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

PRESENT: HON. SHERRY KLEIN HEITLER Justice

PART 30

Bernard, Shelly

- v -

Brookfield Properties

INDEX NO. 107211/08

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this 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 is denied as per a separate Order of today's date.

FILED
SEP 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9.23.10

Sherry Klein Heitler
J.S.C.

HON. SHERRY KLEIN HEITLER

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30

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SHELLY BERNARD,

Plaintiff,

-against-

BROOKFIELD PROPERTIES CORPORATION, et al.,

Defendants.

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DECISION AND ORDER

Index No. 107211/2008
Seq. No. 003



HON. SHERRY KLEIN HEITLER, J.

In or about May 2008 plaintiff Shelly Bernard commenced this asbestos-related personal injury action against defendant THE OFFICE OF JAMES RUDERMAN, LLP ("Ruderman"), among others[1].

Plaintiff was deposed on June 5, 2008. Among other things she claims that she was exposed to asbestos dust while working as a consultant for Salomon Brothers at 55 Water Street, a commercial office building in Manhattan (the "Building"). She worked at the Building from 1985 to approximately February 1988. While there plaintiff claims that renovations and

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[1]In response to that summons and complaint, Ruderman moved this court in July of 2008 (sequence 001) for an order dismissing the action against it pursuant to CPLR 214-d, CPLR 3211(a)(7) and (h) and CPLR 3212 ( i), invoking the 10-year notice of claim rule of CPLR 214-d. That motion was permitted to be withdrawn pursuant to this court's order entered on June 23, 2009. CPLR 214-d provides in relevant part:

> 1. Any person asserting a claim for personal injury, wrongful death or property damage, or a cross or third-party claim for contribution or indemnification arising out of an action for personal injury, wrongful death or property damage, against a licensed...professional corporation or limited liability company lawfully practicing...engineering...which is based upon the professional performance, conduct or omission by such...firm occurring more than ten years prior to the date of such claim, shall give written notice of such claim to each such...firm at least ninety days before the commencement of any action or proceeding against such...firm including any cross or third-party action or claim.****

CPLR 214-d(2) requires the inclusion in any subsequent pleading brought against such licensed professional the representation that there has been full compliance with this statute.

construction were being performed where she worked on the 28th floor of the Building, which generated dust and debris to which she and her fellow workers were exposed for about a year. She testified there was dust all over her clothing and in her food, and described unfettered loose material hanging down like streamers which looked old, which she said was asbestos and insulation through which she had to wade to get to one part of the office from another. Plaintiff became sick in 2007 with ovarian cancer. She has been diagnosed with mesothelioma.

On August 11, 2008 plaintiff subsequently added COLGATE PALMOLIVE CORPORATION ("Colgate") as a defendant in this action, which answered the complaint against it and interposed cross claims against Ruderman and the other defendants.

Defendant Ruderman is a structural engineering firm which was involved in construction activities at the Building during the relevant time periods. By Order to Show Cause dated August 26, 2009 (sequence 003) Ruderman again moves this court pursuant to CPLR 214-d, CPLR 3211(a)(7) and (h) and CPLR 3212(i) for summary judgment dismissing plaintiff's claims and all cross claims against it on the grounds that notices of claim pursuant to CPLR 214-d have not been properly filed or served upon it by any party and have not been properly pleaded in any complaint or cross claims asserted against it . Ruderman further contends it has no record of any work done by it on the 28th floor of the Building and therefore had no connection with the work site and exposure complained of by plaintiff, that it had no responsibility for any asbestos removal work being done at the Building, and that all of its plans and specifications for any work it did in the Building during the relevant time period specifically call for non-asbestos fireproofing. Ruderman asserts plaintiff had no basis upon which to claim there was asbestos in her workplace. Consequently Ruderman claims there is no ground upon which it may be held liable in this action. Ruderman thus asks the court to "so order" its No Opposition Summary

Judgment Motion and Order, to which the plaintiff has consented, dismissing with prejudice the complaint and cross claims against it.

