

**East Vil. Realty, LLC v Alpha Gen. Contrs. of N.Y.,
Inc.**

2014 NY Slip Op 32017(U)

July 31, 2014

Supreme Court, New York County

Docket Number: 1152118/13

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
 COUNTY OF NEW YORK : I.A.S. PART 57
 ----- X
 EAST VILLAGE REALTY, LLC, :
 Plaintiff, :
 -against- :
 ALPHA GENERAL CONTRACTORS OF NEW YORK, INC. :
 STANLEY GLEIT, LLC and FREYER COLLABORATIVE :
 ARCHITECTS, :
 Defendants. :
 ----- X

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MOULTON, J.:

This action arises from construction on a lot owned by plaintiff East Village Realty LLC ("Village Realty") in the East Village in Manhattan. In September 2008, excavation work at the lot, and allegedly inadequate underpinning of the foundation of the adjacent building, caused cracks to appear in the adjacent building.

The owners of the adjacent building sued, among others, Village Realty and various entities hired by Village Realty to perform work at the site. Among those sued in that action, entitled 530 East 13, LLC v East Village Realty et al. (Index number 115182/09), were Alpha General Contractors of New York, Inc. ("Alpha"), the engineering firm Stanley Gleit, LLC ("Gleit") and Freyer Collaborative Architects ("Freyer"). Alpha, Gleit, and Freyer are the defendants in the instant action.

Village Realty did not bring cross-claims against Alpha, Gleit and Freyer in the 530 East 13 LLC action. Instead, it waited until

2013 to bring the instant action.

Village Realty commenced this action with a summons with notice dated March 7, 2013. Defendants all duly made demands in July 2013 for a complaint. Plaintiff did not serve a complaint within the 20 period prescribed by CPLR 3012(b). After a three month interval, all three defendants made the motions to dismiss that are currently before the court.

In response to the motions to dismiss, plaintiff cross-moved for leave to file the late complaint. In his affirmation plaintiff's counsel states that the three month delay was caused by his need to care for his ailing parents and his father in law, as well as East Village's financial distress, which impaired its ability to prepare for new litigation.

DISCUSSION

In order to avoid dismissal for failure to serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b) a plaintiff must demonstrate both a reasonable excuse for the delay and potentially meritorious cause of action. (See Perez v. Geico Ins. Co., 105 AD3d 1025.) The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court. Relevant factors to be considered are the extent of the delay, the prejudice to the opposing party, and the lack of intent to abandon the action. (Grace v. Follini, 80 AD3d

560, 560-1.)~

Plaintiff's attorney's excuse is adequate under the circumstances presented. Defendants have not shown prejudice, and the parties' positions have been set forth in the prior Supreme Court litigation. Additionally the plaintiff's active participation in the other Supreme Court action is an indication that it had no intent to abandon its legal remedies and defenses arising from the construction. (See Mitrani Plasterers Co. v SCG Contracting Corp., 97 AD3d 552.)

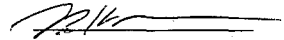
The verified complaint attached to plaintiff's cross-motion sufficiently demonstrates potentially meritorious claims. Gleit and Freyer both argue that any claims against them must sound in malpractice and that this action accordingly runs afoul of the statute of limitations. In its reply papers plaintiff offers some argument that the statute of limitations was tolled by the continuous representation doctrine and he attaches an email that gives colorable support to that assertion. Accordingly, the court cannot determine at this juncture that the claims against Freyer and Gleit are time-barred. These defendants retain this defense and may raise it in a dispositive motion if they are so advised.

CONCLUSION

The motions by defendants to dismiss this action pursuant to CPLR 3012(b) are denied. Plaintiff's cross-motion for leave to

serve a late complaint is granted. The Verified Complaint attached to plaintiff's motion papers will serve as the complaint in this action. This constitutes the decision and order of the court.

DATE: July 31, 2014



J.S.C.

**HON. PETER H. MOULTON
SUPREME COURT JUSTICE**