To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ROBERT GARRON,

Plaintiff,

-against-

BRISTOL HOUSE, INC., ELLEN HONIG, ELLEN HONIG DDS P.C., GARTHCHESTER REALTY, LTD., GARTHCHESTER REALTY SALES CORP., RMR RESIDENTIAL REALTY, LLC, RGW REALTY, INC., f/k/a WRG MANAGEMENT CORP.,

Defendants.

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Index No. 54992/16
Motion Seq. Nos. 001, 002
Decision and Order

EVERETT, J.

The following papers were read on the motions:
001 Notice of Motion/Aff in Supp
Aff in Opp/Exhibits A-E
Repy Aff
002 Notice of Motion/Aff in Supp
Aff in Opp/Exhibits A-E
Reply Aff/Exhibits 1-7

Upon the forgoing papers, the motions are granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff Robert Garron (Garron) commenced the above-captioned action, by filing a summons and complaint in the Office of the Westchester County Clerk on April 15, 2016, to recover damages in the amount of $537,000.00, from defendants Bristol House, Inc. (Bristol House), Ellen Honig, Ellen Honig DDS P.C. (together, Honig), Garthchester Realty, Ltd., Garthchester Realty Sales Corp., RMR Residential Realty, LLC, RGW Realty, Inc., f/k/a WRG

Management Corp. The complaint contains the following nine causes of action. The first cause of action charges Bristol House with breach of contract based on its failure to perform its obligations under the proprietary lease. The second cause of action charges all defendants with negligence based on their failure to ensure that the work done in Unit 1M did not adversely affect Garron's unit directly above. The third cause of action charges all defendants with gross negligence based either on an intentional wrong doing, or on the performance of work in Unit 1M in a manner that evinced a reckless indifference to the rights of others. The fourth cause of action charges all defendants with punitive damages based on their failure to obtain permits for the work performed in Unit 1M, or on their failure to ensure that the alterations to Unit 1M were performed in a workmanlike fashion, and claiming that such failures represent an attack on a public right, and were activated by reprehensible motives. The fifth cause of action charges Bristol House with breach of the implied warranty of habitability, by allowing the work to proceed without a permit, and in an unworkmanlike manner, causing damage to Garron's unit. The sixth cause of action charges all defendants with breach of the covenant of quiet enjoyment in that their breaches and that their acts of negligence have substantially and materially deprived Garron of the beneficial use and enjoyment of his unit. The seventh cause of action charges Bristol House with breach of fiduciary duty, by allowing Garron's unit to become damaged and devalued, thereby adversely affecting the reasonable value of his shares in the cooperative. The eighth cause of action seeks reimbursement from all defendants for reasonable legal fees. The ninth cause of action charges Bristol House with breach of the covenant of good faith and fair dealing by allowing Garron's unit to become damaged and devalued, in contravention of its duties under the proprietary lease.

Issue was not joined as defendants Bristol House, Garthchester Realty, Ltd. (Garthchester), and RMR Residential Realty, LLC (RMR) (or joint defendants, as appropriate) served a joint motion, under motion sequence number 001, for an order, pursuant to CPLR 3211 (a) (5), 213 and 214, dismissing the complaint as against them on the basis that the action is barred by the applicable statutes of limitations. Similarly, defendants Ellen Honig, Ellen Honig DDS P.C. (together, Honig) served their joint motion for an order, pursuant to CPLR 3211 (a) (5) and 214, dismissing the complaint as against them on statute of limitations grounds. The motions, under motion sequence numbers 001 and 002, are consolidated for disposition.

The underlying allegations of fact, which, for the purpose of the instant motions, are largely undisputed, are that, in or about 1998, Garron purchased shares and a proprietary lease appurtenant to Unit 2M in the cooperative building owned and operated by Bristol House, and located at 10 Nosband Avenue, White Plains, New York. Garron resides in Unit 2M together with family members.

In or about 2003, Honig, or an entity acting on her behalf, leased Unit 1M in Bristol House from the nonparty owner of the property, SJKEB Group Corp. (SJKEB), for the purpose of practicing dentistry. Unit 1M is situated directly under Unit 2M. In or about August 2003, an application, listing SJKEB as the property owner and Honig as the lessee, was submitted to the City of White Plains Department of Building (Building Dept.) for the purpose of obtaining a building permit to transform Unit 1M from a medical office into a dental office (reply aff, exhibit 2). On September 11, 2003, the Building Dept. issued Building Permit No. B-38447, and on December 5, 2003, the Building Dept. granted a temporary certificate of occupancy for the use of Unit 1M as a dental office, pending final inspections (*id.* at exhibit 3). By letter dated

September 2, 2004, the Building Dept. advised SJKEB that "all final inspections had been performed under Building Permit number No. B-38447 for interior renovations" and that "[t]hese inspections indicate that the work had been completed to the satisfaction of this department and permission is hereby granted to occupy and use these premises" (*id.* at exhibit 5).