By Notice of Cross Motion dated October 7, 2009 defendant Colgate cross-moves for an order deeming Colgate's CPLR 214-d notice of claim addressed to Ruderman, dated October 1, 2009, which is annexed to Colgate's cross-motion papers as Exhibit A, to have been timely served *nunc pro tunc* [2] pursuant to CPLR 214-d(5), CPLR 3211(h), and CPLR 3212(i) on the ground there exists a substantial basis in law and fact for opposing Ruderman's dismissal motion. In this regard Colgate argues that Ruderman admits that it performed substantial work in the Building during the time plaintiff was there; it does not deny that it worked on the 28th floor at that time but merely asserts that it is unable to locate any record of having worked on the 28th floor; and that its plans for other floors at the time approved the use of vermiculite as a suitable fireproofing material in the Building, which Colgate urges has been found in other cases to be a carrier of asbestos and which fact Colgate asserts is confirmed by the United States Environmental Protection Agency's warning that the majority of vermiculite used in the United States from 1919 to 1990 was contaminated with asbestos (*see,* *http://www.epa.gov/asbestos/pubs/verm.html* [last updated June 7, 2010]). Colgate further points to Ruderman's involvement with the Building as the structural engineer on the project when the Building was initially constructed using asbestos-containing materials. Colgate asserts that it is entitled to the discovery afforded by CPLR 214-d to determine the nature of Ruderman's involvement in the selection and use of asbestos containing materials when the Building was constructed. Further Colgate seeks an order staying the within action pursuant to CPLR 214-d(5)

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[2] On February 11, 2010 Colgate amended the cross-claims asserted by it against Ruderman in its Answer to include representations that it had fully complied with the requirements of CPLR 214-d.

until the motion and the cross motion are determined by the court.

In opposition to the cross motion Ruderman asserts that Colgate failed to file its notice of claim in accordance with the mandate of CPLR 214-d(5) and dismissal is therefore required. Ruderman further contends that Colgate has failed to show a substantial basis in law upon which to defeat its summary judgment motion in so far as Colgate provides no expert witness affidavit as to whether the use of vermiculite was outside the standards of competent practice in the 1980's when vermiculite was commonly used as a practice in the industry for fireproofing of structural members. Ruderman does not deny its involvement with the Building when it was initially constructed.

Plaintiff has put in no opposition to either the motion or the cross motion.

There is no evidence that Ruderman has joined issue by either serving an answer to plaintiff's complaint or to defendant Colgate's cross claim. Its CPLR 3212(i) summary judgment application is therefore denied as premature. However, Ruderman's pre-answer CPLR 3211(a)(7) and (h)[3] dismissal motion is viable. To the extent Ruderman seeks dismissal on the ground that both plaintiff and Colgate have failed to comply with the procedural requirements of CPLR. 214-d (*i.e.*, service upon Ruderman of a notice of claim at least 90 days prior to commencement of an action against it, and inclusion in the subsequent pleading of the

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[3]CPLR 3211(h) provides in relevant part: "Standards for motions to dismiss in certain cases involving licensed...engineers.... A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counter-claim subject to the motion is an action in which a notice of claim must be served on a licensed...engineer....pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, *shall* be granted unless the party responding to the motion demonstrates that a *substantial basis in law* exists to believe that the performance, conduct or omission complained of such licensed...engineer...was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion. (Emphasis added.)

representation that there has been full compliance with the statute), Ruderman's motion is granted..

There is no dispute in this case that Ruderman falls within the protection of CPLR 214-d. "A plain reading of CPLR 214-d requires the Court to grant summary judgment dismissing any action where the parties have not complied with the requirements of this statute." *Kretschmann v Board of Education of the Corning Painted Post School District,* 184 Misc.2d 535, 537 (Sup. Ct. Steuben Co. 2000). CPLR 3211(h) similarly contains mandatory language to such effect. The court is mindful, however, that "compliance with CPLR 214-d(1) is not a jurisdictional prerequisite to commencing an action; rather, compliance with that statute is a condition precedent to commencement of an action, and such compliance must be pleaded in an action for personal injuries against a [licensed professional]. Thus, [a claimant's] initial failure to comply with that statute [does] not render the first action jurisdictionally defective, and a second action [may be] properly commenced pursuant to CPLR 205(a)." *Kretschmann v. Board of Education of Corning Painted Post School District,* 294 AD2d 39, 41-42 (4th Dept 2002). Neither plaintiff nor Colgate have disputed that each failed to serve a CPLR 214-d notice of claim upon Ruderman 90 days prior to serving their respective action/cross claim against Ruderman, nor does plaintiff dispute that its initial and amended pleadings do not contain the required representation that there has been full compliance with the notice of claim statute. What is also not in dispute, however, is that both plaintiff's and defendant Colgate's actions against Ruderman were not barred by the statute of limitations in the first instance. In this regard, CPLR 205 provides in relevant part:

> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the

> cause of action survives, his or her executor or administrator, 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....

