

**Pan Am Equities, Inc. v Consulting Assoc. of NY,  
Inc.**

2013 NY Slip Op 31408(U)

June 26, 2013

Sup Ct, NY County

Docket Number: 156085/2012

Judge: Eileen A. Rakower

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 15**

*Justice*

**PAN AM EQUITIES, INC., NEWMARK KNIGHT FRANK  
GLOBAL MANAGEMENT SERVICES LLC, MOORE STREET  
DEVELOPERS LLC, and WHITEHALL PROPERTIES LLC,**

**Plaintiff,**

INDEX NO. **156085/12**

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

- v -

**CONSULTING ASSOCIATE OF NY, INC., ALUMILEX,  
INC., CLEARVIEW ARCHITECTURAL, INC. d/b/a  
CLEARVIEW GLASS ENTERPRISES, FAI ENGINEERING  
GROUP, P.C., and ROMEO FRACCAROLI, P.E.,**

**Defendants.**

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3

4

5

This is in action for negligence and breach of contract in connection with Plaintiffs’ residential conversion of a building located at 2 New York Plaza, New York County (“the Project”). Plaintiffs allege that certain “replaced/retrofitted windows” installed on the Project, allegedly supplied or fitted by the defendants are defective. As against defendants FAI Engineering Group, P.C. (“FAI”) and Rocco Fraccaroli, P.E. (collectively, “FAI Defendants”), the Complaint alleges that they “fail[ed] to properly perform design services and calculations for the replacement window system.”

FAI Defendants now move for an Order to dismiss the Complaint, pursuant to CPLR §§ 3211(a)(5), (a)(7), and (a)(8), on the basis that the Court lacks jurisdiction over either FAI Defendant and the causes of action against them are time barred. FAI Defendants submit the affidavits of Linda Fraccaroli and Romeo Fraccaroli, P.E.

Plaintiffs oppose. Plaintiffs submit the attorney affirmation of Steven Cramer and Nehad Moughrabi, a property manager for Plaintiffs since November 2009.

FAI Defendants contend that Plaintiffs failed to effectuate service on them. CPLR §311 provides that a foreign corporation, like FAI, may be served by delivering the summons to an officer, director or other agent. CPLR §308 provides that a person may be served on a person of suitable age and discretion at the business or “usual place of abode” of the defendant, provided that the process server then mails the documents to the defendant.

According to Plaintiffs’ Affidavit of Service as to FAI, the Supplemental Summons and Complaint was served on FAI “by delivering a true copy of each to Lina Fraccaroli, Managing Agent/Authorized of [FAI]” at 36 Clinton Avenue, Norwalk, CT 06854 on February 14, 2013. The process server states that he “asked the recipient if he/she is authorized to accept service of behalf of FAI, and the recipient responded in the affirmative.” FAI alleges that it has never maintained offices at that location, Ms. Fraccaroli was not present at 36 Clinton Avenue at any time on December 31, 2012, and she was not authorized to accept service on behalf of FAI nor did she tell Plaintiffs’ process service that she was so authorized. FAI also states that while Ms. Fraccaroli is described as 43 in the Affidavit of Service, she is 30.

According to Plaintiffs’ Affidavit of Service as to Mr. Fraccaroli, the Supplemental Summons and Complaint was served on Mr. Fraccaroli by serving Lina Fraccaroli (again described as 43 years old) at 36 Clinton Avenue, Norwalk, Connecticut, Lina Fraccaroli’s “usual place of abode within the state.” Defendants state that 36 Clinton Avenue is not, and has never been, Romeo Fraccaroli’s, “actual place of business, dwelling place, or usual place of abode” as required by CPLR §308(2) nor is it the residence or business premises.

In opposition, Plaintiffs contend that there was a typographical error in the affidavit of service as to the address where service was rendered, but that Plaintiffs re-served them on March 21, 2013. However, in their reply, Defendants argue that Plaintiffs first commenced this action on September 5, 2012 when they purchased their index number and filed their Summons with Notice, and their subsequent second efforts are service are not timely because they occurred more than 120 days after the that date. Defendants contend that the filing of Plaintiffs’ Supplemental Summons’

on December 14, 2012 does not change that the action was commenced on September 5, 2013. Furthermore, Defendants contend that Plaintiffs' Supplemental Summons was not identical to the initial Summons because it added the FAI Defendants, and did not seek the Court's leave to do so; however, the FAI Defendants did not make this argument in their moving papers.

FAI Defendants also allege that the claims asserted against them are barred by the applicable three year statute of limitation. They state that their sole connection to the Project was to verify the calculations of wind design load for an aluminum window system in June 2008 at the request of defendant Alumilex, and to send a written report to Alumilex on June 13, 2008. FAI alleges that it did not do anymore than to verify the calculations, did not know who was commissioning or ordering the window systems, had no contract or relationship with Plaintiffs, provided no work or services to any of the Plaintiffs, and did not design, manufacture, or install the window system employed in the Project. FAI Defendants allege that the three year statute of limitations commenced when FAI completed its calculations and reported them to Alumilex no later than June 13, 2008, and that Plaintiffs failed to file their action until December 14, 2012, more than three years after FAI completed its work and after the statute of limitations had expired.

In opposition, Plaintiffs allege that the claims against FAI Defendants are not time barred because they are based on damage to the Building that occurred within three years of commencement of this action against the FAI Defendants in December 2012. Plaintiffs allege that the damage occurred starting in August 2010 and continued through most of 2012.

"A cause of action to recover damages for professional malpractice against an architect for defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship (citations omitted), not when the injury occurred or the defective condition was discovered." *Greenport v. Manning Plumbing & Heating Corp.*, 2011 N.Y. Misc. LEXIS 410, \*6 (N.Y. Misc. 2011)

Here, the FAI Defendants have established that they completed their work on the Project on June 13, 2008, and provided no other work to Alumilex and no other work in connection with the Project. The Complaint does not specify when the FAI Defendants are alleged to have provided services, and the affidavit of Mr. Moughrabi


submitted in opposition to the FAI Defendants' motion does not cure this deficiency. Accordingly, the three year statute of limitations period to bring an action against the FAI Defendants based on their work on the Property expired prior to Plaintiffs' commencement of this action in 2012, and dismissal of Plaintiffs' claims as against the FAI Defendants is therefore warranted.

Based upon the foregoing it is hereby,

ORDERED that defendants FAI Engineering Group, P.C., and Rocco Fraccaroli, P.E.'s motion to dismiss the complaint as against them is granted and the complaint is severed and dismissed as against FAI Engineering Group, P.C., and Rocco Fraccaroli, P.E., and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 6/26/13

  
\_\_\_\_\_  
J.S.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION      X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE