SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------x

DONALD BENNETT, JANNETH BENNETT and, DEVIN G. BENNET,

Index No.: 23329/2015

Plaintiff(s),

DECISION/ORDER

-against-

Present:
HON. MITCHELL J. DANZIGER

DEBOE CONSTRUCTION CORP., NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and the CITY OF NEW YORK,

Defendant(s).

----------x

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion to Dismiss the Complaint	Papers Numbered
Notice of Motion and Affirmation in Support with Exhibit & Memorandum of Law in Support	1
Affirmation in Opposition with Exhibits	2
Reply Affirmation in Support	3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant DEBOE CONSTRUCTION CORP (hereinafter, "DeBoe") seeks an order dismissing the plaintiffs' complaint pursuant to CPLR §3211(a)(5) on the ground that plaintiffs' causes of action for negligence are time-barred; pursuant to CPLR §3211(a)(7) for failure to sufficiently state a valid cause of action for breach of contract; and pursuant to CPLR §3211(a)(3) for lack of capacity to sue for breach of contract.

Plaintiffs seek compensation for property damage sustained to their home allegedly caused by a sewer main installation and road work project performed by DeBoe. The complaint alleges that the work was performed by DeBoe pursuant to a contract with the defendants CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and THE CITY OF NEW YORK (hereinafter, "City defendants"). Plaintiffs claim that DeBoe's work was the proximate cause of damages to their home, which is located on the street where the work was performed.

Plaintiffs' complaint alleges that the work was commenced in February of 2011, was

scheduled to last a total of six (6) days, and required streets to be excavated by DeBoe in order to remove, replace, or install sewer pipes (complaint, ¶14-16). Plaintiffs noticed that their home was caused to shake violently during the time that the work was performed (id. at ¶23). Plaintiffs allegedly complained to DeBoe's agents, but were ignored (id. at ¶24). Plaintiffs allege that "over a period of months, after DeBoe's crew had completed its work.. Plaintiffs began to notice minute cracks at different points along the foundation and walls" of their property (id. at ¶26). Approximately two (2) years later, on May 1, 2013, plaintiffs had an engineer inspect the property. The engineer's report concluded that the cracks to the foundation of plaintiffs' property were due to subsoil movement which is a likely result of excavation of soil for the replacement of sewer lines (plaintiffs exhibit "1" in opposition at p. 5, ¶6). Based on this report, plaintiffs' first and fourth causes of action sounds in negligence against DeBoe.

A cause of action for negligence is governed by a three (3) year statute of limitations (CPLR §214[4]; *Santiago v. 1370 Broadway Associate L.P.*, 96 N.Y. 2d 765 (2001). The time within which an action must be commenced, shall be computed from the time the cause of action accrued to the time the claim is interposed (CPLR §203[a]). DeBoe asserts that the negligence claims accrued at the time the work was performed and when plaintiff noticed violent shaking (February 2011). Plaintiffs assert that the claim accrued on May 1, 2013, the date upon which the cracks were attributed to the sewer work performed by DeBoe, and the date upon which plaintiffs allegedly discovered that DeBoe's work may have caused the damage.

Plaintiffs provide one case to support their argument that the negligence cause of action accrued at the time they discovered that DeBoe's work may have caused the damage. However, that case is distinguishable from this matter. In *Dana v. Oak Park Marina Inc.*, (230 A.D.2d 204 [4th Dep't., 1997]) plaintiff's cause of action for intentional infliction of emotional distress was determined to accrue at the time she suffered the actual distress, i.e., when she discovered defendant had installed video cameras in restroom. However, the instant matter is completely distinguishable as it involves alleged negligence in the performance of construction work on land adjacent to plaintiffs' property.

The court finds the instant case is analogous to *Mark v. Eshkar* (194 A.D.2d 356 [1st Dep't., 1993]). In *Mark*, the plaintiff owned a premises that shared a party wall with the adjacent building

owner defendant. Defendant undertook rehabilitation of his building which caused minor damage to the plaintiff's wall, for which defendant compensated plaintiff. However, five years later, larger cracks, apparently structural in nature, became manifest in the wall. The court held that the cause of action for negligence accrued at the time the damage became visible through the development of injuries to the surface of the plaintiff's land.

The court finds that *Mark* is instructive on determining when plaintiffs' cause of action accrued. Plaintiffs' engineer's report indicated that the damage to the property may have been caused by the excavation of soil by DeBoe. Therefore, it seems plaintiffs cause of action accrued at the time visible manifestations of the damage, i.e. cracks in the walls and foundations, were discovered by the plaintiffs. The complaint alleges that the cracks were discovered "over a period of months" after the work was completed in February 2011 (complaint at ¶26). Plaintiff's attorney affirms in the opposition that the defects in the property were discovered almost nine months after the work was completed. While an attorney's unsworn affirmation is of no probative value, for arguments sake, the very latest that the defects were discovered by plaintiffs, and the negligence claim accrued, was sometime in November of 2011. Consequently, the three year statute of limitations commenced in November of 2011 and expired in November of 2014. This action was commence in June of 2015. Based on the foregoing, plaintiffs' fist and fourth causes of action against DeBoe are dismissed pursuant to CPLR §3211(a)(5) as time barred.

Plaintiffs second and third causes of action sound in breach of contract. Plaintiffs assert that they are third party beneficiaries to the contract between defendants DeBoe and the City, that DeBoe breached its duties to plaintiffs, and that plaintiffs suffered damages as a result (complaint ¶45-47 & ¶49-52). A party seeking to maintain an action for breach of contract as a third party beneficiary must establish that: (1) there is an existing valid and binding contract between the signatories; (2) the contract was intended for the third party's benefit; (3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost (*Mandarin v Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 [2011]; *Mendel v. Henry Phipps Plaza W. Inc.*, 6 N.Y.3d 783 [2006]). New York imposes stringent requirements for establishing privity as an intended third-party of another's contract. See, *Port Chester Electrical Contrs. Corp. V. Atlas*, 40 N.Y. 2d 652, 656 [1976] (holding that absent a

showing that a construction contract was intended to benefit a third party, "the party is merely an incidental beneficiary with no right to enforce"); *Ovrsler v. Women's Interart Center*, 170 A.D.2d 407, 408 [1st Dep't., 1991] (holding that "to recover as [a] third party beneficiar[y] it must appear that no one other than the third party beneficiary party can recover if the promisor breaches the contract...or that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party"). Further, the Court of Appeal has held that a public improvement project to complete work which may incidentally benefit an adjoining landowner does not suggest the requisite intent to benefit the third party in order to sustain a cause of action for breach of contract as a third party beneficiary (*Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45-46 [1985]).

Plaintiffs' complaint merely alleges that the contract "was meant to benefit plaintiffs, among others" and that consequently, "plaintiffs became third party beneficiaries to the contract." These allegations are conclusory at best. Moreover, the complaint fails to allege that the contracting parties intended to benefit plaintiffs, how the contract was meant to benefit plaintiffs, or that the plaintiffs were more than incidental beneficiaries of the contract. While the complaint is to be afforded liberal construction and the court should afford plaintiff the benefit of every possible favorable inference, the court finds that plaintiffs have failed to sufficiently plead causes of action for breach of contract as third party beneficiaries. Therefore, the motion to dismiss the breach of contract claims is granted.

Based on the forgoing, the complaint is dismissed in its entirety against defendants DEBOE CONSTRUCTION CORP.

This constitutes the decision and order of the court.

Dated: 3/1/16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.