

<b>Geotech Enters. Inc. v 181 Edgewater, LLC.</b>
2016 NY Slip Op 32328(U)
October 4, 2016
Supreme Court, Queens County
Docket Number: 704839/14
Judge: Timothy J. Dufficy
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FILED  
OCT 14 2016  
COUNTY CLERK  
QUEENS COUNTY

**ORIGINAL**

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35/COMMERCIAL**  
**DIVISION Part A**

-----X

**GEOTECH ENTERPRISES INC. and**  
**INTERNATIONAL GEOTECHNICAL/**  
**STRUCTURAL LABORATORIES, INC.,**

**Plaintiffs,**

**Index No.: 704839/14**

**Mot. Date: 9/2/16**

**-against-**

**Mot. Cal. No. 40**

**Mot. Seq. 2**

**181 EDGEWATER, LLC.,**

**Defendant.**

-----X

The following papers read on this motion by defendant 181 Edgewater, LLC. for an order granting dismissing plaintiffs' first cause of action for negligence and third cause of action for duty of care pursuant to CPLR 3211(a)(5), and CPLR 3211(a)(7).

PAPERS  
NUMBERED

Notice of Motion-Memorandum In Support-Affirmation-Exhibits.....	EF 56-62
Affirmation in Opposition-Exhibits .....	EF 63-69
Reply Memorandum.....	EF 70

Upon the foregoing papers, it is ordered that the motion is denied.

In 2008, the plaintiffs entered into a contract with nonparty Nevins Group, LLC (Nevins) to install pile drilling and load testing equipment at a construction site in Brooklyn. In 2010, after a dispute with Nevins, the plaintiffs ceased performing work at the construction site. On October 21, 2010, Nevins removed the plaintiffs' equipment and machinery from the work site and place them in a storage facility owned by the defendant. During the course of the action against Nevins, the plaintiffs learned that

their equipment and machinery were stored at the defendant's property. In this action, it is essentially alleged that certain equipment and machinery belonging to the plaintiffs were moved and negligently stored in a warehouse belonging to the defendant, causing them to sustain damages.

A brief procedural history of this matter is dispositive of this application. The defendant interposed its answer in this matter on August 22, 2014, over two years ago. On or about December 12, 2014, the defendant filed a motion, pursuant to CPLR 3211(a)(5), seeking to dismiss the second cause of action for conversion based upon statute of limitations, and to amend their answer. By Order, dated April 16, 2015, the defendant's request to amend its answer was granted by the Court (Kitzes, J.), but the application to dismiss was denied. The defendant appealed, and by Order dated March 30, 2016, the Appellate Division Second Department, reversed that branch of the Court's Order which denied the branch of the defendant's motion to dismiss pursuant to CPLR §3211(a)(5).

At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in CPLR 3211(a), and no more than one such motion shall be permitted. (see Rivera v Bd. of Educ. of City of New York, 82 AD3d 614, 615 [1st Dept. 2013]). If a motion is not decided on the merits, is withdrawn, or denied with leave to renew, this rule does not apply (Rivera, supra.)

The defendant's motion, pursuant to CPLR 3211 (a)(5) and (7), is procedurally barred by the "single-motion" rule (see CPLR 3211 [e]; Nunez v Mousouras, 21 AD3d 355, 356 [2d Dept. 2005] see also Landes v Provident Realty Partners II, L.P., 137 AD3d 694 [1st Dept. 2016]). The defendant had a full opportunity to raise its current CPLR 3211(a) arguments on its original CPLR 3211(a) motion to dismiss two years ago (see Barbarito v Zahavi, 107 AD3d 416, 420 [1st Dept 2013]). Moreover, in its responsive papers, it fails to furnish a shred of legal authority permitting this Court to entertain its second motion to dismiss, pursuant to CPLR 3211 (a)(5) and (7).

In Oakley v County of Nassau, 127 AD3d 946, 946-947 [2d Dept. 2015], a case on all fours, the Second Department reversed a trial court that entertained a second motion, holding that:

On or about May 22, 2012, the defendant interposed its answer. Thereafter, the defendant moved, inter alia, pursuant to CPLR 3211 (a) (10) to dismiss the complaint for failure to join a necessary party, and in an order dated September 12, 2013, the Supreme Court denied that branch of the motion. On March 3, 2014, the defendant moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. In opposition to the motion, the plaintiff contended that the defendant's motion violated the single-motion rule of CPLR 3211 (e). The Supreme Court granted the defendant's motion, and the plaintiff appeals. Contrary to the Supreme Court's determination, the defendant was barred by the single-motion rule from making a second CPLR 3211 (a) motion (*citations omitted*).

The Second Department in that case also set forth the policy rationale for the rule: The purpose of the single-motion rule is not only to prevent delay before answer (see *Held v Kaufman*, 91 NY2d 425, 430, 694 NE2d 430, 671 NYS2d 429 [1998]), but also to " 'protect the pleader from being harassed by repeated CPLR 3211 (a) motions' " (*Nassau Roofing & Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679, 680, 424 NYS2d 786 [1980] [internal quotation marks omitted]) and to conserve judicial resources. The defendant provided no reason for not including CPLR 3211 (a) (7) as an alternative basis for relief in its prior [\*\*648] motion. Even though the defendant may not raise the defense of failure to state a cause of action in another CPLR 3211 (a) motion, "it may be later raised in another form," such as a summary judgment motion pursuant to CPLR 3212 (*McLearn v Cowen & Co.*, 60 NY2d at 689). (*emphasis added*).

Oakley, *supra* at 946-947. Defendant's serial motion practice is violation of the rule set forth above.

Defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court, pursuant to CPLR 3025 (b), so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay (see Complete Mgt., Inc. v Rubenstein, 74 AD3d 722 [2d Dept. 2010]). The defendant is directed, to the extent it still has not done so, to amend forthwith its answer to include the defenses as per Justice Kitzes' Order.

Accordingly, for all of the foregoing reasons, it is hereby,

**ORDERED**, that motion by defendant for an order dismissing the plaintiffs' first cause of action for negligence and third cause of action for duty of care, pursuant to CPLR 3211(a), and CPLR 3211(a)(7), is denied in all respects; and it is further,

**ORDERED**, that the defendant is directed, to the extent it still has not done so, to amend forthwith its answer to include the defenses as per Justice Kitzes' Order; and it is further

**ORDERED**, that all other applications not specifically addressed herein are denied in all respects.

**Dated: October 4, 2016**

  
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**TIMOTHY J. DUFFICY, J.S.C.**

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