Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Joseph Mugivan,

Plaintiff,

- against -

The City of New York, The New York City Department of Education, Novelty Crystal Corp., Elmhurst Rubber Co Inc., General Diaper Service Corp., Coronet Piece and Dye Works, Rothchild Printing Co Inc., Ehrankrants, Eckstut & Whitelow Archetects, Ambrosino, Depinto & Schmeider PC, Thornton-Tomasetti PC and Zone Aire Systems Inc.,

Defendants.

Index Number: 24019/04

Motion Date: 1/15/13

Motion Cal. Number: 3&4

Motion Seq. No.: 3&4

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The following papers numbered 1 to 31 read on this motion by defendant, Ehrankrantz, Eckstut & Kuhn Architects (EE&K), for an order lifting the stay and for summary judgment; motion by defendant, Thornton-Tomasetti PC (TT), for an order lifting the stay and for summary judgment; and "cross-motion" by defendant, Ambrosino, Depinto & Schmeider PC (ADS), for summary judgment.

	Papers Numbered
Notice of Motion(EE&K)-Affidavit-Affirmation-Exhibits.	1-5
Memorandum of Law	6
Notice of Motion(TT)-Affidavit	7-9
Affidavit in Support	10-11
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Notice of Cross-Motion-Affirmation-Exhibits	15-18
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Memorandum of Law	24-25
Reply(ADS)	26-27
Reply(EE&K)	28-29
Reply(TT)	30-31

As a preliminary matter, the notice of "cross-motion" by ADS is deemed a notice of motion, since plaintiff is not a moving party.

Upon the foregoing papers it is ordered that the motions are decided as follows:

That branch of the motions by EE&K, TT and ADS for an order lifting the stay of all proceedings in this action pending completion of discovery imposed pursuant to the stipulation dated July 22, 2010, which stipulation was so-ordered by Justice Martin E. Ritholtz on July 22, 2010, is moot since the stay created pursuant to said so-ordered stipulation was vacated pursuant to the subsequent stipulation so-ordered by Justice Ritholtz on December 11, 2012.

The remaining branches of the motions for summary judgment dismissing the complaint and all cross-claims as against EE&K, TT and ADS are granted. The Court notes that the remaining defendants have not appeared to oppose the granting of movants' motions.

Plaintiff allegedly sustained injuries as a result of being exposed to toxins while employed as a teacher at P.S. 7 in Queens County from October 22, 2003 to December 2, 2003. Plaintiff alleges that the school was constructed on a toxic site and that the toxic chemicals therein caused him to suffer burning eyes, fluctuating vision, chronic headaches, chronic sore throat and stomach problems. In particular, plaintiff alleges damage to his neurological system which permanently affected his vision and ability to read. Plaintiff commenced this action against the City and Novelty Crystal Corp. by filing a summons with notice on October 22, 2004. Thereafter, on January 20, 2005, plaintiff commenced an action against the remaining defendants by filing a summons and complaint (Index No. 1527/05). The actions were subsequently consolidated under the present index number pursuant to the order of this Court issued on January 9, 2009.

It is undisputed that EE&K, an architectural firm, was hired to design the school. Plaintiff alleges that EE&K was negligent in allowing the school to be constructed on a contaminated site.

Pursuant to CPLR 214-d(1) and (6), a condition precedent to commencement of an action against architects or architectural firms based upon their professional performance, conduct or omission alleged to have occurred more than 10 years prior to the date the cause of action accrued is the service of a notice of claim at least 90 days prior to the commencement of an action (see Dorst v Eggers Partnership, 265 AD 2d 294 [2nd Dept 1999]). The 10-year period begins to run from the date of completion of the

professional services (see Belunes v Minskoff Grant Realty & Mgt. Corp., 278 AD 2d 143 [1st Dept 2000]).

EE&K has proffered unrebutted evidence in the form of an affidavit from Quentin Munier, a licensed architect employed as senior associate at EE&K who was involved the P.S. 7 project, wherein he averred, inter alia, that EE&K completed its service in connection with P.S. 7 in July 1994, and that the school opened to students in September 2004. No evidence to the contrary has been proffered by plaintiff. Since EE&K's architectural services ended in July 1994, more than 10 years prior to the accrual of plaintiff's cause of action in 2003, plaintiff was required to serve EE&K with a 90-day notice of claim as a condition precedent to commencement of the action against it. It is undisputed that plaintiff failed to serve the requisite notice of claim and no excuse is proffered for such failure.

Plaintiff's counsel merely contends that EE&K waived the defense of failure to serve a notice of claim by not raising it as an affirmative defense in its answer, that Munier's self-serving affidavit in support of the motion does not "pass evidentiary muster", and that plaintiff would be prejudiced by EE&K's delay in raising this defense until this late juncture. Counsel's arguments are without merit.

Since a notice of claim requirement is not a statute of limitations but a condition precedent to commencement of an action, the defense of failing to serve a notice of claim is not one that must be raised as an affirmative defense (see Hey v Napoli, 265 AD 2d 803 [4th Dept 1999]). Moreover, it does not concern the acquisition of personal jurisdiction over defendant, but rather implicates the threshold subject-matter jurisdiction of the court (see id.), which may be raised at any time. Moreover, Munier's affidavit constitutes evidence in admissible form. In addition, counsel's contention that the City should be barred from raising the defense of failure to serve a notice of claim upon the basis of prejudice is without merit. Nothing is proffered by counsel to show that plaintiff was misled or improperly induced into refraining from filing a notice of claim. Indeed, no excuse whatsoever is proffered for failing to serve the requisite predicate notice. In addition, counsel is charged with knowledge of the requirements of the CPLR and may not be heard to argue that the expenditure of time and expense in prosecuting this matter should bar EE&K from seeking dismissal at this time.

Therefore, EE&K is entitled to summary judgment dismissing the complaint against it upon the ground that plaintiff failed to serve it with a pre-requisite notice of claim pursuant to CPLR 214(d)(1).

Even had a timely notice of claim been served, the complaint must still be dismissed against EE&K substantively.

Plaintiff's cause of action against EE&K is for professional negligence for failing to assess and ascertain that the site was contaminated and designing the school so as to ensure against environmental hazards. EE&K has met its prima facie burden on summary judgment by proffering evidence that, as the architect for the school, it was not responsible to assess the site for environmental contamination and, therefore, did not breach a duty of care to plaintiff.

Munier averred in his affidavit, "EE&K was not responsible for any assessment, analysis, remediation, monitoring or reporting of environmental conditions at the construction site. Any such duties relating to environmental conditions is fully outside the scope of the services that EE&K was retained to perform at P.S. 7 and is fully outside the scope of its professional responsibilities as an architectural firm generally." Plaintiff failed to submit an affidavit from an expert to rebut the averments of Munier and raise an issue of fact as to the scope of EE&K's responsibilities as an architectural firm (see Sheehan v Pantelidis, 6 AD 3d 251 [1st Dept 2004]).

Indeed, it was plaintiff's burden in opposing summary judgment to demonstrate a substantial basis in fact and law to believe that the conduct or omission of the architect was negligent and was a proximate cause of plaintiff's injuries (see CPLR 3212[i]). Plaintiff has proffered no basis in fact or law to support a cause of action against EE&K. He has failed to submit any evidence that EE&K, as an architect, bore any responsibility for an environmental assessment of the site to determine soil or air toxicity. And even had such evidence been proffered, plaintiff fails to show any evidence that a breach of such responsibility was a proximate cause of his alleged injuries, in that he has failed to show that he was exposed to sufficient levels of any toxins so as to cause the injuries he claims (see Parker v Mobil Oil, 7 NY 3d 434 [2006]; Cleghorne v City of New York, 99 AD 3d 443 [1st Dept 2012]). The "expert" affidavit of Howard Fishman, who is not a physician but an optometrist, annexed to the opposition papers fails to raise an issue of fact in this regard. His opinion "to a reasonable degree of medical certainty" that his diagnosis of plaintiff as having accommodative/convergence disorder is consistent with exposure to toxins, and his exposition of the neurological effects of chemical exposure and the possible alternative medical causes of plaintiff's condition, is entirely incompetent.

TT and ADS are also entitled to summary judgment dismissing the complaint against them.

TT was the structural engineering firm hired for the school construction project and ADS was the engineering firm hired to design the HVAC, electrical and plumbing systems for the school.

TT has met its prima facie burden on summary judgment by proffering evidence that, as the firm hired to provide structural engineering services for the construction project, it was not responsible to assess the site for environmental contamination and, therefore, did not breach a duty of care to plaintiff. Anjana Kadakia, a professional engineer who is senior principal of TT, testified in her deposition that TT's structural engineering services with regard to the project had nothing to do with environmental contamination analysis. She testified that TT utilized a geotechnical engineer to analyze the soil's load bearing capacity, but such did not involve analysis of the soil for toxic substances. Again, plaintiff proffered no affidavit or deposition testimony of an expert to rebut Ksadakia's testimony concerning the scope of a structural engineer's work so as to raise an issue of fact. Indeed, plaintiff has proffered no basis in fact or law to support a cause of action against TT and, therefore, has failed to meet his heightened burden under CPLR 3212(i). Moreover, even if, arguendo, TT were responsible for assessing the soil and air for contaminants, plaintiff failed to show any evidence that a breach of such duty was a proximate cause of his alleged injuries, in that he has failed to show that he was exposed to sufficient levels of any toxins so as to cause the injuries he claims (see Parker v Mobil Oil, supra).

For the same reasons, the complaint must also be dismissed as against ADS. Michael Ambrosino, a professional engineer and vice president of ADS, averred in his affidavit in support of ADS's motion that ADS had no involvement in the selection of the site for the construction of P.S. 7. In response to the question posed to him in his deposition of whether ADS was to do the testing and evaluation of the soil conditions at the site, he replied in the negative, adding tha ADS does not do anything below ground. He also testified that ADS had no involvement in designing or testing the underground system. Again, no affidavit or deposition testimony of an expert is proffered by plaintiff so as to raise an issue of fact as to whether ADS should have been responsible to assess environmental toxicity. Plaintiff, in opposition, has failed to proffer an affidavit or deposition testimony from an expert so as to raise an issue of fact as to whether ADS deviated from any accepted standard of engineering practice in the design of the HAVAC, plumbing and electrical systems of the school and that such deviation was a substantial factor in causing plaintiff's alleged injuries. As heretofore noted with respect to EE&K and TT, plaintiff has proffered no basis in fact or law to support a cause of action against ADS and, therefore, has failed to meet his heightened burden under CPLR 3212(i). Moreover, he has failed to show any evidence that a breach of any duty was a substantial

factor in causing his alleged injuries, in that he has failed to show that he was exposed to sufficient levels of any toxins so as to cause the injuries he claims (see Parker v Mobil Oil, supra).

Accordingly, the motions are granted and the complaint and all cross-claims are dismissed as against EE&K, TT and ADS.

Dated: February 7, 2013

KEVIN J. KERRIGAN, J.S.C.