Thus it is not fatal if an an action or a cross claim is dismissed for non compliance with the notice of claim provision of CPLR 214-d; it can be saved if the claimant thereafter serves a notice of claim and after 90 days recommences an appropriate action within the six-month grace period of CPLR 205(a). *(See, Kretschmann v Board of Education, supra,* 294 AD2d 39; Alexander, 2001 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C205:6 at 476.) The court believes it is necessary to here point out, in respect of Ruderman's "untimeliness" argument in opposition to Colgate's application to assert its notice of claim at this time, that nothing in CPLR 214-d provides for a 90-day window within which Colgate must have filed a notice of claim against Ruderman once it was brought into this action or once it became aware of Ruderman's first motion against plaintiff on the subject. Rather, the law provides that once Colgate does file its notice of claim it must then *wait* ninety days before commencing an action or a cross claim against Ruderman. It may, however, conduct discovery within such time period. (*See,* CPLR 214-d[1], [4] and [5]). The relevant time period in terms of a matter in which CPLR 214-d applies obviously is whether or not the contemplated action or cross claim is timely in the first place. See CPLR 214-d(3).[4]

Accordingly, Ruderman's CPLR 3211(a)(7) and (h) motion to dismiss the action and cross claims against it is granted *without prejudice* to the recommencement of an appropriate action or cross claim in compliance with the requirements of CPLR 214-d and CPLR 205. In this

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[4]CPLR 214-d(3) provides: "Service of a notice as provided in this section shall toll the applicable statute of limitations to and including a period of one hundred twenty days following such service."

regard, the court declines at this time, and pending further proceedings herein, to "so order" Ruderman's No Opposition Summary Judgment Motion and Order.

To the extent Colgate seeks a stay pursuant to CPLR 214-d(5), its cross motion is denied as academic. CPLR 214-d, which operates in conjunction with CPLR 3211(h) and 3212(i), provides that an action shall *automatically* be stayed pending the outcome of any motion brought pursuant to CPLR 3211(h) or 3212(i). Likewise, Colgate's application for an order deeming its notice of claim, annexed to its papers as Exhibit A, to have been timely served *nunc pro tunc* is denied. As set forth above, the language of both CPLR 214-d(5) and CPLR 3211(h) is mandatory that an action *shall* be dismissed upon showing that the claimant has failed to comply with the notice of claim requirements of CPLR 214-d.

Further, Colgate has not on this motion met the heightened requirement of the "substantial basis" test of CPLR 3211(h). In *Castle Village Owners Corp. v Greater New York Mut. Ins. Co.*, 58 AD3d 178, 183 (1st Dept 2008), the court defined the "substantial basis" test:

> The 'substantial basis' standard set forth in CPLR 3211(h) constitutes a departure from the standard ordinarily applicable to the review of CPLR 3211 motions to dismiss for failure to state a cause of action. Rather than determine whether the allegations of the complaint when viewed most favorably to the plaintiff fall within any cognizable legal theory..., a court reviewing the sufficiency of a complaint under CPLR 3211(h) must look beyond the face of the pleadings to determine whether the claim alleged is supported by 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'.... While under this standard a plaintiff need not demonstrate that the claim is supported by a preponderance of the evidence..., 'a fair inference to be drawn from the legislative history is that CPLR 3211(h) was intended to heighten the court's scrutiny of the complaint and thereby make it easier to dismiss a CPLR 214-d action than other types of negligence actions'(Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 214-d, at 460). (Citations omitted.)

In *Castle Village Owners Corp., supra,* the First Department found the heightened requirement of CPLR 3211(h) had been satisfied where the complaint alleged with specificity and in detail that the defendant had departed from the professional standard of care and that its conduct was a

proximate cause of the injury complained of, which allegations were supported by the affidavit of complainant's expert, a registered professional engineer. In denying the CPLR 3211(h) motion to dismiss the First Department determined, "[t]he allegations of the complaint and the expert affidavit provide a 'substantial basis' to believe that [defendant] was negligent in the performance of its professional design duties and that the negligence was a proximate cause of the damage (*Castle Village Owners Corp., supra,* 58 AD3d at 184).

Here Colgate has failed to provide an appropriate expert's affidavit that Ruderman was negligent in the performance of its duties in permitting certain materials to be used in the Building which would be a proximate cause of plaintiff's exposure to asbestos in the Building. Accordingly, Colgate's request that the court accept its notice of claim annexed to its moving papers as served on Ruderman *nunc pro tunc* because there exists a substantial basis in law to assert Ruderman's negligence is also declined.



Accordingly, it is hereby

ORDERED that pursuant to CPLR 3211(a)(7) and (h) the motion by The Law Offices of James Ruderman, LLP to dismiss this action and all cross claims asserted against it is granted, without prejudice to recommencement of an appropriate action or cross claim in compliance with the provisions and requirements of CPLR 214-d and CPLR 205; and it is further

ORDERED, that the notice of claim annexed to Colgate's motion papers as Exhibit A shall be deemed served upon Ruderman upon service of a copy of this order with notice of entry; and it is further

ORDERED, that any and all other applications not specifically granted herein are denied.

This constitutes the decision and order of the court.

Dated: September 23, 2010

SHERRY KLEIN HEITLER, J.S.C.