According to the complaint, prior to the completion of the work, Garron alerted defendants to his concerns that the renovation construction work in progress in Unit 1M was compromising the structural integrity of his adjoining unit, and he continued to express his concerns to defendants about anticipated damage to his apartment, and to demand restitution and/or remediation for the damage (complaint, ¶ 20). The complaint also alleges that, in or about September 14, 2011, out of his concern over the worsening conditions, Garron hired nonparty Dynamic Structures Inc. (DSI) to investigate cracking in the walls of his unit. On or about November 29, 2011, DSI provided the results of its probes in a letter addressed to "Bristol House c/o Garthchester Realty." Among its reported findings was its assessment that:

> "the removal of the existing 'stiffener partition' during the renovation of the doctor's office below would have caused additional deflection of the joints, which in turn caused the plaster in the apartment to crack. . . the differential deflection will cause further cracking if the recommendations below are not taken into account"

(Garron aff, ¶ 14; aff in opp, exhibit B).

It appears from Honig's sworn affidavit that, in or about July 2012, she was informed by Bristol House building management of the need to perform structural work to address structural issues related to wall cracking. She then engaged a home improvement company to perform the requested work, which was completed in July 2012 (Honig aff in opp, aff, ¶ 13).

According to the complaint, despite Garron's continued communications with the various

defendants about his ongoing concerns and the possibility that the floor of his unit might collapse, defendants' purported lack of adequate response prompted him to commence the instant action, which defendants now move to dismiss.

The gravamen of the joint defendants' motion is that the seven substantive breach of contract, negligence, and contractual obligations claims, both express and implied, are time-barred (CPLR 213, 214), and that the remaining two claims for punitive damages and legal fees cannot survive their dismissal. Similarly, the gravamen of Honig's motion is that, the negligence and breach of the covenant of quiet enjoyment claims must be dismissed as time-barred (CPLR 213, 214), and that the dismissal of the substantive claims precludes any recovery for punitive damages or for legal fees.

It is well settled that, on a motion to dismiss, pursuant to CPLR 3211:

> "the court must take the allegations in the complaint as true and resolve all reasonable inferences in favor of the pleader. A defendant who seeks dismissal of a complaint on the ground that it is barred by the statute of limitations bears the initial burden of demonstrating, prima facie, that the time in which to commence the action has expired. Once the prima facie showing is made, the burden shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies"

(*6D Farm Corp. v Carr*, 63 AD3d 903, 905-906 [2d Dept 2009] [internal citations omitted]).

Addressing first, Garron's breach of contract claim against Bristol House, the joint defendants assert that the six-year statute of limitations governing contract obligations (CPLR 213) expired in 2010. More specifically, the joint defendants explain that, because the construction work was completed in Unit 1M[1] in November 2004, the breach of contract cause of

[1] The motion mistakenly states "when co-defendant did construction in November of 2004, in unit 2M," when it is undisputed that the work at issue was performed in Unit 1M.

action could have accrued no later than November 2004, rendering any post-November 2010 contract claim time-barred. Additionally, the joint defendants, as well as Honig in support of her joint motion to dismiss the breach of the covenant of quiet enjoyment cause of action, contend that the remaining causes of action sounding in alleged breaches of contractual obligations are also limited by the six-year statute of limitations, to the extent they are not premised on injury to property, and limited to a three-year statute of limitations, and must be dismissed as time-barred.

Next, the joint defendants and Honig seeks a dismissal of Garron's two causes of action sounding in negligence, as these claims, which also stem from the construction work completed no later than November 2004, are time-barred by the three year statute of limitations set forth in CPLR 214. Lastly, the joint defendants and Honig assert that the causes of action for punitive damages and legal fees must be also dismissed because "there is no separate cause of action for punitive damages" (*Paisley v Coin Device Corp.*, 5 AD3d 748, 750 [2d Dept 2004]), and because legal fees are derivative in nature and cannot be awarded in the absence of other causes of action.

The joint defendants and Honig have made prima facie showings that Garron's time to commence his action sounding in both contract and negligence has expired, shifting the burden to Garron to show that his causes of action fall within a recognized exception to the statute of limitations (*6D Farm Corp. v Carr*, 63 AD3d at 906).

In his opposition to the motions, plaintiff argues that each of his causes of action has been tolled under the continuing wrong doctrine, the doctrine under which an applicable statute of limitations is tolled "until a continuing harm ceases" (*see Neufeld v Neufeld,* 910 F Supp 977, 982 [SD NY 1996]; *see also Capruso v Village of Kings Point*, 23 NY3d 631, 639-640 [2014]). To this end, plaintiff contends that: defendants' "duties relating to the negligence causes of action

are renewed on a 'second by second' basis" (affirmation in opp, ¶ 11); the contractual causes of action are not time barred because "Defendants have been contacted by Mr. Garron on a regular basis starting in 2004 and continuing through the present" (*id.* at 14); and "each second that passes without action from the Defendants creates a separate cause of action in which the damage to the Premises represents subsequent liability" (*id.* at 13). Garron supports his legal argument with his own sworn affidavit in which he lists: the actions he has taken since he became aware, in or about 2004, that the work that was being performed in Unit 1M might cause structural problems in his unit; the multiple efforts he made to communicate his concerns to defendants; the actions defendants have, and have not, taken with respect to the work in Unit 1M, and in response to his concerns; and the steps he took to investigate the cause of the weakened floor and the wall cracks in his unit. Plaintiff also supports his argument with copies of his communications with defendants, copes of DSI's letters to Bristol House, dated September 14, 2011, and November 29, 2011, regarding its investigation into the cause or causes of cracking in Unit 2M, and with copies of photographs showing wall cracks and other damage. Garron argues that, together, the evidence demonstrates the applicability of the continuing wrong doctrine to toll the three and six-year statutes of limitations.

Plaintiff's argument and submissions notwithstanding, his reliance on the continuing wrong doctrine to save his complaint is misplaced. Pursuant to CPLR 213, an action based on a contractual obligation or liability, express or implied, must be commenced within six years, and pursuant to CPLR 214 (4), an action to recover damages for an injury to property must be commenced within three years. Additionally, causes of action arising from a construction project, whether based on theories of contract or negligence, "accrue[] upon the date of

completion of construction, not when the injury occurred or the defective condition is discovered" (*Regatta Condominium Assn. v Village of Mamaroneck*, 303 AD2d 737, 738 [2d Dept 2003]). Based on Garron's assertions that he began expressing his concerns while the work was in progress, the alleged wrong, or harm, for which damages are recoverable, is referable to the completion of the construction work in Unit 1M, which occurred no later than November 2004. That is the time when Garron's causes of action accrued, and neither his allegations that the damages are continuing unabated, nor his assertion that, as long as defendants continue to breach their duties and contractual obligations by permitting the situation to persist, his causes of action are renewed on a "second by second" basis, nor DSI's release of its investigation results on November 29, 2011, are sufficient to invoke the continuing wrong doctrine (*id.*).[2]

Accordingly, plaintiff's failure to file suit within either three years for his claims based on allegations of negligence, or his claims for damages based on allegations of property damage or on the diminished value of his unit as a result of defendants' alleged negligence (CPLR 214 [4]), or within six years for his claims related to contractual obligations, express or implied (CPLR 213), mandates a dismissal of those claims under CPLR 3211 (a) (5).

The ninth cause of action for breach of the covenant of good faith and fair dealing is also subject to dismissal under CPLR 3211 (a) (5), as, not only is it contemplated in the notice of motion for a dismissal of the entire action on statute of limitations grounds, but as pled, it is inextricably linked to, and duplicative of, plaintiff's breach of contract cause of action, and

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[2] The continuing wrong doctrine is more appropriately applied "in certain cases such as nuisance or continuing trespass where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed" (*Capruso v Village of Kings Point*, 23 NY3d 631, 639 [2014]).

subject to dismissal on that basis, as well as on the ground that it is time-barred.

Turning to plaintiff's cause of action for punitive damages, "punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as gross and morally reprehensible, and of such wanton dishonesty as to imply a criminal indifference to civil obligations" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995] [internal quotation marks and citations omitted]). Not only are plaintiff's allegations of fact inadequate to support an award of punitive damages, but the cause of action for punitive damages must be dismissed because "New York does not recognize an independent cause of action for punitive damages. . . . [since] a demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Podesta v Assumable Homes Dev. II Corp.*, 137 AD3d 767, 770 [2d Dept 2016] [internal quotation marks and citations omitted]). Under the circumstances, there is also no basis on which to award legal fees.

Accordingly, it is

ORDERED that the motion of defendants Bristol House, Inc., Garthchester Realty, Ltd. and RMR Residential Realty, LLC, under motion sequence number 001, to dismiss the complaint as against them is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants Ellen Honig and Ellen Honig DDS P.C., under motion sequence number 002, to dismiss the complaint as against them is granted and the

complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
October 5, 2016

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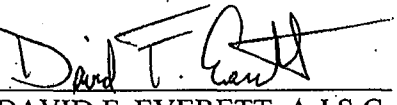

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