

**Omega Diagnostic Imaging PC v Attica Constr.
Corp.**

2020 NY Slip Op 30043(U)

January 8, 2020

Supreme Court, New York County

Docket Number: 154562/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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OMEGA DIAGNOSTIC IMAGING PC, H.P.M.L. REALTY CORPORATION,

Plaintiff,

- v -

ATTICA CONSTRUCTION CORP., SIEMENS MEDICAL SOLUTIONS USA, INC., WESTCHESTER LLA, LLC A/SI TO ATTICA CONSTRUCTION CORP.

Defendant.

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INDEX NO. 154562/2019
MOTION DATE 06/14/2019, 09/26/2019
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (1/8/2020), Siemens Medical Solutions USA, Inc.'s (Siemens) motion to dismiss (seq. 001) and Attica Construction Corp.'s (Attica) motion for summary judgment (seq. 002) are granted and the action is dismissed as untimely.

This action arises out of the lease and installation of an MRI machine in 2012. The amended complaint (the Complaint) asserts two causes of action for (1) negligence and (2) breach of contract (NYSCEF Doc. No. 3). Reference is made to the following agreements:

(i) a document (the **Sales Quote**) dated April 2, 2012 signed and accepted by and between Siemens and Omega Diagnostic Imaging P.C. (**Omega**) pursuant to which Siemens provided Omega with a sales quote and terms of purchase for an MRI machine (the **MRI**) (NYSCEF Doc. No. 11). The Sales Quote states:

2.1 General. Unless otherwise expressly stipulated in writing, the Product covered hereby shall be installed by and at the expense of Seller *except that Seller shall not provide rigging or site preparation services unless otherwise agreed to in writing by Seller for an additional charge* (*id.*, § 12.1 [emphasis added])

(ii) a certain service and warranty agreement (the **Warranty Agreement**) of even date by and between Omega as customer and Siemens as seller pursuant to which Siemens warranted certain parts and labor for a five-year term commencing 9/10/2012 through 9/9/2017, as set forth therein (NYSCEF Doc. No. 15)

(iii) a Master Equipment Lease Agreement (the **Master Lease Agreement**) dated May 1, 2012 by and between Siemens and Omega setting forth the terms and conditions of the lease of the MRI to Omega by Siemens (NYSCEF Doc. No. 17), and

(iv) a Purchase, Release and Settlement Agreement dated March 26, 2019 by and between Siemens and Omega pursuant to which Siemens and Omega agreed to the sale of the MRI to a third-party buyer in exchange for \$119,661.25 in full satisfaction of the remaining lease payments owed to Siemens by Omega (NYSCEF Doc. No. 18).

According to the Complaint, on or about April 2012, Siemens provided Omega Diagnostic Imaging PC (**Omega**) with an installation plan for the MRI that it sold to Omega (Compl., ¶ 7; NYSCEF Doc. No. 12). Thereafter, in June of 2012, Omega [and H.P.M.L. Realty Corporation (**HPML**)] allegedly contracted with Attica for Attica to perform work, labor, services and construction to install the MRI (*id.*, ¶ 8). To that end, Attica used Siemens' installation plans

during its installation work (*id.*, ¶ 9). Per the Installation and Calibration Completion Letter (the **Completion Letter**) dated September 10, 2012, installation of the MRI was completed on September 10, 2012 (Altieri Aff., Ex. F, NYSCEF Doc. No. 13). H.P.M.L. Realty Corporation (**HPML**) is Omega's landlord. The plaintiffs claim that on or about April 20, 2019 – more than six and a half years after installation was completed -- they discovered that the work was improperly done, the MRI was not properly installed, and that, as a result, Omega sustained damages of \$200,000 in loss of income/business interruption, and \$544,000 in diminution of property value vis a vis the MRI and property damage of \$482,000 to HPML.

The statute of limitations applicable to negligence claims is three years and the statute of limitations generally begins to run when a cause of action accrues (CPLR 214 [4]; *B.F. v Reproductive Medicine Assocs. of NY, LLP*, 30 NY3d 608 [2017]). The statute of limitation applicable to breach of contract claims is six years and any such claim accrues at the time of the alleged breach (CPLR 213; *Hahn Auto. Warehouse v American Zurich Ins. Co.*, 18 NY3d 765 [2012]).

The instant action was commenced on May 2, 2019 – more than six and a half years after the installation of the MRI machine was completed in September of 2012. It is untimely with respect to both the three-year statute of limitations applicable to negligence claims and the longer six-year statute of limitations applicable to breach of contract claims. Inasmuch as the plaintiffs claim that the action is timely because defects in the work were not discovered until April 2018 when the floor beneath the MRI allegedly “depressed,” the argument is unavailing as a cause of action for negligent construction accrue upon completion of performance no matter how a claim

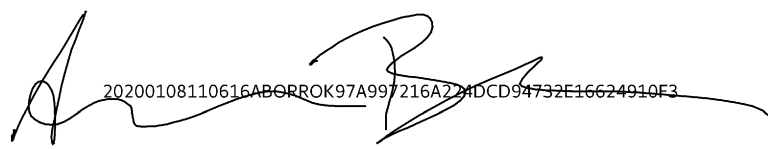
is characterized in the complaint (*City School Dist. of City of Newburgh v Hugh Stubbins & Assocs., Inc.*, 85 NY2d 535, 538 [1995]). To the extent that the plaintiffs argue that, at minimum, HPML as the landlord has a claim against the defendants because there is privity of contract between it and the defendants, this accrual rule expressly applies to property owners (*id.* [rejecting lack of privity argument]).

For the avoidance of doubt, to the extent that the complaint names Westchester LLA, LLC A/SI to Attica Construction Corp. as a defendant in this action there are no allegations against this defendant in the Complaint and the complaint is dismissed as against Westchester LLA, LLC, for this additional reason.

Accordingly, it is

ORDERED that motion sequence nos. 001 and 002 are granted and the amended complaint is dismissed as untimely; and it is further

ORDERED that the Clerk is directed to order judgment accordingly upon service of a copy of this decision with notice of entry.


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1/8/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE