SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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DSSR REALTY CORP. AND ORTOV LIGHTING, INC.,
Plaintiffs,

- against -

PRESIDENT SAI II, LLC, TRIBOROUGH CONSTRUCTION SERVICES, INC., AND JJSL DEVELOPMENT, INC.,
Defendants,
----------x

Decision and order
Index No. ~~504130/20~~ 508479/20
Motion Sequence ~~#~~ 3

January 17, 2023

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking partial summary judgement. The defendants President Sai II and Triborough Construction Services have cross moved seeking summary judgement dismissing the lawsuit. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In 2015 the defendant President Sai II hired defendant Triborough Construction Services as the general contractor of a construction project located at 561 President Street in Kings County. During August 2016 the construction at the site caused damage to the neighboring property owned by the plaintiff DSSR Realty Corp. located at 608 Union Street. Specifically, the excavation work at the site caused damage to defendant's walls, floor and roof. The plaintiff instituted this lawsuit seeking recovery of the damage caused. The plaintiff now seeks summary judgement arguing there are no questions of fact the defendant's

excavation work damaged the plaintiff's property. The defendants have both moved seeking to dismiss the lawsuit on the grounds the statute of limitations has passed and the lawsuit cannot be maintained.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

It is well settled that any action based upon damage to property maintains a three year statute of limitations (CPLR §214(4)). Thus, a lawsuit must be commenced within three years of when the cause of action accrues (Victorson v. Bock Laundry Machine Company, 37 NY2d 395, 373 NYS2d 39 [1975]). The accrual date is the date of injury (id). In Lucchesi v. Perfetto, 72 AD3d 909, 899 NYS2d 341 [2d Dept., 2010] fill which raised the elevation grade was deposited on the plaintiff's property. The court explained that even if the fill was deposited on a date certain the causes of action were "based upon allegations of

continuing wrongs—the continued entry of boulders, mud, and debris onto the plaintiffs' property, and the continued presence of fill" (id). Thus, the continued presence gave rise to the continuous wrong doctrine and the lawsuit was timely. Indeed, in 509 Sixth Avenue Corp., New York City Transit Authority, 15 NY2d 48, 255 NYS2d 89 [1964] the court specifically held that a permanent structure placed on the property of another is a permanent trespass which gives rise to successive causes of action, essentially extending the statute of limitations. However, in Town of Oyster Bay v. Lizza Industries Inc., 22 NY3d 1024, 981 NYS2d 643 [2013] the Court of Appeals explained that the continuous wrong doctrine is not applicable where a discrete act which forms the basis of the wrong occurred more than three years before the filing of the lawsuit. Citing to New York Seven-Up Bottling Co. v. Dow Chemical Co., 96 AD2d 1051, 466 NYS2d 478 [2d Dept., 1983] the court further explained that there can be "no 'continuing tort or torts' where 'there was one tortious act complained of,' and noting that 'the accrual date does not change as a result of continuing consequential damages'" (id). Consequently, the question that must be addressed in this case is not whether work was done after August 2016 but whether a distinct wrong was committed within three years of filing the summons and complaint. The case of Atlantic Express Transportation Corp., v. Weeks Marine Inc., 68 AD3d 903, 892

NYS2d 437 [2d Dept., 2009] does not control in this case at all. In Atlantic Express (supra) the action was commenced in 2006 and the court addressed whether the lawsuit was filed after the applicable statute of limitations. Specifically, the court noted the blasting and dredging operations, which formed the basis for the causes of action, ceased in February 2002. However, the court held that "the plaintiffs demonstrated the existence of a triable issue of fact as to whether the blasting by the appellant, which occurred in 2001-2002 resulted in the parking lot damage which manifested itself sometime after June 9, 2003, and, thus, the cause of action to recover damages for the parking lot damage did not accrue until that time" (id). Thus, that case dealt with manifestations of damage, an issue not applicable here. That case did not disturb the rule that an injury begins upon the occurrence of a discrete act and without any continuous acts the statute of limitations is not extended thereby.

Thus, the specific claims of damage in this case must be examined. The plaintiff's expert Thomas Ingram stated that "as the construction at 561 President Street progressed, the stress on, and damage to, the foundation at 608 Union Street progressed. This, in turn, caused additional damage to the walls, floors, and roof at 608 Union Street over the subsequent years" (Plaintiff's Engineer's Affidavit, ¶7 [NYSCEF Doc. No. 54]). This affidavit clearly indicates that additional work by the defendant caused

additional damage and not merely continuing or consequential damage. The defendant's expert Robert Fuchs stated that essentially there were pre-existing conditions at 608 Union Street and that the construction did not significantly damage the property. Further, Mr. Fuchs disputed Mr. Ingram's conclusions finding they were not explained and were conclusory (see, NYSCEF Doc. No. 75). Thus, there are questions of fact, which cannot be decided in summary fashion, whether the defendant's work caused damage within three years of filing the lawsuit and was consequently timely filed. Therefore, based on the foregoing, all motions seeking summary judgement are denied.

Concerning indemnification, it is well settled that indemnification allows a party forced to pay for the wrongdoing of another to recover such payment from the actual wrongdoer (McDermott v. City of New York, 50 NY2d 211, 428 NYS2d 643 [1980]). In this case there has been no evidence presented that President was negligent in the happening of the damage, therefore, there is no impediment for granting their claims of indemnification from defendant Triborough (see, Kim v. 40th Associates, 306 AD2d 220, 761 NYS2d 228 [1st Dept., 2003]).

Triborough argues that President cannot claim indemnification because President should have been aware of Triborough's inferior work and is therefore also responsible for such performance. It is true that a party cannot be indemnified

for its own negligence (GOL §5-322.1, see, Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co., 89 NY2d 786, 658 NYS2d 903 [1997]). However, there is no evidence that President committed any negligence at all making indemnification improper. Indeed, there are no questions of fact in this regard. The mere fact President had experience in the construction industry and perhaps could have supervised Triborough's work does not mean that President committed negligence at all. Next, Triborough argues that there are questions of fact whether Triborough even performed the work for which President seeks indemnification. Of course, if true, President cannot be indemnified for work Triborough did not perform. Those factual questions will be explored at trial. To the extent a determination is made that Triborough performed the work then President is entitled to indemnification.

So ordered.

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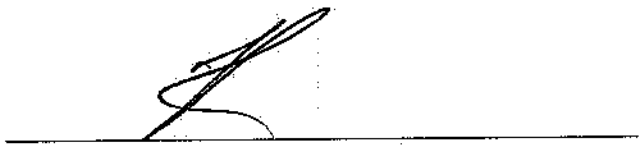

DATED: January 17, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC