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

PRESENT: HON. MANUEL J. MENDEZ **PART** 13
Justice

AIG PROPERTY CASUALTY COMPANY f/k/a CHARTIS PROPERTY CASUALTY COMPANY a/k/a JOSEPH EDELMAN and PAMELA HELD,

Plaintiff,

-against-

PROPERTY MARKETS GROUP, INC., 823 PARK AVENUE, LLC, COSENTINI ASSOCIATES, INC., BARRY RICE DESIGN (ARCHITECT), PLLC, BARRY RICE ARCHITECT P.C., MARTACK CORPORATION d/b/a MARTACK HEATING & AIR CONDITIONING, TETRA TECH ENGINEERS, ARCHITECTS & LANDSCAPE ARCHITECTS, P.C. d/b/a COSENTINI ASSOCIATES, INC., AMERIBUILD CONSTRUCTION MANAGEMENT INC., WILLIAM J. KENNEDY PLUMBING, INC., BMB CONTRACTING, INC., and BIG APPLE SHEETMETAL CO. INC.,

Defendants.

INDEX NO. 157701/15
MOTION DATE 06-08-16
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 11 were read on this motion to/for pursuant to CPLR § 3211 [a],[1],[5],[7] and CPLR § 3211 [c] to dismiss the complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits _____cross motion _____,	6 - 9
Replying Affidavits _____	10 - 11

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that TETRA TECH ENGINEERS, ARCHITECTS & LANDSCAPE ARCHITECTS, P.C. d/b/a COSENTINI ASSOCIATES, INC. and COSENTINI ASSOCIATES, INC.'s motion pursuant to CPLR § 3211 [a],[1],[5],[7] and to treat this motion as one for summary judgment pursuant to CPLR §3211[c] dismissing the complaint against it, is denied. PROPERTY MARKETS GROUP INC. and 823 PARK AVENUE LLC's motion to dismiss plaintiff's causes of actions asserted against them pursuant to CPLR § 3211 [a],[1],[5],[7],filed under Motion Sequence 004, is granted as stated herein. BMB CONTRACTING, INC.'s motion to dismiss the amended complaint and all claims asserted against it pursuant to CPLR § 3211 [a],[1],[5],[7], filed under Motion Sequence 005, is denied.

This is a subrogation action arising out of a claim for property damages, AIG Property Casualty Company f/k/a Chartis Property Casualty Company is seeking to recover payments made to its insureds Joseph Edelman and Pamela Held for water damage identified on September 9, 2013, that occurred in their penthouse condominium unit (hereinafter referred to as "the unit"), located at 823 Park Avenue, New York, New York (hereinafter referred to as "the building").

Tetra Tech Engineers, Architects & Landscape Architects, P.C. d/b/a Cosentini Associates, Inc. and Cosentini Associates. Inc. (hereinafter referred to as "Cosentini") was retained to provide consulting engineering services for the HVAC unit. 823 Park

Avenue LLC is the sponsor of the building (hereinafter referred to individually as the "sponsor") and Property Markets Group (hereinafter referred to individually as "PMG") acted as the sponsor's agent for contracts with various contractors that designed or worked on the building. Pursuant to the building's Offering Plan, PMG was to enter into a contract to become the managing agent after completion of work on the building (Mot. Exh. 1). BMB Contracting Inc. (hereinafter referred to as "BMB"), entered into a contract with Martack Corporation to provide insulation starting in December of 2006. BMB provided services until April 2007 when Martack terminated the work performed under the contract. BMB claims that it only worked on the basement, floors 2-8, and the risers on floors 9 and 10 before termination and had nothing to do with the HVAC or plumbing for the penthouse unit.

Plaintiff commenced this action on July 27, 2015, asserting general negligence claims against the defendants for the design, installation and inspection of the HVAC system for the building. On January 5, 2016, plaintiff filed an Amended Complaint, asserting claims against the sponsor and PMG as general contractor for the renovations and the installation of the HVAC system prior to September 9, 2013. The claims asserted against Cosentini and BMB were for negligence in the design, installation and inspection of the HVAC System. Plaintiff alleges that as a result of all of the defendants' negligence, recklessness, and careless design, installation and inspection of the HVAC system, leaks caused property damage in the unit.

Cosentini makes this motion pursuant to CPLR §3211[a][1],[5],[7] and to treat this motion as one for summary judgment pursuant to CPLR §3211[c], dismissing the complaint against it.

Cosentini seeks to dismiss this action pursuant to CPLR 3211 [a],[5] arguing that this action is time-barred because the statute of limitations runs from the date of completion of work more than three years before plaintiff commenced this action on July 27, 2015, not as of the alleged identification of damage on September 9, 2013. Defendant claims that as of August 15, 2008, it had completed performance of significant duties under the contract related to the HVAC or chilled water piping insulation alleged to have caused the water damage, therefore, the three year statutory limitation period ran out as of August 15, 2011.

Douglas C. Mass, president of Cosentini, in support of the argument that this action is time-barred provides a copy of the July 12, 2004 proposal for the work performed claiming that all consulting engineering services for the project were completed as of August 15, 2008 as reflected in the final invoice. He contends that there is no agreement or privity of contract with the plaintiff. Mr. Mass states that five years later in September of 2013 Cosentini was contacted by the developer and asked to prepare an, "As Built Plan Fire Alarm Riser Diagram," to be filed with the New York City Department of Buildings ("DOB"), and the work performed in 2013 had nothing to do with chilled water piping or the HVAC, for purposes of determining the statute of limitations.

Pursuant to CPLR §3211[a][5], an action may be dismissed because it may not be maintained as barred by the statute of limitations (Education Resources Institute, Inc. v. Hawkins, 88 A.D. 3d 484, 931 N.Y.S. 2d 11 [1st Dept., 2011]). The statute of limitations on a professional negligence claim against an engineer or architect is three years, pursuant to CPLR §214[6] (IFD Const. Corp. v. Corddry Carpenter Dietz and Zack, 253 A.D. 2d 89, 685 N.Y.S. 2d 670 [1st Dept., 1999]). The three year statute of limitations begins to accrue from the date of termination of the professional relationship between the parties and the completion of significant duties under the contract (Board of Managers of Yardarm Beach Condominium v. Vector Yardarm Corp., 109 A.D. 2d 684, 487 N.Y.S. 2d 17 [1st Dept.,1985]).

Plaintiff's argues that the claims asserted against Cosentini are only for general negligence resulting in property damage, not professional negligence or malpractice and therefore the statute of limitations accrues from the date the damage was apparent.

A claim for malpractice cannot be sustained against an engineer or architect, if there is a lack of privity, but a general negligence claim is potentially sustainable, if regardless of privity, there is a retention of authority to control the contractor's work (905 5th Associates. Inc. v. Weintraub, 85 A.D. 3d 667, 927 N.Y.S. 2d 29 [1st Dept., 2011] and Samuels v. Fradkoff, 38 A.D. 3d 208, 832 N.Y.S. 2d 499 [1st Dept., 2007]). A sustainable general negligence claim asserted by a party that has no privity of contract accrues as of the date of the injury, which is when the damage is apparent (Gordon v. Board of Managers of 18 East 12th Street Condominium, 102 A.D. 3d 521, 958 N.Y.S. 2d 360 [1st Dept., 2013]). Property damage is apparent, when the plaintiff either knows or in the exercise of diligence should have known the damage exists (Reyes-Dawson v. Goddu, 74 A.D. 3d 417, 905 N.Y.S. 2d 145 [1st Dept., 2010]).

Cosentini has not established that this action should be dismissed because of the statute of limitations. Cosentini fails to state that there was no retention or control over the contractor's work. The assertions by Cosentini that accrual for statute of limitations purposes is applied in the same manner as professional negligence, at the time work was completed, have not been substantiated and are insufficient to dismiss the plaintiff's claims as time-barred.

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, supra and Guggenheimer v. Ginzberg, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 372 N.E. 2d 17, [1977]).

Plaintiff has stated a potentially meritorious claim of general negligence against Cosentini, that is separate from malpractice warranting denial of the relief sought pursuant to CPLR §3211[a][7].

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Fortis Fin. Servs. v. Fimat Futures, USA, 290 A.D. 2d 383, 737 N.Y.S. 2d 40 [1st Dept., 2002] and Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Plaintiff is provided with every favorable inference and the complaint is construed liberally. A motion to dismiss pursuant to CPLR §3211[a][1], does not require that the plaintiff establish the ultimate success of the allegations (African Diaspora Maritime Corp. v. Golden Gate Yacht Club, 968 N.Y.S. 2d 459 [1st Dept., 2013]).

Cosentini provides copies of the "Construction Management Proposal for Americbuild Construction Management Services ("ACM") and the contract between the owner and Martack Heating & Air Conditioning, the entity that installed the chilled water piping, as proof that it was not responsible for the installation that damaged the unit. Cosentini failed to provide documentary evidence that utterly refutes plaintiff's allegations of general negligence and that this action is not time-barred. The documentary evidence provided does not apply to accrual of a general negligence claim.

Pursuant to CPLR §3211[d] a motion to dismiss may be denied for discovery, if there are facts essential to justify opposition that may exist but cannot be stated (Copp v. Ramirez, 62 A.D. 3d 23, 874 N.Y.S. 2d 52 [1st Dept., 2009]). Plaintiff has established that summary judgment is premature since there has been no discovery exchanged on this pre-answer motion.

PMG and the sponsor's motion filed under Motion Sequence 004 seek to dismiss the amended complaint against them pursuant to CPLR §3211 [a],[1],[5],[7]. The sponsor argues that the applicable statute of limitations for plaintiff's claims pursuant to CPLR §213, accrues six years from August 1, 2008 when the sale of the penthouse unit was closed by Joseph Edelman and Pamela Held through their entity "Park Penthouse Holdings, LLC," and that pursuant to CPLR §3211[a][5], this action should be dismissed as untimely. The sponsor contends that it was not a contractor, did not design, install or inspect the allegedly defective HVAC system, and barring proof of a legal duty independent of the purchase agreement, the negligence claims are deemed solely for breach of contract, subject to a six year statute of limitations and the statute of expired on August 1, 2014.

Pursuant to CPLR §213, the statute of limitations for breach of contract is six years running from the time of the breach or omission in the performance of a contractual obligation. The plaintiff's knowledge of the occurrence is not needed for the accrual of time on a breach of contract action (De Hernandez v. Bank of Nova Scotia, 76 A.D. 3d 929, 908 N.Y.S. 2d 45 [1st Dept. 2005]). Allegations of negligence derived from defects in construction asserted against the sponsor of a condominium sound in breach of contract, not tort, to the extent plaintiff fails to allege breach of an independent duty to the contractual obligations (Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v. NW 124 LLC, 116 A.D. 3d 506, 984 N.Y.S. 2d 17 [1st Dept., 2014]).

Plaintiff's assertion of negligence against the sponsor is derived from defects in the construction and installation of the HVAC system and not distinguishable from a breach of contract claim. Plaintiff has not alleged that the sponsor was negligent in a manner that is separate from the construction and installation of the HVAC system. The claims asserted against the sponsor in this action commenced on July 27, 2015, expired as of six years from the sale of the penthouse unit, and are time-barred. There is no need to address the remainder of the arguments asserted against the sponsor pursuant to CPLR §3211 [a],[1],[7], since the claims asserted are time-barred.

PMG seeks to dismiss the complaint alleging that it had no privity of contract with the plaintiff, and is not a contractor responsible for the design, installation and inspection of the allegedly defective HVAC system in the penthouse unit. It is PMG's contention that it acted solely as an agent for the sponsor with the contractors and it did not owe the plaintiff's any duty of care. PMG seeks to dismiss this action pursuant to CPLR §3211[a][5], arguing that plaintiff's claims asserted against it are time-barred

The statute of limitations applying to PMG as an agent or builder's agent is six years from the purchase agreement, barring violation of a separate legal duty (Oyster Bay v. Lizza Industries, Inc. , 22 N.Y. 3d 1024, 4 N.E. 3d 944, 981 N.Y.S. 2d 643 [2013] and Kordower-Zetlin v. Home Depot U.S.A., Inc., 134 A.D. 3d 556, 22 N.Y.S. 3d 556 [1st Dept., 2015]).

Plaintiff does not distinguish between the relief sought from PMG and the sponsor in opposing their motion filed under Motion Sequence 004 and refers to them jointly as the "builder defendants." Plaintiff has not refuted PMG's assertion that it acted as an agent for the sponsor and not as a separate contractor responsible for negligent work performed. As the sponsor's agent, PMG did not participate in the design, installation and inspection of the HVAC System and there was no contractual relationship with plaintiff. Plaintiff's claims asserted against PMG for general negligence resulting in property damage accrued within six years from the purchase agreement on August 1, 2008 and not at the time of discovery of the damage. There is no need to address the remainder of the arguments asserted against PMG pursuant to CPLR §3211 [a],[1],[7], since the claims asserted are time-barred.

BMB's motion pursuant to CPLR § 3211 [a],[1],[5],[7], filed under Motion Sequence 005, seeks to dismiss all claims asserted against it.

BMB argues that plaintiff's claims pursuant to CPLR § 3211 [a],[5], should be dismissed because they are subject to a three year statue of limitations accruing from the date of termination of work in April of 2007. A sustainable general negligence claim asserted by a party that has no privity of contract accrues as of the date of the injury, which is when the damage is apparent (Gordon v. Board of Managers of 18 East 12th Street Condominium, 102 A.D. 3d 521, supra). Property damage is apparent, when the plaintiff either knows or in the exercise of diligence should have known the damage exists (Reyes-Dawson v. Goddu, 74 A.D. 3d 417, supra). BMB has not established that plaintiff's claims asserted against it would be time-barred because this action was commenced within three years of identification of the property damage.

In support of BMB's contentions pursuant to CPLR §3211 [a],[1], Mr. Bokun, its president annexes invoices showing work performed ended on the 10th floor and that there was a balance due as of May 18, 2007. BMB has not provided documentary evidence "utterly refuting plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Fortis Fin. Servs. v. Fimat Futures, USA, 290 A.D. 2d 383, supra). BMB provides the affidavit of William Bokun, in support of the argument that plaintiff's claims should be dismissed pursuant to CPLR §3211 [a],[7], because the insulation work was only performed on the basement, floors 2-8, and the risers on the 9th and 10th floors and had nothing to do with the HVAC or plumbing for the penthouse unit and there was no privity of contract with plaintiff.

Plaintiff argues that the CPLR §3211 [a],[1],[7] relief sought by BMB should be denied because relevant evidentiary discovery needed to further oppose the relief sought has not yet been exchanged. Pursuant to CPLR §3211[d] a motion to dismiss may be denied for discovery, if there are facts essential to justify opposition that may exist but cannot be stated (Copp v. Ramirez, 62 A.D. 3d 23, supra). It is plaintiff's contention that faulty insulation is the cause of the damage in the unit, and that discovery is needed concerning the type of insulation performed by BMB, and the potential effect on the penthouse unit. Plaintiff has stated a basis to deny the CPLR §3211 [a],[1],[7] relief sought by BMB, as premature.

Accordingly, it is ORDERED that, COSENTINI ASSOCIATES, INC.'s motion pursuant to CPLR § 3211 [a],[1],[5],[7] and to treat this motion as one for summary judgment pursuant to CPLR §3211[c] dismissing the complaint against it, is denied, without prejudice to seeking summary judgment, and it is further,

ORDERED that, COSENTINI ASSOCIATES, INC. shall within twenty (20) days from the date of service of a copy of this Order with Notice of Entry pursuant to e-filing protocol, serve and file an Answer on the plaintiff and the Clerk of this Court, and it is further,

ORDERED, that PROPERTY MARKETS GROUP INC. and 823 PARK AVENUE LLC's motion to dismiss plaintiff's causes of actions asserted against them pursuant to CPLR § 3211 [a],[1],[5],[7],filed under Motion Sequence 004, is granted as stated herein, and it is further,

ORDERED, that plaintiff's claims asserted against PROPERTY MARKETS GROUP INC., in the amended complaint are severed and dismissed, and it is further,

ORDERED, that plaintiff's claims asserted against 823 PARK AVENUE LLC, in the amended complaint are severed and dismissed, and it is further,

ORDERED, that the Clerk of the Court shall enter judgment accordingly, and it is further,

ORDERED that BMB CONTRACTING, INC.'s motion to dismiss the amended complaint and all claims asserted against it pursuant to CPLR § 3211 [a],[1],[5],[7], filed under Motion Sequence 005, is denied, and it is further,

ORDERED that, BMB CONTRACTING, INC. shall within twenty (20) days from the date of service of a copy of this Order with Notice of Entry pursuant to e-filing protocol, serve and file an Answer on the plaintiff and the Clerk of this Court.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: August 16, 2016

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE