

**Martinez v 411 Rest. Corp.**

2020 NY Slip Op 35635(U)

November 9, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31907/2017E

Judge: Donald A. Miles

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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DAISY MARTINEZ,

Plaintiff,

-against-

IndexNo.: 31907/2017E

411 REST. CORP., d/b/a TONIC EAST, 411 THIRD AVE.  
CORP., and JOHN PATRICK BOHAN ARCHIT,  
Defendants.

-----X  
HON. DONALD MILES:

Defendant JOHN PATRICK BOHAN d/b/a JOHN PATRICK BOHAN,  
ARCHITECT, (referred to herein as JPBA) moves to dismiss this action, and any  
cross claims as against it, pursuant to CPLR 214-d (1)-(6), and 3211(a)(7), and (h),  
and related relief.

This is an action to recover for alleged personal injuries sustained by  
Plaintiff, DAISY MARTINEZ, in a trip and fall accident, which allegedly occurred due  
to defective stairs within the restaurant of Defendant, 411 REST. CORP., (known  
as TONIC EAST), on or about October 15, 2017.

Defendant 411 REST. CORP., a tenant at the subject premises, retained  
Defendant JPBA to provide professional architectural services regarding the  
design and construction of its restaurant, located in Manhattan, NY. Defendant,  
411 THIRD AVE. CORP., was the Owner of the premises.

The Plaintiff filed an Amended Complaint on, or about, January 27, 2020, to add JPBA as a Defendant. It is alleged that the amendment was made without leave of Court. The Amended Complaint was allegedly delivered to JPBA's office on, or about, February 18, 2020.

In Defendant 411 THIRD AVE. CORP.'s Answer to the Amended Complaint, dated January 28, 2020, its Cross Claims against JPBA include claims for contribution and indemnification.

In support of JPBA's motion, its submissions include the pleadings, the Affidavits of JOHN PATRICK BOHAN, his Project filings, and the Certificates of Occupancy. In opposition, Plaintiff submits an unsworn report of an architect, Robert King.<sup>1</sup>

Movant JPBA alleges that the Complaint and Cross Claims as against it should be dismissed, for the failure to serve a Notice of Claim, pursuant to CPLR 214-d, "Limitations on certain actions against licensed ... architects" which provides, in relevant part as follows:

**"1. Any person asserting a claim for personal injury, ... or a cross or third-party claim for contribution or indemnification arising out of an action for personal injury, ... against a licensed architect, engineer, land surveyor or landscape architect or against a partnership, professional corporation or**

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<sup>1</sup> It is noted that an unsworn report of an architect "does not constitute evidentiary proof in admissible form" (*See e.g., Cannon v NY City Tr. Auth.*, 213 AD2d 303 [1st Dept 1995]).

limited liability company lawfully practicing architecture, engineering, land surveying or landscape architecture **which is based upon the professional performance, conduct or omission by such licensed architect**, engineer, land surveyor or landscape architect or such firm **occurring more than ten years prior to the date of such claim, shall give written notice of such claim to each such architect**, engineer, land surveyor or landscape architect or such firm **at least ninety days before the commencement of any action or proceeding against such licensed architect**, engineer, land surveyor or landscape architect or such firm including any cross or third-party action or claim. The notice of claim shall identify the performance, conduct or omissions complained of, on information and belief, and shall include a request for general and special damages...

... **A notice of claim served in accordance with this section shall be filed**, together with proof of service thereof, **in any court of this state** in which an action, proceeding or cross or third-party claim arising out of such conduct may be commenced or interposed, within thirty days of the service of the notice of claim. Upon the filing of any such notice of claim, a county clerk shall collect an index number fee in accordance with section eight thousand eighteen of this chapter and an index number shall be assigned.

**2. In such pleadings as are subsequently filed in any court, each party shall represent that it has fully complied with the provisions of this section. ...**

**6. No claim for personal injury, ...or a cross or third-party claim for contribution or indemnification arising out of an action for personal injury, ... may be asserted against a licensed architect**, engineer, land surveyor or landscape architect or such firm arising out of conduct by such licensed architect, engineer, land surveyor or landscape architect or such firm **occurring more than ten years prior to the accrual of such claim shall be commenced or interposed against any such licensed architect, engineer, land surveyor or landscape architect or such firm unless it shall appear by and as an allegation in the complaint or necessary moving papers that the claimant has complied with the requirements of this section"** [emphasis added]

Defendant JPBA, a licensed architect, alleges that the claims against him

herein are based upon his professional performance which occurred more than

ten years prior to the dates (January 27, and 28, 2020) when the subject claims were attempted to be interposed against him.

In this regard, Defendant JPBA alleges, in relevant part, that he is licensed to practice architecture and practices as John Patrick Bohan Architect. In early 2005, Defendant 411 REST.CORP., had retained him to provide architectural services regarding the design and construction of its new restaurant (referred to as the Project). The Project “involved a gut renovation of the premises and the construction of a new restaurant, including an interior staircase leading to the bathrooms.” His Project filings were done in 2005 and 2006, and all his professional services for this Project were completed by June 8, 2006. Thereafter, he performed ministerial acts of filing for the Certificates of Occupancy, which were nevertheless completed prior to March 3, 2008, which is the date when the Final Certificate of Occupancy was issued. (See Affidavits by John Patrick Bohan, dated March 11, 2020, and May 13, 2020, and documentation in support thereof).

Defendant also alleges that Plaintiff failed to seek leave of Court to amend her pleadings to add him as a party Defendant – in violation of CPLR 3025(b) “Amendments and Supplemental Pleadings by Leave” which provides that: “A party may amend his or her pleading, ... at any time by leave of court or by stipulation of all parties”.

In her opposition to Defendant JPBA's motion, Plaintiff does not allege that she complied with the requirements of CPLR 214-d, or CPLR 3025(b). Accordingly, Plaintiff failed to file the requisite Notice of Claim and failed to assert in her pleadings that she fully complied with the provisions set forth therein; and apparently did not request leave of Court to amend her pleadings to add JPBA as a party Defendant. Co-Defendants do not oppose the Motion.

The Notice of Claim requirement is a "condition precedent to commencement of an action, and such compliance must be pleaded in an action for personal injuries against an architectural firm"; thus, a motion to dismiss is properly granted based on the failure to provide the required written Notice of Claim pursuant to CPLR 214-d. (*See Kretschmann v Bd. of Educ.*, 294 AD2d 39, 40-41 [4th Dept 2002]).

Where, as here, a plaintiff "failed to serve upon [an engineer] a notice of claim *at least 90 days prior to commencement of this action and failed to include in the subsequent pleading the representation that there has been full compliance with the statute [, s]uch noncompliance warrants dismissal and thus, the court needs not proceed with the "substantial basis" analysis under CPLR 3211 (h), or the determination of the sufficiency of the pleading under CPLR §3211 (a)(7)"*

[emphasis in original] (*Kenny v Turner Constr. Co.*, 2011 NY Slip Op 33692[U], \*7-8 [Sup Ct, NY County 2011]).

Under the circumstances, Defendant JPBA's motion is granted, and this action, and Co-Defendant 411 THIRD AVE. CORP.'s Cross Claims, as against it, are dismissed. This decision is made without prejudice to the recommencement of an action, or assertion of a cross claim, if warranted, after compliance with the Notice of Claim, and other requirements. (See CPLR 214-d, and CPLR 3025[b]).

However, this Court makes no determination herein as to the viability of any potential other action. In this regard, in a case addressing this issue, a Court held that "we conclude that the court properly determined that the second action was timely commenced pursuant to CPLR 205 (a) because it was commenced within six months of the dismissal of the first action, which was timely commenced, and complied with the notice of claim requirement of CPLR 214-d (1)." (*Kretschmann v Bd. of Educ.*, 294 AD2d 39, 42 [4th Dept 2002]). It is noted that CPLR § 205 "Termination of action", provides that:

"(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have

been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period”.

This constitutes the decision and order of this Court.

Dated: November 9, \_\_\_\_\_ 2020

*Donald Miles*

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Donald Miles, J.S.C.