

<b>Ramapo Commons Condominium 1 v Ramapo Local Dev. Corp.</b>
2021 NY Slip Op 33341(U)
June 16, 2021
Supreme Court, Rockland County
Docket Number: Index No. 031503/2019
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
RAMAPO COMMONS CONDOMINIUM 1,

*Plaintiff,*

*-against-*

RAMAPO LOCAL DEVELOPMENT CORPORATION and K.  
DOUBLE DECKERS INC.,

*Defendants.*

-----X  
*Sherri L. Eisenpress, A.J.S.C.*

**DECISION AND ORDER**

Index No. 031503/2019

(Motions # 2 and 3)

The following papers, numbered 1 to 12, were considered in connection with (i) Defendant K. Double Deckers Inc.'s ("KDD") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212(b), granting summary judgment in favor of defendant and dismissing the action (Motion #2); and (ii) Ramapo Local Development Corp.'s ("RLDC") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212(b), granting summary judgment in favor of defendant and dismissing the action (Motion #3):

**PAPERS**

**NUMBERED**

**Motion #2**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-BB	1-2
AFFIRMATION IN OPPOSITION/EXHIBIT A	3
AFFIRMATION OF DENNIS LYNCH	4
AFFIRMATION IN REPLY	5

**Motion #3**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-I/ AFFIDAVIT OF IAN SMITH/AFFIDAVIT OF ANDREW YARMUS, P.E./ MEMORANDUM OF LAW IN SUPPORT	6-10
AFFIRMATION IN OPPOSITION/EXHIBITS 1-7	11
AFFIRMATION IN REPLY	12

Upon the foregoing papers, the Court now rules as follows:

In or about November 2008, the Ramapo Local Development Corporation ("RLDC") was formed pursuant to the Not-For-Profit Corporation Law for the purposes of developing projects, including the development of an affordable housing project which later became known as the Ramapo Commons Condominium. "Phase 1" consisted of four separate buildings, with each building containing 12 units. The RLDC entered into a contract with The Pines Homes Corporation ("Pines") on or about July 31, 2009, for Construction Management Services. Upon the recommendation of Pines, RLDC hired a company, pursuant to a contract, identified as "Double Deckers," to construct exterior decks for Phase 1. It appears from invoices provided by RLDC that "Double Deckers" began installation of the decks in March 2011 and completed them on November 16, 2011. Certificates of Occupancy were issued for the four buildings on November 15, 2011 and sales of those units commenced on December 6, 2011.

Plaintiff, the condominium association, commenced the above captioned action on March 21, 2019. The Complaint alleges four causes of action: (1) Negligence against RLDC and KDD; (2) Breach of Contract against RLDC and KDD; (3) Fraud in the Inducement against RLDC; and (4) Breach of Housing Merchant Implied Warranty against RLDC. Plaintiff claims that with respect to the installation of the decks, KDD improperly placed "ledger boards" over the siding of Plaintiff's building and failed to properly install "flashing" over the top of the ledger boards. It is undisputed that the decks were not constructed in compliance with building code regulations. As a result, Plaintiff claims that in or about September, or early October 2018, there were reports of water leaking into several of the condominium units.

Defendant KDD moves to dismiss the case on the ground that Plaintiff's claims are time barred. It asserts that actions premised upon negligent construction must be commenced within three years of completion of the work, or at the latest, the issuance of the certificate of occupancy, which in this case was November 15, 2011. Additionally, it argues that there is no apparent relationship between defendant "K. Double Deckers, Inc." and the entity

which was hired to and actually performed the subject work. They note that the purported contract is with "Double Deckers."

Defendant RLDC also moves for summary judgment and dismissal of this case against it. It also argues that the statute of limitations for a negligence action has long passed and that there is no "discovery" rule with respect to this action that would extend the statute of limitations. Defendant also submits affidavits from Ian Smith, Chief Building Inspection for the Town of Ramapo, and Andrew Yarmus, P.E., licensed Professional engineer, who both opine based upon their expertise that the lack of flashing was readily observable from the date of completion of the decks. As such, even if the statute of limitations ran from the date of "discovery," the negligent condition was discoverable since November 2011. Defendant also argues that any claims sounding in contractual warranty, or breach of contract, are time barred. With respect to the cause of action for fraud and misrepresentation, Defendant RLDC submits this action is, and remains a contract cause of action, and cannot be recast in tort since any fraud relates to a breach of contract claim. Additionally, it argues that there is no evidence that defendant RLDC possessed the requisite scienter to establish fraud. Lastly, it argues that RLDC cannot be held responsible for co-defendant's acts as an independent contractor.

Plaintiff opposes the summary judgment motions. With respect to KDD's motion, it argues that of the five "Double Deckers" registered with the State, three of them share the same service address in Monsey and are owned by the same individual. The service address registered with the Secretary of State is identified on every invoice sent to "Double Deckers" for the work at issue. These facts, coupled with two certificates of insurance issued by one of the three Monsey Double Decker entities was purchased for the benefit of RLDC, and is sufficient to demonstrate that Defendant K Double Deckers Inc. was the entity that did the work.

Plaintiff argues that the negligence action was brought within the statute of limitations as the property damage claim began to accrue on the date of injury, which in this

case was September/October 2018, and not the date the work was completed. Plaintiff argues that the cases relied upon by Defendants relate to matters where plaintiff was also the contracting party. Plaintiff claims that here, the plaintiff was essentially a stranger to the work, as it purchased the property at issue after the work was completed. It further argues that it did not have notice of the defective condition of the decks because they were not at ground level and any defect would not be apparent to a "passer-by," and at no time did Plaintiff inspect the property, notwithstanding the fact that it purchased the property.

Plaintiff argues that with respect to the fraud claim, summary judgment is not warranted because RLDC deliberately cut corners with respect to the construction; Certificates of Occupancy from the Town of Ramapo were issued even though they were in violation of the Building Code; and Anthony Mallia, the prior Building Inspector was indicated with respect to theft, falsifying building permits and issuing false certificates (although not specifically with respect to this project.) Assuming the defective condition was open and obvious as Defendants claim, then Plaintiff argues that the "only possible way for the RLDC to have passed inspection and received certificates of occupancy was by knowing fraud." Lastly, with regard to the breach of contract and breach of warranty claims against RLDC, Plaintiff withdraws these claims. As such, the Second and Fourth Causes of Action are hereby dismissed.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material

questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

A cause of action against a contractor for defects in construction generally accrues upon completion of the actual physical work. Cabrini Medical Ctr. v. Desina, 64 N.Y.2d 1059, 1061, 489 N.Y.S.2d 872 (1985). The issuance of a final certificate of payment by the architect or complete occupancy of the building, indicates completion. Id.; See also Whippoorwill Hills Homeowners Assn., Inc. v. Toll at Whippoorwill, L.P., 99 A.D.3d 894, 951 N.Y.S.2d 903 (2d dept. 2012)(cause of action for negligent construction and design of homes resulting in latent defects, accrued upon the date of completion of construction, but no earlier than the closing date.) The statute of limitations is three years, and "[i]n the absence of a contractual relationship between the parties relative to the construction and design of exterior decks, plaintiff is not entitled to assert a six-year limitations period." Harbour Pointe Village Homeowners Association, Inc. v. Marrano/Marc Equity Joint Venture, 185 A.D.2d 648, 586 N.Y.S.2d 55 (4<sup>th</sup> Dept. 1992).

Dismissal is warranted when an action is interposed more than three years after substantial completion of the work, irrespective of when the damage is actually discovered. Suffolk County Water Authority v. J.D. Posillico, Inc., 267 A.D.2d 301, 700 N.Y.S.2d 45 (2d Dept. 1999). Stated another way, an injury to property accrues at the time the injury is sustained, notwithstanding the actual damage is not suffered until later. Johnson v. Marianetti, 202 A.D.2d 970, 609 N.Y.S.2d 494 (4<sup>th</sup> Dept. 1994) See also Regatta Condominium Assn. v. Village of Mamaroneck, 303 A.D.2d 737, 758 N.Y.S.2d 348 (2d Dept. 2003)(cause of action alleging faulty construction or design, whether characterized as negligence, malpractice, or

breach of contract, accrued upon the date of completion of construction, not when the injury occurred or the defective condition is discovered.); Russell v. Dunbar, 40 A.D.3d 952, 838 N.Y.S.2d 97 (2d Dept. 2007).

In the instant matter, Defendants have demonstrated their entitlement to dismissal of the negligence cause of action as it is time barred by the Statute of Limitations. Certificates of Occupancy for the subject buildings were issued on November 15, 2011, indicating completion, and as such, an action for negligence was required to be commenced prior to November 15, 2014. Moreover, there is simply no merit to Plaintiff's argument that the above cited cases do not apply to it because Plaintiff was not a party to the contract between the Defendant RLDC and the sub-contractor. In Amedeo Hotels Ltd Partnership v. Zwicker Elec. Co., 291 A.D.2d 322, 323 (1<sup>st</sup> Dept. 2002), the Court rejected the very same argument asserted by Plaintiff here and held that:

[N]o matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract—an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties...When the Hotel was conveyed to Amedeo, it succeeded to any such cause of action against Zwicker, and, as the prior owner's successor-in-interest, it is subject to the same defenses that would have been available to Zwicker against the prior owner, including the statute of limitations. [Internal citations omitted.]

Nor can Plaintiff extend the Statute of Limitations by contending that it did not inspect the decks at any time prior to learning of the leaks in several of the units in 2018. In Reyes-Dawson v. Goddu, 74 A.D.3d 417, 418, 905 N.Y.S.2d 145 (1<sup>st</sup> Dept. 2010), the Court noted that even assuming that plaintiff's claim against the architect did not, of necessity, accrue upon completion of the work and could be brought within three years of when the damage to her property became apparent, the motion court properly concluded that she either knew, or in the exercise of reasonable diligence, should have known in 2003, that which was apparent to anyone with technical competence to see. The Court further noted that "plaintiff's own

neglect in failing to properly investigate the condition of her property by retaining an engineer to conduct an inspection cannot be used as the basis for tolling the statute of limitations." Id.

Here, Defendant RLDC submitted expert affidavits that the lack of flashing on the decks was readily apparent, and every purchaser was given the opportunity to inspect the buildings prior to purchase. In opposition thereto, Plaintiff fails to submit evidence that the alleged defective condition was not readily observable. Plaintiff's failure to conduct inspections is not excused by the fact that the decks were not eye-level or because the average person would not recognize the defect condition. Accordingly, the negligence cause of action is time barred.

For a fraud cause of action, CPLR Sec. 213(8) provides that the period to commence an action is six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it. See also Rite Aid of N.Y. Inc. v. R.A. Real Estate, Inc. 40 A.D.3d 474, 837 N.Y.S.2d 48 (1<sup>st</sup> Dept. 2007) The fraud cause of action must also be dismissed, as it is time barred by the Statute of Limitations. Given that defective condition on the decking was visible at the time construction was finished, and the certificates of occupancy were issued despite this patent condition, any alleged fraud could have been discovered at that time. Even if the cause of action were not time-barred, the Court finds that Plaintiff has failed to set forth sufficient evidence of RLDC's scienter to demonstrate a prima facie case of fraud. The former building inspector's indictment on charges that are not specifically related to this project do not satisfy Plaintiff's burden.

Accordingly, it is hereby

**ORDERED** the Notice of Motion filed by Defendant K. DOUBLE DECKERS INC. for Summary Judgment (Motion #2) is GRANTED in its entirety; and it is further

**ORDERED** that the Notice of Motion filed by Defendant Ramapo Local Development Corporation for Summary Judgment (Motion #3) is GRANTED in its entirety; and

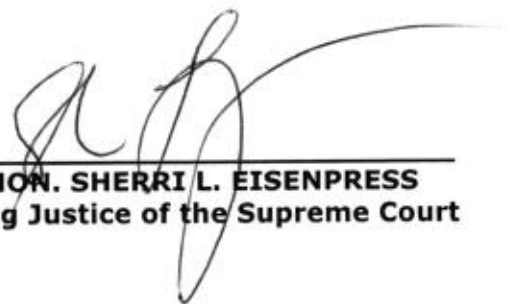
it is further

**ORDERED** that the Complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motions #2 and

#3.

Dated: New City, New York  
June 16, 2021



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**HON. SHERRI L. EISENPRESS**  
Acting Justice of the Supreme Court

TO: All parties (via NYSCEF)