

Kimnam Co., Inc. v Architect Design Studio Neo

2011 NY Slip Op 34057(U)

January 3, 2011

Sup Ct, NY County

Docket Number: 650028/09

Judge: Joan A. Madden

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

PRESENT: *Hon. Joan A. M. ...*

PART 11

Index Number : 650028/2009

KIMNAM CO INC

vs

ARCHITECT DESIGN STUDIO NEO

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 decided in accordance with the annexed memorandum Decision & order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED

JAN 06 2011

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: *January 03, 2011*

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

-----X
KIMNAM CO., INC., KIMNAM CO., INC. d/b/a
CAFÉ EXCHANGE, 65 BROADWAY CO., INC.,
65 BROADWAY CO., INC. d/b/a VARIETY CAFÉ,
65 B'DWAY CO., LLC and 65 B'DWAY, LLC
d/b/a VARIETY CAFÉ, Index No.: 650028/09

Plaintiffs,

-against-

ARCHITECT DESIGN STUDIO NEO, NEO P&C,
CO., RICHARD C. HONG, individually, VICTOR
K. HAN, individually, SUNG-HO SHIN, ARCHITECT,
P.C., SUNG HO SHIN, R.A., individually, NOVA
PLUMBING & HEATING, INC. and STEVE S. CHON,

Defendants.

-----X
JOAN A. MADDEN: J.S.C.:

In this action arising out of alleged professional malpractice and other errors made in connection with a renovation project involving two delicatessen restaurants, defendants Nova Plumbing & Heating, Inc. ("Nova") and Steven S. Chon ("Chon") (together "the moving defendants") move to dismiss the cause of action against them. Plaintiffs oppose the motion, which is granted for the reasons stated below.

Background

Plaintiffs variously own and/or operate two delicatessen restaurants located at 49 Broadway and 65 Broadway in Manhattan.¹ Nova is a New York corporation which performs plumbing work. Chon is a corporate officer and owner of Nova, and holds a Master Plumber's License. The fifth cause of action, the only claim against the moving defendants is for "plumbing malpractice," and alleges that Nova was retained as the

¹It is alleged that plaintiff 65 B'dway Co., LLC, is the successor-in-interest to 65 Broadway as the tenant of 65 Broadway, Co., Inc. and as the operator of the delicatessen known as Variety Café,

plumbing subcontractor of the renovation construction project for the delicatessen restaurant located at 65 Broadway, New York, New York, and to perform work on the plumbing system, the sprinkler system and the cooking equipment at that location. It is further alleged that in connection with this work, Nova was “supposed to file applications for the appropriate permits from the DOB and other agencies and to ‘sign off’ said permits when the work was complete” and “submit the appropriate documentation to the DOB when the work was complete, in order that 65 Broadway and 65 B’dway could obtain a Certificate of Occupancy for the delicatessen restaurant” (Complaint, ¶ 40, 42). Plaintiffs also state that Chon’s Master Plumber License was used for all DOB permit applications and other filings (Complaint ¶ 41)

It is alleged that after the completion of the work, “Nova and Chon failed to sign off said plumbing permits and failed to submit appropriate documentation to DOB, so that 65 Broadway and 65 B’DWAY were not able to obtain a Certificate of Occupancy for said delicatessen restaurant” (Complaint ¶ 43). It is also alleged that “Nova and Chon failed to follow the plumbing plans for the sprinkler system for said delicatessen restaurant, which called for the installation of additional sprinkler plumbing lines. Instead, Nova and Chon tapped into existing lines” (Id., ¶ 44).

The complaint alleges that “as a proximate result of said plumbing malpractice, negligence and breaches of the applicable standard of care by Nova and Chon, 65 Broadway and 65 B’DWAY have been damaged and forced to retain the services of a replacement plumber to complete the work, to sign off and submit the appropriate documentation to the DOB in order to obtain a Certificate of Occupancy (Complaint, ¶ 45). The moving defendants were replaced as the plumbers of record on or about August

30, 2007 (Complaint, ¶ 47). However, as stated above, the Certificate of Occupancy has not been obtained as of the date the Complaint was filed.

Plaintiff initiated this action on or about January 14, 2009. On April 15, 2009, the moving defendants filed an answer to the complaint and combined discovery demand notices on plaintiffs. Defendants responded to these demands on or about October 19, 2009.

The moving defendants now move for summary judgment dismissing the complaint, arguing that the fifth cause of action is barred by the applicable statute of limitations and there is no basis for holding Chon personally liable for any purported wrongdoing by Nova. In particular, the moving defendants argue that the documentary evidence shows that Nova completed all the required work in October 2002, and that this action, which was commenced in January 2009, is untimely.

In support of its motion, defendants submit the affidavit of Chon and certain records from the New York City Department of Buildings (“DOB”), which according to Chon show that DOB inspected the plumbing work performed by Nova in October 2002, and found that no further work was required.² In addition, with respect to the sprinklers, Chon point to DOB records showing that in October 2002, a Hydrostatic test was completed but that the inspector wanted the Building Plans amended to show the true number of sprinkler heads. However, Chon avers that the amendment of the plans was

²The DOB records identify 63 Broadway and not 65 Broadway as the premises inspected. However, Chon identifies the property as 63/65 Broadway in his affidavit, and the DOB records containing application details for the project identify the premises as 63 Broadway but under the location information indicate that the “house number” is 65 Broadway. Notably, plaintiffs do not deny the DOB records relate to plumbing work at issue.

not part of Nova's duties, but was the responsibility of the architects on the project.

Chon also points to DOB records showing that in 2007, another plumbing company was retained to perform the work at the site.

The moving defendants also argue that plaintiffs submit no evidence that the moving defendants had contractual or other obligation to obtain a "sign off" on the DOB permits.

In opposition, plaintiffs submit no evidence controverting the moving defendants' showing that their work was completed in October 2002. Instead, they argue that as Nova was not replaced as the "plumber of record" and that the deficiency in the plumbing work continued until August 2007, the limitations period did not begin to run until that date. Plaintiffs also argue that while there was no written contract with Nova, there was a verbal agreement to perform the work. Notably, however, plaintiffs fail to submit an affidavit from a person with knowledge of the terms of the alleged oral agreement, but rely, instead, on the affidavit of an architect who was not involved in the retention of Nova. Plaintiffs also contend that as Chon acted in his personal capacity as a Master Plumber, he can be held personally liable.

In reply, the moving defendants argue that the statute of frauds bars any claim based on an oral agreement. In addition, they argue that as there is no evidence or allegations that as a Master Plumber, Chon was required to certify work on the renovation project, he cannot be held personally liable.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Here, the moving defendants have made a prima facie showing that they are entitled to summary judgment based on the affidavit of Chon and the DOB records showing that Nova's work on the renovation project was completed by October 2002. The fifth cause of action is labeled as a claim for "plumbing malpractice." However, a malpractice claim is not viable as plumbing does not qualify as a profession giving rise to malpractice liability. See Leather v. United States Trust Co. of New York, 279 AD2d 311, 312 (1st Dept 2001)(noting that plaintiff failed to show that defendants were engaged in a profession, that is "an occupation generally associated with long-term educational requirements leading to an advanced degree, licensure evidencing qualifications met prior to engaging in the occupation and control of the occupation by adherence to standards of conduct, ethics and malpractice liability")(internal citations omitted). Thus, plaintiffs' apparent argument that the continuous representation doctrine, which applies only to professional services, tolled the statute of limitations period is without merit. Compare Sendar Development Co. LLC v. CMA Design Studio, P.C., 68 AD3d 500, 503 (1st Dept 2009).

Next, in cases, like the instant one, arising out of the work performed by a contractor, the six-year statute of limitations period provided under CPLR 213(2), governing breach of contract claims, applies and accrues upon the completion of the

contractor's work. Amedeo Hotels Limited Partnership v. Zwicker Electric Co., 291 AD2d 322, 322 (1st Dept 2002). Moreover, this rule is applicable, "[n]o matter how the claim is characterized in the complaint-negligence, malpractice, breach of contract...since all liability has its genesis in the contractual relationship between the parties." Id.

Here, the record shows that the moving defendants' work on the project was completed in October 2002. As this action was not commenced until January 2009, or more than six years later, the fifth cause of action must be dismissed as time-barred. Accordingly, the court need not reach the merits of the moving defendants' other arguments, including that Chon cannot be held personally liable to plaintiffs.

Conclusion

In view of the above, it is

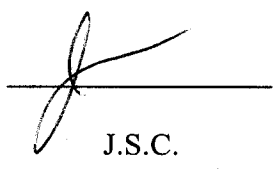
ORDERED that the fifth cause of action is dismissed in its entirety; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remaining parties shall appear for a status conference on March 3, 2011 at 9:45 am in Part 11, room 351, 60 Centre Street, New York, NY 10007.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: January 3, 2011


J.S.C.