

Philadelphia Indem. Ins. Co. v Buffalo Hotel Supply Co., Inc.

2017 NY Slip Op 32634(U)

December 19, 2017

Supreme Court, Tompkins County

Docket Number: EF2015-0101

Judge: Eugene D. Faughnan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 27th day of October, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

PHILADELPHIA INDEMNITY INSURANCE
COMPANY, as subrogee of COUNTRY CLUB
OF ITHACA, NY, INC.,

Plaintiff,

-vs-

BUFFALO HOTEL SUPPLY COMPANY, INC.,
HALCO MECHANICAL, ALLIED ELECTRIC
COMPANY, and TYCO INTEGRATED
SECURITY, LLC,

Defendants.

DECISION AND ORDER

Index No. EF2015-0101
RJI No. 2016-0018-M

APPEARANCES:

Counsel for Plaintiff:

Eliot Greenberg, Esq.
Rosner, Nocera & Ragone, LLP
61 Broadway, Suite 1900
New York, NY 10006

Counsel for Defendant
Buffalo Hotel Supply Company, Inc.:

Lisa M. Diaz-Ordaz, Esq.
Law Offices of Destin C. Santacrose
535 Washington Street, Suite 403
Buffalo, NY 14203

Counsel for Halco Mechanical:

Kevin R. VanDuser, Esq.
Sugarman Law Firm
211 West Jefferson St.
Syracuse, NY 13202-2680

Counsel for Allied Electric Company:

Gerald E. O'Connor, Esq.
Lippman O'Connor
300 Olympic Towers
300 Pearl Street
Buffalo, NY 14202

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court to address separate motions by three Defendants.¹ The first motion was made by Allied Electric Company (“Allied”) to dismiss Plaintiff’s Amended Complaint based on CPLR § 3211(a)(5) arguing that the Amended Complaint is barred by the Statute of Limitations. The second motion was made by Buffalo Hotel Supply Company, Inc. (“Buffalo Hotel Supply”), and is also based on the Statute of Limitations. The third motion was by Halco Mechanical (“Halco”), seeking leave to serve an Amended Answer to include the affirmative defense of the Statute of Limitations, and then to dismiss the Amended Complaint based upon that affirmative defense, and also based upon the lack of proximate cause, as a matter of law. Plaintiff has opposed all three motions, arguing that the Statute of Limitations begins to run upon discovery of the defect and resulting damage, and that the Amended Complaint was timely.² For the reasons set forth below, the motions of all three Defendants are granted.

¹A fourth named Defendant, Tyco Integrated Security, LLC (“Tyco”) previously made a motion to dismiss all claims against it, which was granted by the Court on February 1, 2017.

²All the papers filed in connection with these motions are included in the electronic case file maintained by the County Clerk, and have been considered by the Court.

Background Facts

On January 23, 2014, a pipe ruptured at the Country Club of Ithaca (“Country Club”), resulting in a water leak and property damage. Plaintiff is the subrogee of the Country Club. Plaintiff’s Complaint was filed on October 5, 2015, and the Amended Complaint was filed on May 4, 2016.

All 3 of the Defendants performed some work in connection with a renovation project at the Country Club around 2004-2005. The Plaintiff’s Complaint and the Amended Complaint do not contain allegations regarding the timing of the Defendants’ work, but the allegations do pertain to that renovation project.

The Amended Complaint alleges that Allied was negligent, reckless, grossly negligent and/or failed to use due care in the installation of an alarm system at the Country Club. Allied provided an affidavit with its motion stating that Allied completed its contractual duties in 2004.

The Amended Complaint further alleges that Buffalo Hotel Supply was negligent, grossly negligent, reckless and/or failed to use due care “in maintaining and/or installing the hood system and fresh intake system” at the Country Club, and that as a result “the fresh air intake unit located on the roof malfunctioned and the air heating coils had failed to operate, thereby causing a sprinkler line ... to fracture.” Buffalo Hotel Supply submitted its own evidence that the date of completion of its work was June 1, 2004.

The Amended Complaint also alleges that Halco was negligent, reckless, grossly negligent and/or failed to use due care in maintaining and/or installing the sprinkler system and that as a result, “a plastic collar around a sprinkler head ... failed” causing extensive damage. Halco contends that it did not initially assert a Statute of Limitations defense due to the lack of allegations in the Complaint and Amended Complaint as to the date of the work and therefore,

there was no basis for Halco to raise the affirmative defense. Halco has also submitted evidence that its work was completed no later than June, 2004.

Thus, the evidence from all 3 moving Defendants claim the work was completed by 2004. Approximately 10 years later, on January 23, 2014, the pipes burst and caused the damage at issue. The proper date from which to calculate the running of the Statute of Limitations is the primary legal argument. Plaintiff has conceded in its reply papers to Allied's motion that Plaintiff is not asserting a breach of contract claim and "the Court need not decide whether the instant action is subject to the Statute of Limitations for breach of contract pursuant to CPLR § 213." (Affirmation of Hillary E. Wright, Esq., at ¶10. The claim is instead premised on negligence which has a three year Statute of Limitations. CPLR § 214.

LEGAL DISCUSSION AND ANALYSIS

A motion to dismiss under CPLR § 3211(a)(5) is appropriately granted if the movant establishes that a cause of action cannot be maintained due to the expiration of the Statute of Limitations. It is the moving "party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed." *Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc.*, 168 AD2d 822, 823, citing *Doyon v. Bascom*, 38 AD2d 645, 645-646 (3rd Dept. 1971). To meet that burden, "the movant is required to support the motion with an affidavit or other competent proof sufficient, if uncontroverted, to establish the defense as a matter of law." *State Higher Educ. Services Corp. v. Starr*, 158 AD2d 771, 771 (3rd Dept. 1990), citing *Doyson, supra*. If the moving party makes that showing, "the burden shifts to the plaintiff to come forward with evidence contrary to that submitted by the movant or otherwise tending to establish a tolling of the statute." *Starr* at p. 771; see also *Quinn v. McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085 (2nd Dept. 2016).

The Statute of Limitations for a negligence or property damage claim is three years. CPLR §214. Further, “in cases against architects or contractors, the accrual date for the Statute of Limitations purposes is completion of performance... no matter how a claim is characterized in the complaint - negligence, malpractice, breach of contract.” *City School Dist. of City of Newburgh v. Stubbins & Assoc.*, 85 NY2d 535, 538 (1995); *see Sosnow v. Paul*, 36 NY2d 780 (1975); *Cabrini Med. Ctr. v. Desina*, 64 NY2d 1059 (1985). In *City of Newburgh*, a defectively assembled pipe fitting burst and caused damage to a library’s book collection. The Court of Appeals upheld dismissal of the cause of action as time barred as the work had been completed some 15 years before the pipe burst.

A. Allied’s motion to dismiss

Allied submitted an affidavit of Barbara McQueeney, president and custodian of records for Allied, which stated that Allied was retained by Northeast Construction to install the fire alarm system. Allied did not design the system. McQueeney also stated that Allied completed its performance under the contract in 2004, was not retained to provide any maintenance services, and has not been back to the property since 2004.

Since the action in the present case was not filed until 2015, which was almost 11 years after the completion of the work, and outside the Statute of Limitations, the Court concludes that Allied has made a *prima facie* case supporting its motion under CPLR §3211 (a)(5). The burden then shifts to Plaintiff to raise a question of fact as to whether the action was timely commenced, or an exception applies.

Plaintiff highlights an apparent discrepancy, or error, in the McQueeney affidavit, with respect to Allied’s last presence at the property. Plaintiff provided an Invoice from Allied dated April 29, 2005 for services involving trouble shooting an air unit. Plaintiff asserts that a material issue of fact exists concerning the last time Allied performed work, or if it was continuing to

maintain the equipment.

The Court concludes that Plaintiff's evidence does not raise a material issue of fact. Even though the McQueeney affidavit may have overlooked the 2005 Invoice, and even if Allied had been back at the property in 2005 as alleged by Plaintiff, that fact still would not negate the Statute of Limitations defense. It was still 10 years prior to the commencement of the action, and outside the Statute of Limitations. Plaintiff has yet to allege a date when Allied performed its work, or completed it. Furthermore, Plaintiff has failed to provide any evidence of continuing maintenance services that would warrant consideration of a later date to begin the time for the Statute of Limitations.

Plaintiff also alleges that there was no contract between Allied and the Country Club distinguishes this case from cases cited by Allied such as *Cabrini*. However, "[e]ven if the plaintiff is not a party to the underlying ... contract, the claim may accrue upon completion of the construction where the plaintiff is not a 'stranger to the contract,' and the relationship between the plaintiff and defendant is the 'functional equivalent of privity.'" *Town of Oyster Bay v. Lizza Indus., Inc.*, 22 NY3d 1024, 1030 (2013), quoting *City of Newburgh, supra*. Here, the construction was undertaken on behalf of the Country Club and for the benefit of the Country Club, and represents the functional equivalent of privity. Therefore, the case still falls under the general rule of accrual stated in the *City of Newburgh* case. See e.g. *Town of Oyster Bay, supra*.

Plaintiff's opposition does not contain any affirmative proof that Allied was present at any time after 2005 or provided any services or continuing maintenance within the applicable Statute of Limitations. Plaintiff has not rebutted Allied's *prima facie* showing, and accordingly, Allied's motion to dismiss is GRANTED.

B. Buffalo Hotel Supply's motion to dismiss

In support of its motion, Buffalo Hotel Supply filed an attorney's affidavit attaching a subcontract agreement it had with Northeast Construction for services in connection with the Country Club renovation, which involved setting in place various pieces of commercial food equipment. Buffalo Hotel Supply also submitted a Project Completion Confirmation listing the completion date as June 1, 2014. Buffalo Hotel Supply has thus provided evidence of its completion of performance in June, 2004. Again, it should be noted that Plaintiff's Complaint and Amended Complaint do not contain any allegations as to the dates of the performance of the work. For the same reasons noted above with respect to Allied's motion, the Court concludes that Buffalo Hotel Supply has made a *prima facie* showing in support of its Statute of Limitations defense. The burden is, therefore, shifted to Plaintiff.

In opposition to Buffalo Hotel Supply's motion, Plaintiff argues that Buffalo Hotel Supply's motion is not accompanied by an affidavit of a person with personal knowledge of the facts. Instead, Buffalo Hotel Supply relied upon an attorney's affidavit. Plaintiff also argues that the Project Confirmation Certification is not authenticated and cannot be relied upon for the motion to dismiss. Plaintiff also reiterates its position that the Statute of Limitations runs from the date of the water damage, and that there was a lack of contractual privity with Buffalo Hotel Supply.

An "affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts." *Zuckerman v. New York*, 49 NY2d 557, 563 (1980). Thus, the attorney affidavit submitted by Buffalo Hotel Supply property served as the vehicle to submit the document (Project Completion Confirmation). On its face, this shows a completion date of June 1, 2004. Plaintiff has not submitted any evidence to refute, or call into question, the affidavit or the document. With respect to Plaintiff's

remaining arguments, the Court has already concluded that the Statute of Limitations began to run upon the completion of the work, and not when the water damage occurred; and the Court also finds there was a functional equivalent of privity with Buffalo Hotel Supply.

Thus, the Court concludes that the Plaintiff has not met its burden in opposition to the motion of Buffalo Hotel Supply. Accordingly, the motion by Buffalo Hotel Supply to dismiss the complaint is GRANTED.

C. Halco's motion to amend its answer and motion to dismiss

Halco seeks to amend its Answer to include the affirmative defense of Statute of Limitations, then also seeks to dismiss Plaintiff's Amended Complaint. The Court will first address the motion to amend the Answer. Halco points out that the Plaintiff's Complaint and Amended Complaint do not contain any allegations as to the timing of Halco's work, or any of the other Defendants. Thus, Halco did not assert the Statute of Limitations defense, because there was no allegation that would indicate the defense might be appropriate.

Plaintiff opposes the amendment of Halco's answer. Plaintiff argues that Halco was aware of the facts to support a Statute of Limitations defense when it filed its answer in February, 2016, and Amended Answer in June, 2016. In addition, Plaintiff argues that the Bill of Particulars in November, 2016 provided a complete rendition of the claims file, and Halco did not seek to amend its answer until October, 2017.

"Provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR 3025 (b) should be freely granted." *Smith v. Haggerty*, 16 AD3d 967, 967-968 (3rd Dept. 2005). Here, it was not unreasonable for Halco to fail to assert a Statute of Limitations defense because Plaintiff Complaint and Amended Complaint made no allegation with respect to the completion of Halco's work, which the Court has already concluded is the relevant date. Halco also presented

evidence that it did not have records dating all the way back to 2004, based on its document retention policy. Even though Halco may have obtained information from Plaintiff about the date of the completion of the work through Plaintiff's Bill of Particulars, Plaintiff has not come forward with any evidence to show prejudice. In fact, since the co-defendants raised the Statute of Limitations defense, Plaintiff cannot claim surprise by Halco also raising it. *See e.g. Mushatt v. Tompkins Comm. Hosp.*, 228 AD2d 925 (3rd Dept. 1996). Furthermore, in light of the previous discussion, it cannot be said that Halco's Statute of Limitations Defense would be without merit.

Accordingly, Halco's motion to amend its Answer to include a Statute of Limitations defense is GRANTED.

Turning now to Halco's motion to dismiss based upon the Statute of Limitations, Halco submitted an affidavit from its CEO, Hal Smith. Smith stated that Halco was hired to install a sprinkler system at the Country Club, but Halco's duties did not include maintenance of the sprinkler system. He also averred that Halco completed its duties no later than June, 2004, and Halco did not provide any maintenance to the sprinkler system. Smith stated that, after he read the motion from Buffalo Hotel Supply, his memory was refreshed concerning the time of completion of the work.

With the submission of affidavit evidence that Halco completed its work in June, 2014, and that it had no contract to maintain the sprinkler system, Halco has submitted prima facie evidence to support its Statute of Limitations defense. The burden is thus shifted to Plaintiff.

In opposition to the motion, Plaintiff attached 2 invoices dated January 31, 2014 for boiler work performed by Halco at the Country Club. Plaintiff argues that this creates an issue of fact as to the accuracy of the Smith affidavit, and the scope of Halco's work (since the 2004 work was for the sprinkler system and the 2014 invoice was for boiler work); as well as a question as to who Halco contracted with, and the last date of work.

The Court concludes that Plaintiff has not rebutted Halco's prima facie case. The

invoices pertain to boiler work. Plaintiff's Complaint is for damages caused by the sprinkler system. With regard to the sprinkler system work, Smith says it was completed by 2004, and Plaintiff has not rebutted that assertion, even with the 2 invoices. Furthermore, Smith's affidavit says he conducted a thorough search of Halco's records, but only with regard to the substance of the lawsuit- the sprinkler system. Thus, the invoices are unrelated to this action, and Plaintiff has not raised a material issue of fact.

With respect to Plaintiff's remaining arguments, the Court has already concluded that the Statute of Limitations began to run upon the completion of the work, and not when the water damage occurred; and the Court also finds there was a functional equivalent of privity with Halco.

Thus, the Court concludes that the Plaintiff has not met its burden in opposition to the motion of Halco. Accordingly, the motion by Halco to dismiss the complaint is GRANTED.

Based upon all the foregoing discussion, the motions of all 3 Defendants to dismiss the Amended Complaint against them are GRANTED. The Amended Complaint is DISMISSED in its entirety.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: December 19, 2017
Ithaca, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice