

Patterson v Town of Mount Pleasant

2013 NY Slip Op 33766(U)

September 12, 2013

Supreme Court, Westchester County

Docket Number: 55183/13

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF: 09/18/2013

Disp x Dec _____ Seq. No. 1 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
ALLEN PATTERSON,

Plaintiff,

-against-

Index No. 55183/13

DECISION AND ORDER

TOWN OF MOUNT PLEASANT and TOWN OF MOUNT
PLEASANT BUILDING DEPARTMENT,

Defendants.

-----X

The following papers numbered 1 to 4 were read on this
motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits ¹	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Reply Memorandum of Law	4

Defendants bring this motion seeking to dismiss the action in this case arising out of a home that plaintiff purchased in August 2010. Defendants issued a Certificate of Occupancy to a construction company (which sold the home to plaintiff) relating to a renovation and addition of a new bedroom, enlargement of the first floor, and a new deck on an existing home. Plaintiff

¹Exhibits must be tabbed. Counsel are directed to review the Part Rules.

thereafter, in January 2012, received a letter from defendants stating that an inspection was required, and that the basement of the house was not approved as a habitable space.

After the inspection, plaintiff first learned that "the construction of the Premises did not comply with the regulations and requirements of the New York State Uniform Fire Protection and Building Code and Town Ordinances and New York State Energy Conservation Code applying to Building [sic] of its class and kind." In April 2012, plaintiff served a Notice of Claim, and thereafter commenced this action.

Although defendants have several grounds for their motion, the only one that need concern the Court is the statute of limitations. There is no dispute that to be timely, a plaintiff must first serve a Notice of Claim against a municipality within 90 days "after the claim arises" pursuant to the General Municipal Law § 50-e. See *Safarowic v. Dinozzi Bldg. Corp.*, 206 A.D.2d 356, 613 N.Y.S.2d 944 (2d Dept. 1994); *Rosenbaum v. Boulder Ridge Homeowners Ass'n, Inc.*, 276 A.D.2d 615, 715 N.Y.S.2d 318 (2d Dept. 2000). Plaintiff admits that "a cause of action involving the issuance of a Certificate of Occupancy most often accrues at the time when the Certificate of Occupancy is issued, in this case, August 13, 2010."

Plaintiff claims, however, that where there is an allegation of fraud, deception or misrepresentation, the statute of limitations may not be invoked. For this proposition, plaintiff

cites *Okie v Village of Hamburg*, 196 A.D.2d 228, 609 N.Y.S.2d 986 (4th Dept. 1994). In that case, the Fourth Department found that the statute of limitations **did** apply where a town simply committed negligence. It dismissed the town from the action. Specifically, the Court held that

Defendant may be estopped from asserting the Statute of Limitations if the defendant has engaged in fraud, deception or misrepresentation. The record does not reveal that the Village misrepresented to plaintiffs that their home was not in a floodplain in a manner designed to inhibit them from filing suit. The only representation made to plaintiffs was a generalized representation contained in the certificate of occupancy that the structure complied with all laws, which later turned out to be incorrect. That is insufficient to estop the Village from asserting a Statute of Limitations defense.

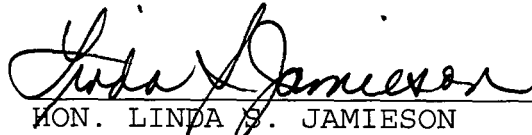
Similarly, here too, there is no evidence, or even any allegation, that defendants committed fraud, deception or misrepresentation. Nothing was concealed in any way from anyone who chose to look at the available information. Plaintiff argues that the notes on the Building Department's "file jacket" about additional requirements and plans show that there was misfeasance, nonfeasance or fraud. Yet even if this were the case, there is no allegation that these notes were hidden or were otherwise unavailable should plaintiff (or his counsel, or title insurance) have sought to review them in 2010, prior to the purchase of the house.

Since there is no allegation of concealment, fraud, deception or malfeasance - but only possible negligence - the

[*4]
Court must grant the motion and dismiss the action. The Court notes that plaintiff is not without remedies, as an action against the builder from which he bought the home, and several others has been pending for over a year and a half.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 12, 2013



HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Stephen Arfine, P.C.
Attorney for Plaintiff
245 Saw Mill River Road, Suite 106
Hawthorne, NY 10532

Rice & Amon
Attorneys for Defendants
4 Executive Blvd., Suite 100
Suffern, NY 10901