At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of October, 2014.

P R E S E N T:
HON. DAVID I. SCHMIDT,
Justice.

DECISION & ORDER

Index No. 14650/2012

Mot. Seq. No(s). 2

PERETZ BRONSTEIN and GITEL BRONSTEIN a/k/a GITTY BRONSTEIN,

Plaintiffs,

--against--

OMEGA CONSTRUCTION GROUP, INC., BORIS BRONNBERG, ROMAN BRONNBERG, GEORGE GUTTMAN, DIMO ENGINEERING PC, MICHAEL T. CETERA, ALEX RABINOVICH, and ATLANTIC CASUALTY INSURANCE COMPANY,.

Defendants.

In this breach of contract and negligence action, plaintiffs Peretz Bronstein and Gitel Bronstein (plaintiffs) seek damages relating to problems they encountered with a construction project to enlarge and renovate their single-family home (the "Project") located at 410 Crown Street in Brooklyn, New York. Plaintiffs aver several causes of action alleging that the defendants, who were retained to perform various professional services relating to the Project, were either negligent in their performance of their professional duties and/or breached their respective contracts by failing to complete the Project in conformity with the applicable contracts and in compliance with New York City's zoning laws.

Defendant Cetera ("Cetera"), the architect originally hired by the plaintiffs to prepare, file and obtain approval of the plans for the Project with the New York City Department of Buildings

(the "DOB"), moves, pursuant to CPLR §§ 214(6) and 3211 (a)(1),(5) and (7) to dismiss the amended complaint as against him as time barred.

There is no dispute between the parties that CPLR § 214(6)'s three-year time limit is the applicable statute of limitations provision with respect to plaintiffs' professional malpractice claim. At issue in the instant motion is the question of when plaintiffs' claim against Cetera accrued and if the statute of limitations was effectively tolled by the continuous representation doctrine.

Cetera argues that he fulfilled his obligations under the original agreement and that any claim by plaintiffs accrued upon his termination from the Project, which he claims occurred at the latest on or about June 4, 2008, the date the DOB issued a stop work order based on his formal withdrawal from the Project. Cetara also argues that any communications, discussions and emails with the plaintiffs' made subsequent to the June 4, 2008 date were of a ministerial nature and not a continuance of his professional services. In support of his motion, Cetera annexes, among other things, copies of a series of emails between himself and Gitel Bronstein, a letter issued to the DOB advising that he was withdrawing as the Project's architect and the aforementioned June 4, 2008 stop work order.

Plaintiffs oppose the motion contending that Cetera was never terminated and that he continued to provide professional services with respect to the Project through November 2010. Plaintiffs' support their argument by providing a series of emails, exchanged between plaintiffs' and Cetera, from September 2010 through November 2010, in which Cetera counsels plaintiffs' with respect to ongoing issues between plaintiffs and the DOB concerning the Project's compliance with zoning regulations. For the reasons outlined below the motion is denied.

Background

On or about June 9, 2006, plaintiffs and Cetera entered into an agreement, pursuant to which, Cetera was to provide plaintiffs architectural services by preparing drawings and applications for the alteration of the plaintiffs' residence. The services to be provided by Cetera included (1) drafting and retainer and performing research and zoning analysis, (2) preparation of final plans for the Project, (3) filing of the plans with DOB, and (4) obtaining approval from the DOB for the Project. The contract offered as optional services, the performance of the required controlled inspections relating to the construction and the obtaining of the certificate of occupancy upon completion of the Project. Plaintiffs also retained defendant Omega Construction Group, Inc. (Omega) and defendant George Guttman, P.E. ("Guttman") of defendant Dimo Engineering, P.C. ("Dimo") to provide services relating to the Project.

Plaintiffs admit that on or about February 25, 2008 Cetera had obtained approval from the DOB to proceed with the Project as drawn up in the amended plans filed by Cetera (see July 7, 2014, affidavit of Peretz Bronstein at par.6).

Subsequent to the approval of the plans, Cetera and plaintiffs' exchanged a series of emails relating to the need to coordinate the controlled inspections. In his March 17, 2014 affidavit in support of the motion to dismiss, Cetera states that he was unable to coordinate controlled inspections for the Project as required by the DOB with the plaintiffs and their contractor Omega. Cetera refers the court to an April 2008 email in which plaintiffs advised him that Omega's in house architect was going to oversee the controlled inspections from April 2008 forward. Thereafter, by letter dated May 23, 2008, Cetera notified the DOB that the plaintiffs and Omega never notified him of the start of the work and that the work on the Project was not proceeding in accordance with the approved plans. Cetera further advised the DOB that he was withdrawing his

responsibility for the items of controlled inspections for the Project. On or about June 4, 2008, the DOB issued a stop work order based on Cetera's withdrawal from the job.

In early 2010, plaintiffs' apparently began to encounter trouble with the Project due to numerous DOB objections, including but not limited to, issues with the Project's compliance with zoning regulations. In early September 2010, plaintiffs contacted Cetera for help with the efforts relating to the resolution of the DOB's objections to the Project's violation of applicable zoning regulations. From early September 2010 through early November 2010, Cetera reviewed applications, obtained property records and provided advice to the plaintiffs' as part of the effort to resolve the objections. There is no indication in the record before the court that Cetera and plaintiffs' continued to communicate after November 2010. Plaintiffs, made several applications to the DOB in their effort to resolve the zoning objection, but it appears that those efforts proved futile and culminated in a final denial by the DOB in April of 2011of plaintiffs' application to approve the Project as built.

Plaintiffs originally commenced this lawsuit on July 17, 2012. At first plaintiffs' named Omega as the only defendant. Thereafter, on August 16, 2013, plaintiffs moved for leave to amend the complaint to add, *inter alia*, Cetera as a defendant. By order dated January 10, 2014 and entered with the Kings County Clerk on January 21, 2014, plaintiffs' application was granted. Plaintiffs' served Cetera and the instant motion was served and filed.

Discussion

"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" (*Frank v. Mazs Group, LLC*, 30

AD3d 369, 369–370 [2nd 2006]). Determining the completion date with respect to an architect's obligations should be determined based on the facts and circumstances of the particular case (*see Board of Educ. of Tri-Val. Cent. School Dist. at Grahamsville v Celotex Corp.,* 88 AD2d 713, 714 [1982]. However, even after the completion of work, the statute of limitations may be tolled under the "continuous representation" doctrine where a party can show it continued to rely upon the continued services of an architect and those services relate to the original professional services (*see Regency Club at Wallkill, LLC v. Appel Design Group, P.A.,* (112 AD3d 603, [2nd Dept. 2013]).

The record establishes that Cetera fulfilled his obligations under the original agreement by obtaining DOB approval of the amended plans on February 25, 2008. Thereafter, the professional relationship between the parties was formally terminated when Cetera submitted his withdrawal as the Project's architect to DOB and, on notice to plaintiffs, issued a stop work order based on Cetera's withdrawal as of June 4, 2008. However, it is unclear if the communications between the plaintiffs and Cetera in the fall of 2010 constituted a renewal of that professional relationship. The chain of emails exchanged between plaintiffs and Cetera indicates that the issues the Project encountered with DOB's zoning objections timely manifested before the passage of the three year statute of limitations, the earliest accrual of which would have occurred as of February 25, 2008, that, on or before February 25, 2011, the plaintiffs contacted Cetera for his help to resolve the zoning issues raised by the DOB based on Cetera's plans and that Cetera undertook efforts to aid plaintiffs' in the resolution of the zoning issues. Thus, there is an issue of fact to be resolved at trial with respect to the applicability of the continuous representation doctrine to the facts of this case because it is unclear whether plaintiffs' and Cetera renewed their professional relationship.

The situation in *Regency Club at Wallkill, LLC v. Appel Design Group, P.A.*, (112 AD3d 603, [2nd Dept. 2013]) is analogous the issues at bar in the present action. In *Regency*, the Appellate Division, Second Department determined that the "law recognizes that the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems" (112 AD3d 603, 607 [2nd Dept. 2013]). A motion to dismiss made pursuant to CPLR 3211(a)(5) should be denied where there are questions of fact concerning the application of the doctrine unless the gap in representation is not continuous as a matter of law (*id., see also Gomez v. Katz*, 61 AD3d 109 [2nd Dept. 2009].

Finally, assuming arguendo that the statute of limitations was effectively tolled until November 2010, making November 2013 the deadline to commence the claim against Cetera, the statute of limitations was once again tolled when plaintiffs' filed the August 16, 2013 motion to seeking leave amend its complaint to add Cetera and the subsequent order granting leave to serve the supplemental summons and amended complaint (*Perez v Paramount Communications*, 92 NY2d 749 [1999]).

Thus, for the reasons outlined above, defendant Cetera's motion to dismiss is denied.

This constitutes the Decision and Order of the Court.

E N T E R,

J. S. C.
HON. DAVID I. SCHMIDT