

FC Bruckner Assoc., L.P. v Fireman's Fund Ins. Co.

2013 NY Slip Op 30848(U)

April 18, 2013

Supreme Court, New York County

Docket Number: 600341/10

Judge: Saliann Scarpulla

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

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 600341/2010
FC BRUCKER ASSOCIATES, L.P.
vs.
FIREMAN'S FUND INSURANCE CO.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

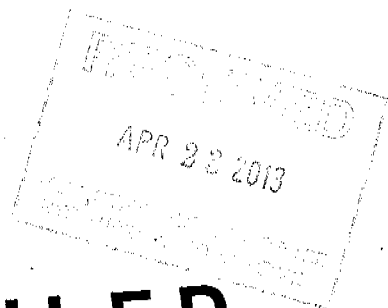
The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 4/18/13
which disposes of motion sequence(s) no.

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



FILED

APR 24 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/18/13

_____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----- X
FC BRUCKNER ASSOCIATES, L.P. and
FIRST NEW YORK MANAGEMENT, INC.,

Index Number: 600341/10
Submission Date: 12/12/2012

Plaintiffs,

DECISION & ORDER

-against-

FIREMAN'S FUND INSURANCE CO.
and GAB ROBIN'S NORTH AMERICA, INC.

FILED

APR 24 2013

Defendants.
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NEW YORK
COUNTY CLERK'S OFFICE

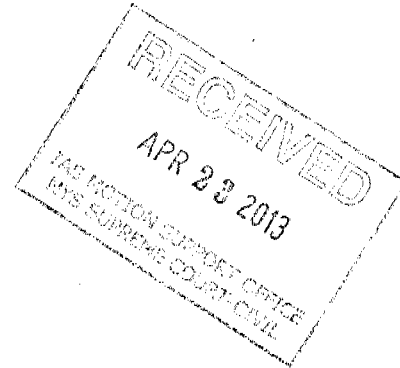
For Plaintiffs:
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For Defendant GAB Robbins North America:
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For Defendant Fireman's Fund Insurance:
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Papers considered in review of GAB Robbins North America's motion for summary judgment:

Notice of Motion/Affirm. of Counsel/Memo of Law.....	1
Affirm. in Opp. to Motion.....	2
Affirm. in Partial Opp. to Motion.....	3
Reply Memo of Law/ Affirm. of Counsel.....	4



HON SALIANN SCARPULLA, J.:

In this action, defendant GAB Robins North America, Inc. ("GAB") moves for summary judgment dismissing plaintiffs FC Bruckner Associates, L.P. ("FC Bruckner") and First New York Management, Inc.'s ("FNY") complaint pursuant to CPLR § 3212.

On February 9, 2010, FC Bruckner and FNY (collectively, "Plaintiffs") commenced this action against defendants Fireman's Fund Insurance Co. ("FFIC") and

GAB. Plaintiffs assert four causes of action: a declaratory judgment claim and a breach of contract claim against their excess insurer, FFIC, and a negligence and a breach of contract claim against their third-party insurance administrator, GAB.

In their complaint, Plaintiffs allege that they are entitled to defense and indemnification from FFIC, and that FFIC is liable for breach of contract because of its failure to provide insurance coverage to Plaintiffs in an underlying tort action, *Sullivan v. FC Bruckner Plaza Associates, et al.*, New York Supreme Court, Bronx County, Index No. 14817/1997) (“the *Sullivan* action”).

Plaintiffs also allege that GAB acted negligently and in breach of contract because it failed to provide timely notice of the *Sullivan* action to FFIC. Plaintiffs’ breach of contract claim is based on a contract between GAB and Forest City Enterprises, Plaintiffs’ parent corporation, in which GAB agreed to provide certain services as a third-party insurance administrator (“the contract”).

One of the central issues of dispute in this action is the date on which GAB provided notice of the *Sullivan* action to FFIC. GAB claims that it provided notice to FFIC on January 31, 2003. GAB submits a copy of a fax notice from its casualty general adjuster, Mary L. Nance, to FFIC’s Claims Department sent on January 31, 2003.

FFIC claims, on the other hand, that it did not receive GAB’s notice until June 10, 2003. FFIC argues that GAB’s fax notice from January 31, 2003 was not sent to FFIC, but to another company, Interstate Insurance Group (“Interstate”). FFIC submits a copy

of a fax notice that it received from Interstate on June 10, 2003, in which Interstate informed FFIC of the underlying action. On December 23, 2003, FFIC disclaimed coverage based, in part, on the failure to provide timely notice of the claim.

In its motion for summary judgment, GAB argues that Plaintiffs' complaint should be dismissed because their breach of contract and negligence claims are time-barred under CPLR §§ 213(2) and 214(4) statute of limitation periods.

In opposition, Plaintiffs argue that their claims are timely. First, Plaintiffs argues that their claims are governed by New Jersey law because GAB's contract contained a choice of law provision designating New Jersey law to apply.¹ According to Plaintiffs, under New Jersey law, the Ohio statute of limitations applies to their claims.

In the alternative, Plaintiffs argue that even if the CPLR applies, they are entitled to tolling under the "continuous representation" doctrine. Plaintiffs argue that GAB acted as a professional in advising them regarding insurance coverage and defense strategy.

FFIC submits a partial opposition to the motion. FFIC argues that it did not receive notice of the lawsuit until June 2003, and requests that this Court reject GAB's characterization of Glenn Skrynecki's deposition testimony.²

¹ The contract states that "this contract shall be interpreted and construed in accordance with the laws of the State of New Jersey."

² The Court does not address FFIC's argument at this time because it is not relevant to this motion.

* 5]

In reply, GAB argues that the contract's choice of law provision does not apply to the statute of limitations period. GAB also argues that Plaintiffs' are not entitled to tolling under the "continuous representation" doctrine because that doctrine does not apply to third party insurance administrators. GAB also argues that if New Jersey law applied, then the New Jersey statute of limitations would apply and bar Plaintiffs' claims.³

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

It is a well-settled policy of the New York state courts to enforce contractual choice of law provisions. *Boss v. Am. Exp. Fin. Advisors, Inc.*, 15 A.D.3d 306, 307 (1st Dep't 2005). However, choice of law provisions generally apply to substantive issues only. *Portfolio Recovery Assoc., LLC v. King*, 14 N.Y.3d 410, 416 (2010). Under New

³ Plaintiffs and GAB both argue that New York's borrowing statute, CPLR § 202, does not apply to this action. I agree that CPLR § 202 does not apply here because Plaintiffs are New York residents and their claims accrued within New York state. *Portfolio Recovery Assoc.*, 14 N.Y.3d at 416.

York law, the application of a statute of limitations period is not a substantive issue, it is considered procedural because it pertains to the remedy rather than the right. *Id.* at 416.

Here, I find that the New York statutes of limitations set forth in CPLR §§ 213(2) and 214(4) apply to Plaintiffs’ claims against GAB.⁴ Although the GAB contract contains a choice of law provision selecting New Jersey law, that provision does not govern the statute of limitations period that applies to this dispute. In a contract action commenced in New York state court, the New York statute of limitations period applies unless the contractual choice of law provision contains an “express intention” that another state’s statute of limitations applies. *Portfolio Recovery Assoc.*, 14 N.Y.3d at 416; *Melcher v. Apollo Medical Fund Management L.L.C.*, 25 A.D.3d 482 (1st Dep’t 2006). The contract at issue here does not contain an express intention that the New Jersey statute of limitations must apply, and therefore Plaintiffs’ claims are subject to the New York statutes of limitations, CPLR §§ 213(2) and 214(4).

In applying CPLR §§ 213(2) and 214(4), I find that Plaintiffs’ breach of contract and negligence claims are time-barred. CPLR § 213(2) provides that breach of contract claims are subject to a six year statute of limitations. A breach of contract claim accrues at the time of the breach. *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 770 (2012). Here, Plaintiffs’ breach of contract claim accrued on the date of the

⁴ In my prior decision and order dated May 24, 2011, I found that Ohio substantive law applies to this action. *FC Bruckner Associates, L.P. v. Fireman’s Ins. Co.*, 2011 NY Slip Op 31392(U) (Sup. Ct., NY County, 2011), *aff’d*, 95 A.D.3d 556 (1st Dep’t 2012).

alleged breach – i.e., when GAB allegedly provided late notice to FFIC, which is either January 31, 2003 or June 10, 2003. Even assuming that the claim accrued on the later date of June 10, 2003, Plaintiffs’ breach of contract claim is barred by the six year statute of limitations because Plaintiffs did not commence this action until February 9, 2010.

Under CPLR § 214(4), negligence claims are subject to a three year statute of limitations. A negligence claim accrues at the time of the injury. *Lavandier v. Landmark Ins. Co.*, 26 A.D.3d 264, 264 (1st Dep’t 2006). Here, Plaintiffs’ claim accrued on the date that FFIC disclaimed coverage, December 23, 2003. Plaintiffs’ negligence claim is barred by the three year statute of limitations period because they did not commence their action until February 9, 2010.

I also reject Plaintiffs’ argument that their claims are governed by the professional malpractice statute of limitations in CPLR § 214(6), and that they are entitled to tolling under the continuous representation doctrine. Claims against insurance brokers and agents are not governed by CPLR § 214(6), but “by the limitations periods applicable to negligence actions (CPLR 214[4]) and breach of contract actions (CPLR 213[2]).” *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 30 (2001). Although GAB may have assumed duties to advise Plaintiffs regarding insurance coverage levels and defense strategy, those duties were not sufficient to bring GAB, a third-party insurance administrator, within the coverage of CPLR § 214(6). *Id.* at 29.

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Accordingly, GAB's motion for summary judgment dismissing Plaintiffs' complaint is granted.

In accordance with the foregoing, it is

ORDERED that defendant GAB Robins North America, Inc.'s motion for summary judgment dismissing plaintiffs FC Bruckner Associates, L.P. and First New York Management, Inc.'s complaint pursuant to CPLR § 3212 is granted; and it is further

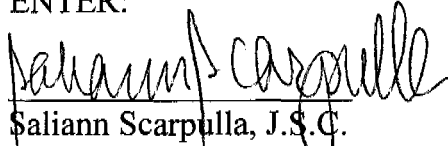
ORDERED that plaintiffs FC Bruckner Associates, L.P. and First New York Management, Inc.'s complaint is dismissed as against GAB Robins North America, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
April 14, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED

APR 24 2013

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