Century Tower Assoc. NY LLC v Feld, Kaminetzsky & Cohen
2022 NY Slip Op 30229(U)
January 18, 2022
Supreme Court, New York County
Docket Number: Index No. 653468/2020
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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CENTURY TOWER ASSOCIATES NY LLC,

Plaintiff,

- v -

FELD, KAMINETZSKY & COHEN, A DIVISION OF GEI CONSULTANTS INC.,P.C.,DIGGER SPECIALTIES, INC.,STRUCTURAL PRESERVATION SYSTEMS, LLC,AND AVCON RAILING SYSTEMS,

Defendant.

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INDEX NO. 653468/2020

MOTION DATE 07/28/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for DISMISS

Plaintiff Century Tower Associates NY LLC brings this action against Defendants Feld, Kaminetzsky & Cohen, a division of GEI Consultants Inc., PC ("GEI"), Digger Specialties Inc. ("Digger"), Structural Preservation Systems LLC ("Structural"), and Avcon Railing Systems ("Avcon"), alleging that Defendants breached and negligently performed their contracts in the provision of balcony rehabilitation services. In motion sequence 001, GEI moves to dismiss both the complaint and any cross-claims set forth against it, on the grounds that documentary evidence establishes that those claims are barred by the statute of limitations. Structural, Digger, and Plaintiff oppose the motion, which is fully submitted.

Background

Plaintiff is the owner of the building located at 2600 Netherland Avenue, Bronx, New York 10022 and entered into a purchase order with GEI on April 9, 2013 for engineering services in connection with balcony rehabilitation of the building. (NYSCEF Doc No. 14, Complaint, at ¶¶

15-16; NYSCEF Doc No. 52, Purchase Order.) Subsequently, Plaintiff and GEI entered into an agreement on April 4, 2014 as Owner and Architect, respectively, with Structural listed as the Contractor. (NYSCEF Doc No. 53, Agreement, at 4.)

Plaintiff commenced this action with the filing of the summons on July 29, 2020 (NYSCEF Doc No. 1) and filed the complaint on January 31, 2021, alleging that the Defendants collectively failed to fulfill their obligations and that the balconies were defective, and in one instance a glass panel fell sixteen floors to the ground. (Complaint at ¶ 3.) Plaintiff set forth one claim for breach of contract for each Defendant and one collective claim for negligence. (Complaint at ¶¶ 35-59.)

GEI moves to dismiss the complaint and all cross-claims asserted against it, pursuant to CPLR 3211[a][1], [5], and [7]. First, GEI argues that Plaintiff's "breach of contract" claim is actually a claim for professional malpractice, which is governed by the three-year statute of limitations in CPLR 214[6]. (NYSCEF Doc No. 28, GEI's Memo, at 2.) GEI then argues that documentary evidence establishes that its work was completed and the limitations period began to run on either November 13, 2015 or December 30, 2015 at the latest, and thus any claim for professional malpractice against it must have been brought by December 30, 2018. (*Id.* at 12.) In support, GEI submits the affidavit of Pericles Stivaros, a vice president of GEI; a Letter of Completion issued by the Department of Buildings declaring that GEI's work was completed on November 13, 2015; and an invoice dated February 15, 2016 but pertaining to work performed on December 30, 2015, which GEI alleges was its final invoice related to the project. (NYSCEF Doc Nos. 23, Stivaros Aff.; 25, DOB Letter; 26, Invoices.)

In opposition, Structural argues that the "continuous representation" doctrine tolled the statute of limitations, as GEI was "continuously involved in remediation efforts from approximately July 2017 through May 2019 to explore, discuss and provide its professional

opinion as to what remedial work would be needed to properly repair and secure the balcony railings." (NYSCEF Doc No. 39, Structural Opp., at ¶ 21.) In support, Structural submits a July 6, 2017 email from Plaintiff informing Structural that there were "two more railings that are popping up[.]" (NYSCEF Doc No. 41, Emails 1.) Gary Naughton, one of Structural's branch directors, then alleges that he "believe[s] that Century Towers also informed GEI and Avcon of these railing issues at or around the same time as Structural was informed about them and asked for GEI and Avcon's advice[.]" (NYSCEF Doc No. 40, Naughton Aff., at ¶ 12.) Naughton further alleges that Victor Lorenzo, another Structural employee, informed Naughton that Adam Szenk, an employee of GEI, was present at the building for a meeting and participated in another meeting by phone. (*Id.* at ¶ 14.) Finally, Structural introduces emails from Jose Herrera, an employee of Olnick, Plaintiff's parent company, stating that "Peri [aka Pericles Stivaros, GEI's vice president] also confirmed he is able to make it" to a meeting January 29, 2019 meeting, and a subsequent January 30, 2019 email thanking email recipients for attending the meeting. (NYSCEF Doc No. 42, Emails 2.)

Plaintiff opposes the motion on a different ground, arguing that GEI incorrectly characterizes its breach of contract claim, which has a six-year statute of limitations, as a professional malpractice claim. (NYSCEF Doc No. 50, Pl. Opp., at 4-7.) Plaintiff argues that its breach of contract claim is premised upon GEI's breach of "specific, quantifiable tasks—namely, [GEI's obligation] to engage in regular and continuing oversight of the work performed and to report about it," which were "independent from abiding by ordinary professional standards[.]" (*Id.* at 6-7.)

Discussion

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable." (*Lambe v Lenox Hill Hosp.*, 2013 WL 6832016, at *1 [Sup Ct, NY County 2013], *quoting Baptiste v Harding-Marin*, 88 AD3d 752, 753 [2d Dept 2011].)

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff s claim." (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995].) Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]) and "conclusively establishes a defense to the asserted claims as a matter of law." (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].)

Here, GEI fails to meet its burden to prevail on the motion. Although GEI submits a Letter of Completion from the DOB indicating that the work was completed on November 13, 2015, that notion is belied by GEI's own invoice which demonstrates that it performed additional work on December 30, 2015.

Moreover, GEI's "duties did not end with *either* completion of the building or payment to it of its fees" (*Bd. of Educ. of Tri-Valley Cent. Sch. Dist. at Grahamsville v Celotex Corp.*, 88 AD2d 713, 714 [3d Dept 1982] [emphasis added]), as, pursuant to the Agreement, GEI had an obligation to "provide administration of the Contract and [act as the] Owner's representative during

construction, until the date the Architect issues the final Certificate for Payment." (Agreement at p 11, § 10.1.) "Where, as here, a construction contract required the architect to conduct inspections to determine the dates of substantial and final completion and to issue a final certificate of payment, a cause of action against him does not accrue until the final certificate of payment is issued." (*Brail v Ogawa Depardon Architects*, 2020 WL 6378963, at *19 [Sup Ct, NY County 2020].) On this record, the court is unable to discern when, if ever, GEI issued the final Certificate for Payment to Structural, and as such, GEI has failed to establish that the time in which to commence an action against it has expired. (*Lambe*, 2013 WL 6832016, at *1.) Thus, the motion to dismiss the complaint on this ground is denied.

Cross-claims

Structural sets forth cross-claims against GEI for indemnification and contribution (NYSCEF Doc No. 32, Structural Answer, at ¶¶ 54, 57), while Digger sets forth one cross-claim for contribution. (NYSCEF Doc No. 47, Digger Answer, at ¶ 10.)

GEI argues that the cross-claims for contribution must be dismissed because the damages sought on each claim are for purely economic loss, for which a contribution claim is unavailable. (GEI's Memo at 13-15, *citing Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636 [1st Dept 1993].) Although it is true that Plaintiff seeks damages only for the costs of balcony repairs (NYSCEF Doc No. 14, Complaint at ¶¶ 32-34), GEI's motion to dismiss the cross-claims for contribution must be denied at this juncture, as there is still a pending cause of action for negligence set forth against each Defendant. (*St. Patrick's Home for Aged & Infirm v Laticrete Intl., Inc.*, 264 AD2d 652, 658 [1st Dept 1999] ["While plaintiff's tort causes of action against the codefendants may ultimately be shown to lack merit or be barred by the Statute of Limitations, those causes of action are still pending against the codefendants as they have not moved to dismiss

them. Thus, the necessary predicate tort liability for a contribution action remains in the case"]; *Jones v. Rochdale Vill., Inc.*, 96 AD3d 1014, 1018 [2d Dept 2012] [denying defendant's motion to dismiss cross-claim for contribution where defendant "failed to eliminate all triable issues of fact as to whether it negligently designed the doorway threshold upon which the plaintiff tripped"].)

Further, dismissal of the indemnification cross-claim would be premature, as the extent of GEI's duty to indemnify its co-Defendants "depends upon the extent to which its negligence contributed to plaintiff's injuries, an issue which is not yet determined." (*Healy v 169 East 69th St. Corp.*, 189 AD3d 680, 681 [1st Dept 2020] [internal citations omitted].) In addition, the Purchase Order provided that GEI agrees to indemnify Plaintiff and Plaintiff's agents for losses arising out of GEI's negligent acts. (Purchase Order at § 6.) On this record, the court is unable to dismiss the cross-claims. As such, it is hereby

ORDERED that GEI's motion sequence 001 for dismissal of the complaint and all cross-claims is hereby denied in its entirety.

1/18/22
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE