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SHORT FORM ORDER

INDEX NO.: 14704-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

Hon. Emily Pines
J. S. C.

Motion Date: 03-20-2012
Submit Date: 04-24-2012
Motion No.: 004 MG

[ ] Final
[x] Non Final

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SACHEM CENTRAL SCHOOL DISTRICT, ON ITS OWN AS ASSIGNEE OF AURORA CONTRACTORS, INC.,

Plaintiff,

-against-

JOHNS MANVILLE, GIAQUINTO MASONRY, INC., RESTOR TECHNOLOGIES, INC., HST ROOFING , INC., CORD CONTRACTING CO., INC, INTERCOUNTY GLASS, INC., and VIPA RESTORATION, INC.,

Defendants.

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ORDERED that the motion (Mot. Seq. # 004) by defendant Cord Contracting Co., Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is granted.

Factual and Procedural Background

In 2002 Sachem Central School District ("Sachem") entered into a construction contract with Aurora Contractors, Inc. ("Aurora"), that included the installation of the roof and the exterior wall system at a new high school building. Aurora subsequently entered into subcontracts with HST Roofing, Inc. ("HST"), Giaquinto Masonry, Inc. ("Giaquinto"), Restor Technologies, Inc. ("Restor"), Cord Contracting Co. ("Cord"), Intercounty Glass, Inc. ("Intercounty") and VIPA Restoration, Inc. ("VIPA"), for wall, roof, and other construction work and material production at the high school. The roof installation was completed on February 17, 2004.

Sachem alleges that since 2004, the high school has been plagued with water leaks from the roof and wall systems, as well as widespread disbonding of the roof system. Sachem alleges that the leaks and resulting property damages were the result of defects in the roofing system and/or construction/workmanship and/or material deficiencies by the defendants. Additionally, Sachem claims that the wall systems and roof system were improperly prepared, installed and/or constructed by Giaquinto, Restor, HST, Cord, Intercounty and VIPA causing extensive water/wind damage at the high school.

In August 2006, Aurora commenced an action against Sachem in this Court under Index No. 21012/06 to recover damages for work it performed for which it was allegedly not paid ("2006 Action"). Sachem asserted counterclaims against Aurora. On August 28, 2009, Sachem commenced a third-party action against JM for breach of warranty and negligence with regard to the roof system. On January 13, 2010, Aurora commenced a fourth-party action against Giaquinto, Restor, HST, Cord, Intercounty and VIPA ("Fourth-Party Defendants") for breach of contract, negligence, indemnification and contribution.

On July 8, 2010, this Court (Emerson, J.) heard oral argument on whether to dismiss the third- and fourth-party complaints in the 2006 Action on the ground that they were procedurally improper.

Thereafter, as part of a settlement of the 2006 Action between Aurora and Sachem, Aurora assigned Sachem its claims against all of its subcontractors and material men who performed work and/or furnished materials on the high school project, including its claims for indemnity, contribution and breach of contract asserted in the fourth-party complaint.

By Decision After Oral Argument dated December 2, 2010, this Court (Emerson, J.) dismissed the third and fourth-party complaints in the 2006 Action "with leave to commence a new action pursuant to CPLR 205 in accordance herewith." In its Decision, the Court stated, in relevant part:

> Insofar as Aurora sought to recover from its subcontractors in the event that it was liable to Sachem on the counterclaims, Aurora properly impleaded the subcontractors. However, Aurora and Sachem have now settled the claims and counterclaims asserted by them in the main action with Aurora receiving $400,000 and assigning to Sachem all of its rights and claims against its subcontractors and material men. Thus, ***Aurora's claims against Manville and the subcontractors, as well as Sachem's claims against Manville, may now be asserted by Sachem in an action against Manville and the subcontractors***, and Manville's claims against Aurora for indemnification and contribution may be asserted in a third-party action.
>
> In view of the foregoing, the court dismisses the third- and fourth-party actions ***with leave to commence a new action pursuant to CPLR 205 in accordance herewith***.
>
> (Emphasis added).

By order dated February 8, 2011, this Court (Emerson, J.) dismissed Aurora's fourth-party complaint with leave to commence a new action pursuant to CPLR 205.

On May 3, 2011, Sachem, on its own and as assignee of Aurora, commenced this action against JM, Giaquinto, Restor, HST, Cord, Intercounty, and VIPA. The Verified Complaint contains four causes of action. The first cause of action is asserted only against JM and, therefore, is not relevant to the instant motion. The second cause of action is asserted against all defendants for negligence in the performance of construction and installation of the roofing and wall systems and the issuance of a guarantee by JM. The second cause of action alleges, among other things, that the defendants breached a duty of care owed to Sachem with respect to the construction and installation of the roofing and wall systems. The second cause of action is asserted by Sachem individually, and not as assignee of Aurora. The third cause of action is asserted against all defendants for negligence in the "performance of the work, labor, service and furnishing of materials and equipment" at the high school. The third cause of action is asserted

by Sachem individually, and not as assignee of Aurora. The fourth cause of action is asserted by Sachem, as assignee of Aurora, against Giaquinto, Restor, Cord, HST, Intercounty, and VIPA for breach of contract, breach of warranties, and negligence in the construction and installation of the roofing and wall systems.

Cord now moves to dismiss the Verified Complaint as asserted against it pursuant to CPLR 3211 on the ground that the claims asserted are barred by the statute of limitations, or, alternatively, for summary judgment pursuant to CPLR 3212. Cord raised the issue of statute of limitations as an affirmative defense in its answer.

Cord contends, among other things, that Sachem improperly commenced this action pursuant to CPLR 205 because CPLR 205 only applies where a new action is commenced by the same plaintiff. Cord argues that CPLR 205 does not allow an assignee of the original plaintiff to commence a new action. Additionally, Cord argues that Sachem cannot get the benefit of the six-month extension conferred by CPLR 205 in commencing this action because the claims it asserts in this action as assignee of Aurora were not timely commenced by Aurora in the 2006 Action. Cord notes that Aurora did not commence the fourth-party action in the 2006 Action until January 13, 2010. In an affidavit in support of Cord's motion, William Minard, a Project Manager employed by Cord for 12 years, states that all of Cord's work on the roof and exterior work was completed prior to February 17, 2004, and that his "firm recollection is that Cord's work on the roof and the exterior walls was completed in December of 2003." Thus, Cord argues that Aurora's negligence (three-year statute of limitations), breach of contract (six-year statute of limitations), and breach of warranty (four-year statute of limitations) claims, were not timely commenced by Aurora on January 13, 2010, more than six years after Cord had completed its work, when the fourth-party complaint was filed in the 2006 Action.

In opposition to the motion Sachem argues, among other things, that it properly commenced the instant action pursuant to CPLR 205 based upon Justice Emerson's decision dated December 2, 2010, and subsequent order dated February 8, 2011. Further, Sachem argues that the recollection of Cord's employee fails to establish Cord's defense of statute of limitations. In an affidavit in opposition to Cord's motion, Bruce Singer, Sachem's Associate Superintendent for Business, states, upon information and belief, that Cord provided a significant amount of labor and construction work on the wall and roof system. However, Singer does not contradict Minard's statement that Cord it completed its work in December of 2003.

Discussion

In Justice Emerson's Decision dated December 2, 2010, the Court specifically granted Sachem, pursuant to CPLR 205, the right to commence an action against the subcontractors, including Cord, to assert the claims asserted by Aurora against the subcontractors in the 2006 Action. Justice Emerson noted that Sachem had been assigned Aurora's rights and claims against the subcontractors. Thus, Justice Emerson granted Sachem, as Aurora's assignee, leave to commence a new action to assert the claims asserted by Aurora in the fourth-party complaint in the 2006 Action. However, Sachem was not granted leave to commence a new action pursuant to CPLR 205 to assert claims in its own right against the subcontractors. Here, only the claims asserted in the fourth cause of action are asserted by Sachem as assignee of Aurora. The second and third causes of action for negligence are asserted by Sachem in its own right, not as Aurora's assignee. Inasmuch as Sachem, in its own capacity and not as the assignee of Aurora, is not the original plaintiff from the 2006 Action, i.e. Aurora, Justice Emerson's grant of leave to Sachem to commence a new action pursuant to CPLR 205(a) does not allow for the assertion of the second and third causes of action by Sachem in this action (*see Reliance Ins. Co. v. PolyVision Corp.*, 9 NY3d 52, 57 [2007]). Accordingly, the second and third causes of action as asserted against Cord are hereby dismissed as untimely, as the three-year statute of limitations applicable to the second and third causes of action for negligence had expired as of May 3, 2011, when Sachem first interposed those causes of action in its own right in this action.

The Court acknowledges Cord's argument that because Sachem, as assignee of Aurora, is a different plaintiff that the original fourth-party plaintiff in the 2006 Action, this entire action, as asserted against it, is improperly commenced pursuant to CPLR 205. However, even if this Court agreed with Cord's position, as a court of coordinate jurisdiction this Court has no authority to rule on a matter reviewed by Justice Emerson, a judge of equal authority (*see Grossman v Composto-Longhi*, 96 AD3d 1000, 1002 [2d Dept 2012]). Notably, there is no indication in the record before this Court that Cord appealed from Justice Emerson's order. Thus, this Court is bound by Justice Emerson's determination that Sachem is a proper plaintiff pursuant to CPLR 205 with regard to the fourth cause of action asserted by Sachem as assignee of Aurora.

However, it does not appear that the issue of the statute of limitations was raised before or reviewed by Justice Emerson. Cord has established, through the affidavit of its employee, that it completed its work in December of 2003. Sachem, in opposition, has failed to put forth any evidence contradicting this factual assertion. Therefore, Cord has established that the claims asserted against it in the fourth cause of action by Sachem as assignee of Aurora, i.e. breach of contract, breach of warranty, and negligence were untimely when interposed by Aurora on

January 13, 2010, when it filed the fourth-party complaint in the 2006 Action. By that time, the applicable statutes of limitations on such claims had expired, as more than six years had elapsed after Cord completed its work in December of 2003. Therefore, Cord's motion is granted and the complaint as asserted against it is dismissed.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 23, 2013
Riverhead, New York

HON. EMILY PINES
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J. S. C.

[ ] Final
[x] Non Final

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