

Seinuk v Papadatos Partnership, LLP

2013 NY Slip Op 30500(U)

March 12, 2013

Supreme Court, New York County

Docket Number: 600216/2010

Judge: Shlomo S. Hagler

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

YSRAEL A. SEINUK, P.C.,

Plaintiff,

- against -

PAPADATOS PARTNERSHIP LLP,

Defendant.

FILED

INDEX NO.: 600216/2010

MOTION SEQ. NO.: 001

MAR 12 2013

DECISION and ORDER

NEW YORK
COUNTY CLERK'S OFFICE


Motion by defendant for summary judgment to dismiss plaintiff's complaint on statute of limitation grounds.

	<u>Papers Numbered</u>
Notice of Motion with Affidavit of Steven Papadatos, a partner of defendant, dated June 28, 2011 & Exhibits "1" through "5"	<u>1, 2, 3</u>
Defendant's Memorandum of Law	<u>4</u>
Affidavit of Plaintiff's principal, Jaime Ocampo, dated July 26, 2011, in Opposition to Motion with Exhibits "A" and "B"	<u>5, 6</u>
Plaintiff's Memorandum of Law	<u>7</u>
Transcript of Oral Argument of June 25, 2012	<u>8</u>

Cross-Motion: No Yes Number of Cross-Motions: 0

**Upon the foregoing papers, it is hereby ordered that
Defendant's Motion is denied as set forth in the attached
separate written Decision and Order.**

Dated: March 7, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one: Final Disposition Non-Final Disposition

Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

-----X
YSRAEL A. SEINUK, P.C.,

Plaintiff,

- against -

PAPADATOS PARTNERSHIP LLP,

Defendant.

Index No.: 600216/10

Motion Sequence No. 001

DECISION & ORDER

-----X
HON. SHLOMO S. HAGLER, J.S.C.

Defendant Papadatos Partnership LLP ("Papadatos" or "defendant") moves for summary judgment to dismiss the complaint on Statute of Limitations grounds. Plaintiff Ysrael A. Seinuk, P.C. ("Seinuk" or "plaintiff"), opposes the motion.

FILED

MAR 12 2013

NEW YORK
COUNTY CLERK'S OFFICE

FACTUAL BACKGROUND

The Orthodox Autocephalous Church in Tirana, Albania ("the Church"), hired the defendant, an architectural firm, to provide design and related services for the Church. Plaintiff submitted a proposal for structural engineering services, dated June 25, 2003, which defendant accepted and signed on August 26, 2003 ("the Agreement"). (See Exhibit "3" to Defendant's Motion) The Agreement provided that the fee of \$200,000 was "to be billed on a percent complete basis." (*Id.*)

Both parties agree that plaintiff performed its work on the project from August through December 2003 and that its last work was performed in or around December 2003. (See Affidavit of Steven Papadatos, dated June 28, 2011, in support of the Motion, at ¶¶ 9-10; Plaintiff's Response to Defendant's Interrogatories, Responses to Interrogatories 4 and 6, attached as Exhibit "4" to Defendant's Motion.) Plaintiff billed defendant on a monthly basis beginning in August 2003 and continuing through March 2004. (See Exhibit "A" to Plaintiff's Affidavit in Opposition.) Defendant

paid the bills from August 2003 through November 2003, but did not pay plaintiff's bills of December 2003, January 2004, February 2004, or March 2004. (*Id.*)

Plaintiff commenced this action against defendant on three causes of action: (1) breach of contract, (2) quantum meruit, and (3) account stated. Plaintiff purchased an index number and filed its Summons and Complaint on January 28, 2010. (*See* Exhibit "1" to Defendant's Motion and Exhibit "B" to Plaintiff's Affidavit in Opposition.) Defendant served its answer on or about February 12, 2010. (*See* Exhibit "2" to Defendant's Motion.)

DISCUSSION

Both parties agree that the statute of limitations for this breach of contract action is six (6) years, pursuant to CPLR § 213(2). Defendant asserts that plaintiff's complaint should be dismissed because it was filed more than six years after the cause of action accrued. Defendant argues that the cause of action accrued "upon the completion of performance" *i.e.*, when the last work was performed in December of 2003. (*See* Defendant's Memorandum of Law, at p. 2.) In support of its position, defendant cites *Amedeo Hotels Ltd. Partnership v Zwicker Elec. Co.*, 291 AD2d 322 (1st Dept 2002) (in suit against company for negligent design and installation of electrical distribution system for hotel, statute of limitations commenced to run upon completion of work), *City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535 (1995) ("In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance . . . an owner's claim arising out of defective construction accrues on date of completion"), *County of Rockland v Kayer, Garment and Davidson Architects*, 309 AD2d 891 (2d Dept 2003), and *John J. Kassner & Co., Inc. v City of New York*, 46 NY2d 544 (1979). (*Id.*)

In opposition, plaintiff argues that the cause of action only accrued upon the breach of the contract, when the defendant failed to pay the invoice for the completed work.¹ (See Plaintiff's Memorandum of Law, at p. 1.) In support of its position, plaintiff cites *Verizon N.Y., Inc. v Sprint PCS*, 43 AD3d 686 (1st Dept 2007), which specifically distinguishes *Amedeo Hotels Ltd. Partnership v Zwicker*, and holds that when the claim is for payment on the contract, and not for defective or consequential damages, the cause of action accrues and the statute of limitations begins to run on the date plaintiff's invoice demanded payment and defendants failed to pay. (See also *Howard B. Spivak Architect P.C. v Zilberman*, 2008 NY Slip Op 32475[U] [Sup Ct, NY County 2008] [citing *Bombardier Transportation (Holdings) USA, Inc. v Telephonics Corp.*, 14 AD3d 358 (1st Dept 2005)].)

Burden of Proof on Motion for Summary Judgment

Summary judgment is a drastic remedy "which should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v. Garlock*, 23 A.D.2d 943, 944) or where the issue is even arguable (*Barrett v. Jacobs*, 255 N.Y. 520, 522) since it serves to deprive a party of his [her or its] day in court. Relief should be granted only where no genuine, triable issue of fact exists." (*Broadway 111th Street Associates v. Morris*, 160 A.D.2d 182, 553 N.Y.S.2d 153 [1st Dept 1990]).

The Court of Appeals set forth the movant's burden on a motion for summary judgment in *Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 853 (1985) as follows:

1. Plaintiff also argues that it did not know that defendant was replacing the plaintiff as structural engineer on the project and that it would not be paid for its already performed services until the defendant refused to pay plaintiff's invoices. (See Affidavit in Opposition of Plaintiff's principal, Jaime Ocampo, dated July 26, 2011, at ¶¶ 6-7)

The proponent of a summary judgment motion 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 (*see, Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v. Williams*, 84 A.D.2d 648, 649, 444 N.Y.S.2d 305; *Greenberg v. Manlon Realty*, 43 A.D.2d 968, 969, 352 N.Y.S.2d 494).

This Court need not decide the issue of when the cause of action accrued in this action because defendant failed to meet its burden on summary judgment by demonstrating that it preserved its defense based on statute of limitations grounds. Defendant failed to raise this defense in either its answer or in a pre-answer motion to dismiss pursuant to CPLR § 3211. A statute of limitations defense is referenced in subdivision (a), paragraph 5 of CPLR § 3211. Subdivision (e) of CPLR § 3211 provides that:

At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based on a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.

Since the defendant neither included a statute of limitations defense in its answer nor brought a pre-answer motion to dismiss pursuant to CPLR § 3211, defendant has waived this defense. *See Horst v Brown*, 72 AD3d 434 (1st Dept 2010) (“[A]n objection or defense based on the statute of limitations is waived unless raised in a responsive pleading or in a pre-answer motion to dismiss. Defendant failed to do either, and thus waived this defense” [citing *Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183 (1st Dept 2007)].)