SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

TROKAIK REALTY, INC.,

Plaintiff,

– against –

HP YUCO HDFC, INC., YUCO BUILDERS, LLC, BONG YU, PC and 188 PARTNERS, LLC,

Defendants.

X

DECISION/ORDER

Index No. 500045/2021
Motion Seq. No. 1 and 2
Date Submitted: 5/6/2021

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant Bong Yu PC's pre-answer motion to dismiss and the remaining defendants' pre-answer motion to dismiss

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed…….	2–11, 13-21
Affirmation in Opposition, Affidavits, and Exhibits Annexed.....	23
Reply Affirmation.....	24, 25

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Defendant Bong Yu, P.C. moves, and the remaining defendants also move, in Mot. Seq. #1 and 2, pre-answer, pursuant to CPLR 3211 (a) (1), (5), and (7) and CPLR 214 to dismiss the complaint as against them.

On December 22, 2017, plaintiff commenced an action against the moving defendants for property damage by filing and serving a summons with notice. The index number was 524679/2017. The notice said, "The nature of this action is based on Negligence, Trespass, Nuisance, Beach of Duty to Protect Neighboring Property, and violations of the Administrative and Construction Codes of the City of New York." Plaintiff owns 352 Bedford Avenue, Brooklyn, NY, and defendants 188 Partners, LLC and HP Yuco HDFC, Inc. own 354-356 Bedford Avenue, Brooklyn, NY, which is adjacent to plaintiff's property.

Plaintiff's property is a store with apartments above, and defendants' property is a three-unit condominium, called the Williamsburg Apartments Condominium, one unit (Block

2430 Lot 1001) comprising 19 residential units owned by defendants188 Partners, LLC and HP Yuco HDFC, Inc., one unit comprising the commercial space on the ground floor and cellar (Lot 1002) owned by 188 Partners Realty LLC since May 23, 2018, when it took title from the defendants 188 Partners, LLC and HP Yuco HDFC, Inc. as Sponsors and Declarants of the condominium conversion, and one unit (lot 1003), which is a "community facility" located on the first and second floors, owned by 188 Partners, LLC and HP Yuco HDFC, Inc. From June 30, 2014 until the Declaration of Condominium was recorded on March 8, 2018, the property was known as Block 2430, Lot 23 and was owned by defendant HP Yuco HDFC, Inc., with recorded agreements with 188 Partners, LLC regarding their future plans for the property.

Apparently, all of the defendants demanded that plaintiff serve a complaint, pursuant to CPLR 3012 (b), and when the complaint was not served, and more than a year had passed since the summons with notice had been served, defendants moved, in two motions in that first action (seq. 1 and 2), to dismiss the complaint. Plaintiff cross-moved for an extension of time to serve the complaint, claiming law office failure. Plaintiff's cross motion, mot. seq. 3, was e-filed on May 21, 2019. This was 15 months after the first demand for the complaint had been served on plaintiff's counsel. The Justice assigned to the matter granted the plaintiff's motion and denied defendants' motions in an order dated June 6, 2019. Defendants appealed this order and by Decision & Order, dated November 25, 2020, the order was reversed. The Appellate Division said the defendants' motions should have been granted as plaintiff had failed to demonstrate a reasonable excuse for its default.

This action was commenced on January 4, 2021 by electronically filing a summons and complaint. No affidavits of service have been filed. Copies are provided in Doc. 20, filed by one of the movants. These motions followed within a month of service of process on

defendants. Defendants claim they are entitled to dismissal pursuant to CPLR 3211 (a) (1), (5), and (7) and CPLR 214. The court will address each of these statutes separately.

The proposed complaint provided by plaintiff in the first action, e-filed as Doc. 24 to plaintiff's cross motion and dated "April 2019," states that the property damage to plaintiff's property took place "beginning in 2014 and continuing through and including 2018." Therein, plaintiff demands monetary damages. In this second action, the complaint (Doc. 1), dated December 29, 2020, seems to be identical to the one drafted for the first action.

The branch of defendant Bong Yu PC's motion and of the other defendants' motion which argue that the complaint must be dismissed due to "documentary evidence" pursuant to CPLR 3211 (a) (1) is denied, as there is no applicable documentary evidence in either of the motion papers. The court orders provided are not "documentary evidence."

The branch of defendant Bong Yu's motion that argues that the complaint must be dismissed for failing to state a claim pursuant to CPLR 3211 (a) (7) is granted. Counsel for this defendant argues that defendant Bong Yu, PC solely provided architectural services in connection with the construction and as such, cannot be responsible for damage to the plaintiff's property (Doc. 3, ¶ 37) "as a result of adjacent construction work involving excavation and underpinning and design of the foundation work." He provides (Doc. 10) a copy of a contract for architectural services between defendant as architect and 188 Partners, LLC, described as "owner" for four different new buildings to be built in Brooklyn. Also provided are documents from the NYC Department of Buildings (Doc. 11). While an affidavit from a party with knowledge from defendant Bong Yu, PC would have been appreciated, rather than requiring the court to look over the architect's contract, the court finds that movant has made a prima facie case. The excavation and underpinning were not

part of this defendant's tasks. Further, plaintiff does not oppose this defendant's motion in its opposition affirmation, which only addresses the statute of limitations arguments.

The contract for architectural services demonstrates that movant was not intended to be a "person who cause[d]" soil or foundation work to be made (NY City Building Code § BC 3309.4), and otherwise owed no duty to the other defendants or to the plaintiff (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 559 [1992]; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541-542 [1st Dept 2014]; *see also Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-140 [2002]). Moreover, the submissions indicate that this defendant was not actively at fault in bringing about the alleged damage caused to the plaintiff's building and did not exercise actual supervision or control over the damage-producing work (*see Reiss v Professional Grade Constr. Group, Inc.*, 172 AD3d 1121, 1124 [2d Dept 2019]).

Next, the remaining defendants, in mot. seq. 2, claim the complaint must be dismissed pursuant to CPLR 3211 (a) (7), for failing to state a cause of action. This branch of the motion is denied as while the complaint is not very specific, a claim for property damage is a valid cause of action.

Next, the remaining defendants, in mot. seq. 2, claim the complaint must be dismissed pursuant to CPLR 3211 (a) (5), the statute of limitations. The statute of limitations for property damage is three years, as set forth in CPLR 214. Thus, as the date of commencement was January 4, 2021, plaintiff is barred from asserting any claims for damage that took place earlier than January 4, 2018. As the complaint states that the damage took place during the years 2014 to and including 2018, this does not bar the entire action. Plaintiff asserts, however, that CPLR 205 (a) must be considered, and that recent appellate authority provides that plaintiff is entitled to the benefits of this statute, which was

"designed to remedy 'what might otherwise be the harsh consequences of applying a limitations period where the defendant party has had timely notice of the action.' "

This statute provides that, where an action was timely commenced but terminated for "any other manner than by" [a list of reasons], the plaintiff may recommence the action within six months of the termination upon the "same transaction or occurrence or series of transactions or occurrences." The termination date is, for this matter, the date of the Appellate Division's determination (*Malay v City of Syracuse*, 25 NY3d 323 [2015]). This second action was commenced and served within six months of the termination of the first action. If applicable, this "saving statute" permits the complaint to be deemed to have been filed on the date of the filing of the first action (*Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665 [2014]).

The issue here is whether the termination of the prior action falls within the provisions of CPLR 205 (a). The first exception is a "voluntary discontinuance." That is inapplicable here. The second is a dismissal for "failure to obtain personal jurisdiction" over the defendants. This is also inapplicable. The third is "a dismissal of the complaint for neglect to prosecute the action." Defendants claim this exception is applicable, as the complaint in the first action was dismissed for failing to prosecute. CPLR 205 (a) states "where a dismissal is one for neglect to prosecute the action made pursuant to rule [3216] of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." The Decision and Order of the Appellate Division which states that the action should have been dismissed pursuant to CPLR 3012 (b) for failing to serve a complaint within 20 days of the demand for a complaint. It does not state that plaintiff's action was being dismissed for neglect to prosecute. It says, "in light of the plaintiff's failure to

demonstrate a reasonable excuse [for failing to serve the complaint], we need not consider whether it had a potentially meritorious cause of action." Thus, plaintiff argues that the dismissal was not for neglect to prosecute, and cites a recent case, *Deutsche Bank Natl. Tr. Co. v Baquero*, 192 AD3d 660 [2d Dept 2021].

"[T]he 'neglect to prosecute' exception in CPLR 205 (a) applies not only where the dismissal of the prior action is for '[w]ant of prosecution' pursuant to CPLR 3216, but whenever neglect to prosecute is in fact the basis for dismissal" (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 520 [2005]). Where the record makes clear the basis for the prior dismissal, the question of whether it was a dismissal for neglect to prosecute is a question of law (*see id*. at 520-521; *Deutsche Bank Natl. Tr. Co. v Baquero*, 192 AD3d 660 [2d Dept 2021]).

Where there is clear appellate law, this court must follow it. With regard to a dismissal for failing to serve a complaint pursuant to CPLR 3012 (b), movant's attorney correctly points out that the law is clear that "the dismissal of an action for failure to serve a complaint within 20 days after due demand therefor constitutes a neglect to prosecute within the intendment of CPLR 205 (a)" (*see Benedetto v Hodes*, 112 AD2d 393, 394 [2d Dept 1985]; *Schwartz v Luks*, 46 AD2d 634 [1st Dept 1974]; *Wright v Farlin*, 42 AD2d 141 [3d Dept 1973], *appeal dismissed*, 33 NY2d 657; *Loomis v Girard Fire & Mar. Ins. Co.*, 256 AD 443, 443 [3d Dept 1939]; *Fisher v Tier Oil Co.*, 75 Misc 2d 162 [Sup Ct, Broome County 1973]). Unless the appellate authority changes this clear guidance, the court must conclude that recommencement under CPLR 205 (a) was unavailable to the plaintiff herein.

Accordingly, it is ORDERED that Mot. Seq. 1 is granted, and the complaint is dismissed as against defendant Bong Yu, PC, and it is further

ORDERED that Mot. Seq. 2, the remaining defendants' motion to dismiss the complaint, is granted solely to the extent that the complaint is dismissed as against the three moving defendants unless plaintiff electronically files an amended complaint within 60 days of the date this order is entered which limits its claims to those which occurred on or after January 4, 2018.

This constitutes the decision and order of the court.

Dated: May 26, 2021

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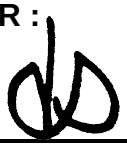

Hon. Debra Silber, J.S.C.