

Kenny v Turner Constr. Co.

2011 NY Slip Op 33692(U)

April 6, 2011

Supreme Court, New York County

Docket Number: 603387/2006

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 603387/2006

KENNY, PATRICIA

vs.

TURNER CONSTRUCTION

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion


In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by the third third-party defendant Mueser Rutledge Consulting Engineers, pursuant to CPLR §§3211 (a)(7), 3211 (h) and 214-d (1), dismissing the third third-party complaint of the third third-party plaintiff The Corporate Source, Inc., is granted without prejudice to recommence the action, in compliance with the CPLR §214-d (1) requirements, within the six-month grace period pursuant to CPLR §205 (a); and it is further

ORDERED that the notice of claim annexed to Corporate Source's motion papers as Exhibit A shall be deemed served upon Mueser Rutledge Consulting Engineers upon service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: 4/6/11


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 35

-----X
PATRICIA KENNY,

Plaintiff,

Index No: 603387/2006

- against-

DECISION/ORDER

TURNER CONSTRUCTION COMPANY, RICHARD
MEIER & PARTNERS, MICHAEL HARRIS SPECTOR,
AIA. P.C. a/k/a THE SPECTOR GROUP and SPECTOR
GROUP HOME, LLC and SPECTOR ASSOCIATES,
LLP, THE CORPORATE SOURCE INC., YSRAEL A.
SEINUK, P.C. SYSKA HENNESSY, INC., NELSON &
POPE, LLP, KINGS COUNTY WATERPROOFING INC.,
L. MARTONE & SONS INC., MACEDOS
CONSTRUCTION CO., INC., FRANCIS BROTHERS
SEWER and DRAINAGE, INC. and
COKEN COMPANY, INC.,

Defendants.

-----X
TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiff,

-against-

Third-Party Index No:
590746/2007

THE CORPORATE SOURCE INC.,

Third-Party Defendant.

-----X
MACEDOS CONSTRUCTION CO., INC.,
OF NEW JERSEY N/K/A/ FLEMINGTON
CONSTRUCTION INC. AND S/H/A MACEDOS
CONSTRUCTION CO., INC.,

Second Third-Party Plaintiffs,

-against-

Second Third-Party
Index No: 590746/2007

J & A CONCRETE CORP.,

Second Third-Party Defendant.

-----X
 THE CORPORATE SOURCE, INC.,

Third Third-Party Plaintiff,

-against-

Third Third-Party Index
 No.: 5590556/2010

LEHRER McGOVERN BOVIS, INC.,
 BOVIS LEND LEASE LMB, INC.,
 HIGH CONCRETE STRUCTURES, INC.,
 HIGH CONCRETE GROUP LLC and
 MUESER RUTLEDGE CONSULTING ENGINEERS,

Third Third-Party Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Patricia Kenney (“plaintiff”), commenced this negligence action against various engineers, architects, and contractors for injuries she sustained on January 19, 2005, when she slipped and fell (the “incident”) at a parking garage (the “garage”) located at the United States Courthouse in Central Islip, New York (the “courthouse”). Defendant Turner Construction Company brought a third-party action against the third-party defendant, The Corporate Source, Inc. (“Corporate Source”), and Corporate Source filed a third third-party complaint against, *inter alia*, a third third-party defendant Mueser Rutledge Consulting Engineers (“MRCE”), seeking contribution.

MRCE now moves pursuant to CPLR §§3211 (a)(7), 3211 (h) and CPLR 214 -d (1) to dismiss the third third-party complaint for failure to state a cause of action and comply with a notice requirement.

For the reasons stated below, the motion is granted.

Background Facts

Corporate Source, a provider of janitorial and grounds services at the courthouse at the time of the incident, alleges, *inter alia*, that MRCE, a geotechnical engineering firm, was negligent in performing its services dating back to 1992 through 1997, *i.e.*, prior to and during the construction of the garage in 1997-2000, and that such negligence caused plaintiff's injuries. Specifically, Corporate Source alleges that MRCE's negligent analysis of the subsurface soil conditions and subsequent recommendations to the structural engineer with respect to the garage foundation design, eventually caused the garage structure to shift, permitting water to accumulate and freeze on the floor of the garage, thereby creating a dangerous condition, causing plaintiff to slip and fall.¹

MRCE now moves to dismiss the complaint against it, arguing that Corporate Source failed to comply with the procedural mandate of CPLR §214-d (1), which requires service upon a professional engineer or firm of a notice of claim at least 90 days prior to the commencement of an action against it, if the alleged negligent services performed by such engineer or firm were completed more than 10 years prior to the commencement of the action (CPLR §214-d [1]). Such compliance is a condition precedent to filing of this claim.

In opposition, Corporate Source argues that, even though the requisite notice was not given prior to the commencement of the action, CPLR §3211 (h) permits the court to deny such motion if an opposing party demonstrates that "a substantial basis in law exists" to believe that the engineer's conduct as set forth in the notice, was negligent and proximately caused plaintiff's

¹ The court notes that, according to the moving papers, this theory of MRCE's liability was asserted by Corporate Source's counsel at a court conference on January 4, 2011.

injury. Corporate Source argues that such “a substantial basis” exists in this case, since MRCE’s recommendations as to the design of the garage’s foundation were adopted by the structural engineer of the project, and “the foundation design was [a] proximate cause of excessive shifting [which] led to cracking [of the structure] and water accumulation [on the garage’s floor]” (opposition, ¶6). Thus, argues Corporate Source, the court should deny the motion and enter an order “treating the attached 214-Notice of Claim [as timely served] *nunc pro tunc*”² (opposition, ¶13).

Alternatively, if the court grants MRCE’s motion, dismissal of the complaint should be without prejudice to re-file within six months of the dismissal.

MRCE responds that Corporate Source misinterprets the application of CPLR §§3211 (h) and 214-d (1), since the “substantial basis” standard only applies where the threshold notice requirement has been satisfied. In the absence of the proper notice mandated by the statute, dismissal is automatic.

Discussion

Pursuant to CPLR § 3211(h),

“a motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action [. . .] subject to the motion is an action in which a Notice of Claim must be served on a licensed architect [or] engineer, pursuant to the provisions of subdivision 1 of section 214 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 architect [or] engineer [. . .] or such firm *as set forth in the Notice of Claim* was negligent and that such performance, conduct or omission was a proximate cause of personal injury” (emphasis added).

² The court record reflects that Corporate Source attaches a copy of the notice served upon MRCE simultaneously with the opposition papers.

Further, CPLR §214-d (1) provides in relevant part as follows:

"[a]ny person asserting [. . .] a third-party claim for contribution or indemnification arising out of an action for personal injury [. . .] against a licensed architect, engineer, land surveyor or landscape architect [. . .] which is based upon the professional performance, conduct or omission by such licensed architect, engineer, land surveyor or landscape architect [. . .] occurring more than ten years prior to the date of such claim, *shall give written notice of such claim [. . .] at least ninety days* before the commencement of any action or proceeding . The notice of claim shall identify the performance, conduct or omissions complained of, on information and belief, and shall include a request for general and special damages." (Emphasis added).

Thus, both CPLR §214-d and CPLR §3211 (h) contain mandatory language requiring the dismissal of any action where either written notice of the claim was not given, or, if the notice has been given, no substantial basis exists for the claim. As the legislative history of the CPLR §214-d demonstrates, it was enacted to ameliorate the problems of exposing architects or engineers to liability long after completion of a project and to provide "an expedited procedural device to quickly dispose of cases brought against a design professional more than ten years after completion that lack a basis in substantial evidence" (Senate Mem. in Support, L. 1996, ch. 682, 1996 McKinney's Session Laws of NY, at 2614).

Furthermore, it has been held that compliance with the notice requirement is *a condition precedent* to the commencement of this type of action (*Rabinowitz v Great Neck Park Dist.*, 2008 WL 2563498 [Sup Ct New York County 2008][Trial Order][by operation of the statute, it was incumbent upon the plaintiff to serve a notice of claim upon defendant architect as a *condition precedent* to commencement of the action CPLR 214-d]; *see also* Senate Mem. in Support, *supra*, at 2612 [actions "are dismissed unless a substantial basis exists for the claim *and the claimant adheres to certain procedural requirements*"] [emphasis added]). Moreover, "such

compliance must be pleaded in an action for personal injuries against an [engineering or] architectural firm” (*Kretschmann v Board of Education of the Corning Painted Post School District*, 294 AD2d 39, 744 NYS2d 106 [4th Dept 2002]).

New York courts have shown no hesitation in dismissing actions in which a plaintiff has failed to comply with the 90-days notice-of-claim requirement of the CPLR §214-d (*see, e.g., Bernard v Brookfield Properties Corp.*, 2010 WL 3843689 [Sup Ct New York County 2010]; *Dorst v Eggers Partnership*, 1999, 265 AD2d 294, 696 NYS2d 478 [2d Dept 1998]; *Rabinowitz v Great Neck Park Dist.*, 2008 WL 2563498, *supra* [Sup. Ct., Nassau County]).

In the instant matter, it is undisputed that MRCE, a licensed professional engineering firm, falls within the protection of CPLR §214-d (1) as the cause of action against MRCE is predicated upon its negligence with regard to the geotechnical engineering services rendered in connection with the foundation of the garage in which the plaintiff was injured.

It is also undisputed that the within action, as asserted against MRCE, was commenced in November 2010, approximately thirteen years after its engineering services were completed in or about 1997, and therefore, more than ten years after any alleged negligence could have occurred. Consequently, by operation of the statute, it was incumbent upon Corporate Source to serve a notice of claim upon MRCE as a condition precedent to the commencement of this third third-party action (*Rabinowitz, supra*; CPLR §214-d [1]).

Corporate Source failed to serve upon MRCE a notice of claim *at least 90 days prior* to commencement of this action and failed to include in the subsequent pleading the representation that there has been full compliance with the statute. Such noncompliance warrants dismissal and thus, the court needs not proceed with the “substantial basis” analysis under CPLR 3211 (h), or

the determination of the sufficiency of the pleading under CPLR §3211 (a)(7).

It should be noted, that Corporate Source's CPLR §214-d (1) notice, attached to its opposition papers as exhibit A, cannot be deemed timely served *nunc pro tunc*, in light of the mandatory language of both CPLR §214-d (5) and CPLR §3211(h), 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 (*Bernard v Brookfield Properties Corp.*, 2010 WL 3843689 , *supra* [CPLR §214-d notice, attached as an exhibit to one of the defendants' cross-claim, could not be deemed timely served *nunc pro tunc*]; *see also Kretschmann v. Board of Educ. of Corning Painted Post School Dist.*, 184 Misc 2d 535, 708 NYS2d 812 [Sup Ct Steuben County 2000][the complaint, which failed to allege compliance with the statute, was insufficient to provide the required notice under CPLR §214-d; and, to authorize notice *nunc pro tunc* would effectively nullify the notice requirements applicable prior to commencement of an action against an architect]).

Accordingly, the complaint as against MRCE is dismissed without prejudice and MRCE may recommence the action, in compliance with the CPLR §214-d (1) requirements, within the six-months grace period of CPLR §205(a).

Conclusion

Based on the foregoing, it is hereby

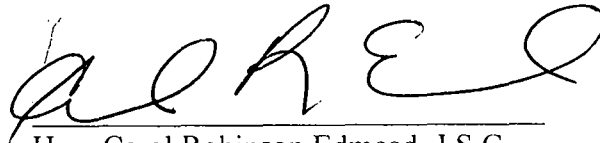
ORDERED that the motion by the third third-party defendant Mueser Rutledge Consulting Engineers, pursuant to CPLR §§3211 (a)(7), 3211 (h) and 214-d (1), dismissing the third third-party complaint of the third third-party plaintiff The Corporate Source, Inc., is granted without prejudice to recommence the action, in compliance with the CPLR §214-d (1)

requirements, within the six-month grace period pursuant to CPLR §205 (a); and it is further

ORDERED that the notice of claim annexed to Corporate Source's motion papers as Exhibit A shall be deemed served upon Mueser Rutledge Consulting Engineers upon service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: April 6, 2011



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD