708 N.Y.S.2d 642 [2d Dept., 2000]). The plaintiff has not identified with specificity the scope or time when the work was performed. Moreover, the plaintiff has not established when it first had notice of the alleged defective construction and damages that gave rise to the underlying cause of action, other than alleging a "continuing nuisance." However, since the Court must give the plaintiff every favorable inference on a CPLR §3211(a) motion to dismiss and issues of fact exist as to whether the plaintiff's claim falls within any of the exceptions to the statute of limitations, the motion to dismiss is denied.

With respect to the application to dismiss pursuant to CPLR § 3211(a)(4), this Court does not find the parties to this action and the action under Index No. 13432/09 to be identical. As plaintiff herein correctly points out, J. D. Posillico, Inc. and Lizza Industries Inc., a joint venture is an independent party defendant.

A Preliminary Conference (see ***22 NYCRR 202.12***) shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on the 2nd day of June, 2010, at 9:30 a.m. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

The foregoing constitutes the Order of this Court.

Dated: March 31, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
APR 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE