Armato Props., Inc. v New York City Tr. Auth.
2023 NY Slip Op 30359(U)
January 31, 2023
Supreme Court, New York County
Docket Number: Index No. 153636/2019
Judge: Denise M. Dominguez
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** *Justice* **PART** **21**

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ARMATO PROPERTIES, INC.,

Plaintiff

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE CITY OF NEW YORK

Defendants

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INDEX NO. 153636/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 56

were read on this motion to/for DISMISS.

Upon review of the above documents and having heard oral arguments, for the reasons that follow, the motion and cross-motion are denied.

Plaintiff Armato Properties, Inc. (Plaintiff), a domestic business corporation with a place of business at 1701 Second Avenue (the property), brings this action against Defendants New York City Transit Authority, Metropolitan Transportation Authority (collectively, Transit) and the City of New York (the City) for property damage, and public and private nuisance.

In this motion Transit moves by notice of motion for the dismissal of the complaint on three grounds. Transit first alleges that the complaint is untimely under CPLR §§ 3211 [a] [5], Public Authorities Law 1212 [1], 1212 [2], 1276 [1] and 1276 [2]. Secondly, Transit seeks dismissal of the complaint pursuant to CPLR § 3211 (a) (7) alleging that it fails to state a cause of action against Transit. In the alternative, Transit seeks an order granting summary judgment pursuant to CPLR § 3212.

Plaintiff opposes the motion and cross-moves to strike Defendants' answers for not complying with discovery or, alternatively, to preclude Defendants from offering evidence at trial. Transit and the City oppose the cross-motion.

Plaintiff's Cross-Motion

The Court will first address Plaintiff's cross-motion for discovery. While the parties agree to exchange certain discovery by March 17, 2020, the Court takes judicial notice of the Covid-19 pandemic during that time. The Court also notes that the City provided an 88-page discovery response on February 28, 2022. Further, Plaintiff does not establish making a good faith effort to resolve these discovery dispute without court intervention, as required by court rules (see 22 NYCRR § 202.7 (a) (2) (c); *see e.g. Matter of Government Empls. Ins. Co. v Pellot*, 187 AD3d 620, 620 [1st Dept 2020]). Accordingly, Plaintiff's discovery motion is denied.

Transit's Motion

Statute of Limitation Argument

Transit first seeks dismissal based on the statute of limitations. The applicable limitations period for an action based on property damages is three years (CPLR § 214 [4]; *Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013] [*Oyster Bay*]). The statute of limitations for a tort action against Transit is one year and thirty days (Public Authorities Law §§ 1276 [1], [2]; *see Guzy v New York City*, 129 AD3d 614, 615 [1st Dept 2015]; *Watkins-Bey v MTA Bus Co.*, 174 AD3d 553, 555 [2d Dept 2019]).

Here, Transit's attorney affirmation (NYSCEF Doc. No. 19) notes that, according to the complaint, water from the storm drain sewer had been infiltrating the property's subsurface area, basement, and drainage system since February 12, 2016. The affirmation also notes that, in paragraph 5 of Plaintiff's bill of particulars, Plaintiff does not provide a specific date of the occurrence at issue but instead states that the water infiltration occurred "over the past three

years" (NYSCEF Doc. No. 23, ⁋ 5). Transit also relies on paragraph 8 of the bill of particulars, which reiterates that the damage occurred starting on February 12, 2016. Based on this, Transit concludes that the date of loss is February 12, 2016, and in Plaintiff commencing this action more than three years after the date of loss on April 8, 2019, makes the action untimely.

In opposition, Plaintiff submits the affidavit of Christine Armato, an officer and principal of Plaintiff (NYSCEF. Doc. No. 36). She states that the flooding commenced in 2016, and that the flooding has occurred "on a regular basis and continuing" (*id.*, ⁋ 7). She explains that Plaintiff identified the storm sewer drain as the source of the water in December 2018, when Plaintiff put red dye into the drain and "the red dye immediately infiltrate[ed] the property" (*id.*, ⁋⁋ 4-5). Plaintiff relies on the report of PalMar Engineering, P.C., which explains the red dye process (*see* NYSCEF Doc. No. 38). Plaintiff further states that around January 7, 2019, the property "sustained significant structural damage, separate and apart from the damages complained of previously, but also as a result of the water runoff . . ." (NYSCEF. Doc. No. 36, ⁋ 6). Plaintiff also alleges that it informed Defendants of the problems on a regular basis, and it adds that Defendants did not investigate or otherwise attempt to resolve the problem. She states it is not disputed that the Second Avenue subway construction occurred near and around the property, and that all Defendants bore responsibility for the project.

Plaintiff further argues that the action is timely as the "property sustained significant damaged to the structure on or about January 7, 2019, which did not exist prior to that date" (NYSCEF Doc. No. 34, ⁋14). Plaintiff has included copies of the notices of claim, dated February 12, 2019, that it mailed to Transit (NYSCEF Doc. Nos. 40, 41).[1] As stated, it filed the

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[1] Plaintiff also filed a copy of the notice of claim that it mailed to the City, but that is not relevant to this motion.

complaint on April 8, 2019. According to Plaintiff, January 7, 2019, is the date that should be used to determine the timeliness of this action and further argues that it is timely since it was commenced within the year-and-ninety-days statute of limitations.

Further, Plaintiff contends the damage is also not time-barred because the storm drain sewer is a continuing nuisance (citing *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977] [private nuisance involves interference with use or enjoyment of the property]). Plaintiff relies on *Bloomingdales, Inc. v New York City Tr. Auth.* (13 NY3d 61, 66 [2009]), which states "that a trespass that constitutes an unlawful encroachment on a plaintiff's property will be considered a continuous trespass giving rise to successive causes of action," supports its position. Plaintiff also cites *Smith v Town of Long Lake* (40 AD3d 1381, 1383 [3d Dept 2007]), in which the Third Department states that nuisance claims "generally give rise to successive causes of action that accrue each time a wrong is committed."

In reply, Transit adheres to its position that the statute of limitations clock commenced in February 2016 and relies on cases such as *EPK Props., LLC v Pfohl Bros. Landfill Site Steering Comm.* (159 AD3d 1567, 1569 [4th Dept 2018] [*EPK*] [quoting *Capruso v Village of Kings Point*, 23 NY3d 631, 639 (2014)] [emphasis deleted]). Transit also contends that Plaintiff's reliance on *Bloomingdales* is misplaced because no trespass is involved here. Instead, Transit relies on a later Court of Appeals case, *Oyster Bay*.

The *Oyster Bay* court found that a plaintiff, as a third-party beneficiary of a sewage contract, had six years from the completion of the public works contract to commence a claim for damage stemming from allegedly negligent construction work and rejected plaintiff's argument that the continuing nuisance claims were "independent causes of action that do not arise from the contracts" (22 NY3d at 1031).The *Oyster Bay* Court reasoned that, "[a]lthough

plaintiffs allege that the injuries to their property are ongoing, defendants' tortious conduct consisted of discrete acts . . . that ceased upon the completion of the sewer construction" (*id.* at 1032). The accrual date, the court stated, "does not change as a result of continuing consequential damages" (*id.* [quoting *New York Seven-Up Bottling Co. v Dow Chem. Co.*, 96 AD2d 1051, 1052 [2d Dept 1983], *affd* 61 NY2d 828 [1984]). The court found *Bloomingdales*, among other cases, inapplicable because *Oyster Bay* involved neither an unlawful encroachment on the property nor a continuous interference with any easements.

Here, both parties rely on distinguishable precedent in support of their positions. Transit argues that Plaintiff does not allege encroachment or an interference with its easements and therefore *Bloomingdales* is inapplicable. And Plaintiff relies on *Smith,* which is persuasive but not controlling authority for the proposition that successive causes of action accrue each time there is a violation.

However, these arguments do not get to the core of the issue. At this time, there is insufficient information to decide whether this matter constitutes a continuing nuisance for statute of limitations purposes (*Ubiles v Ngardingabe*, 194 AD3d 436, 437-438 [1st Dept 2021]).

While Transit relies heavily on *Oyster Bay*, unlike here the *Oyster Bay* court applied contractual principles on the ground that the Town of Oyster Bay was a third-party beneficiary of the contract at issue (*see also Omega Diagnostic Imaging PC v Attica Constr. Corp.*, 190 AD3d 617, 618 [1st Dept 2021] [statute of limitations for contracts applied where party "was in the functional equivalent of privity with defendants"]). Further, neither side alleges that Plaintiff is not a third-party beneficiary to the Second Avenue Subway contract, in which the statute of limitations would begin to run when the structure collapses, or when the damage from the negligent construction otherwise becomes apparent (*Ellington Owners Corp. v 200 Bradhurst*

Devs. LLC, 190 AD3d 550, 551 [1st Dept 2021] [internal quotation marks and citation omitted]; *see Gibbons v Grondahl*, 161 AD3d 590, 590 [1st Dept 2018] [accrual measured from time of discovery of the wrong]).

The other nine cases involved in *Oyster Bay* were untimely because they relied on a public nuisance theory, and "a public nuisance claim accrues upon substantial completion of the work" (*Village of Lindenhurst v J.D. Posillico, Inc.*, 94 AD3d 1101, 1101 [2d Dept 2012], *affd by Oyster Bay*, 22 NY3d 1024). However, neither Transit as the moving party nor Plaintiff explore this and set forth the date the subject work was completed or establish the proper limitations period.

Further, Transit's papers do not establish that Plaintiff cannot state a claim for a continuing wrong as the Second Avenue Subway extension was an ongoing project (*see Gibbons*, 161 AD3d at 590 ["distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs"] [internal quotation marks and citation omitted]). Notably, at this time there has been no discovery exchange as to whether there was new damage to the storm drain sewer. Thus, distinguishable from Transit's reliance on *EPK*.

Accordingly, this Court does not address the issue but denies this prong of the motion without prejudice.

Dismissal Argument

The second prong of Transit's motion seeks dismissal based on Plaintiff not stating a viable claim against Transit. Specifically, Transit alleges that it did not perform any work in the area at issue and the City owns and controls the storm sewer drain.

In support, Transit submits the affidavit of Nitin Patel, the Senior Engineering Manager in the Construction and Development Department of MTA (NYSCEF Doc. No. 24, ⁋ 1). Patel states that "[n]either the MTA/TRANSIT, nor its contractors performed work that impacted the

storm drain sewer or the property" (*id.*, ⁋ 6). More specifically, Patel states that the end point of Transit's work was at the southwest corner of 88th Street and Second Avenue, and both the property and the adjacent storm drain sewer were at least 20 feet away (*id.*, ⁋⁋ 4, 6, 7). The affidavit annexes the engineer's drawing that shows the end point for Transit's project (NYSCEF Doc. No. 25).

Further, Patel's affidavit states that movants did not begin their work in the general area until October 2016, which is months after Plaintiff alleges the property initially sustained damage (NYSCEF Doc. No. 24, ⁋ 6). Finally, the affidavit asserts that, upon information and belief, the City owns the storm sewer drain, and that movants are not responsible for it (*id.*, ⁋ 8-10). Thus Transit argues that this establishes that they are not responsible for the damage at issue.

In opposition, Plaintiff argues that under CPLR 3211, the moving party must show that the pleading does not state a cause of action, and not that a cause of action exists (citing, *e.g.*, *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). Also, the Court of Appeals in *EBC I, Inc. v Goldman, Sachs & Co.* (5 NY3d 11, 19 [2005]) stresses that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determination a motion to dismiss." Therefore, Plaintiff asserts, the court must accept the complaint's allegations as they relate to the moving parties.

For the purposes of this motion, this Court does not consider whether Plaintiff can establish its allegations, but instead evaluates the adequacy of this complaint (*see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]). Here, Transit's documentary evidence can be considered to determine whether "plaintiff [has] identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action" (*Basis Yield*

Alpha Fund [Master] v Goldman Sachs Group, Inc., 115 AD3d 128, 134 [1st Dept 2014]). In this circumstance, "the standard morphs from whether the plaintiff has stated a cause of action to whether it has one" (*id.* at 135 [internal quotation marks and citation omitted]). However, the documentary evidence must undisputedly reject the well-pleaded claim (*id.*; *see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Thus, "unless the movant[s] show[] that a material fact as claimed by the plaintiff is not a fact at all and no significant dispute exists regarding the alleged fact, the complaint shall not be dismissed" (*Homapour v Piroozian*, 210 AD3d 661, 663 [2d Dept 2022] [internal quotation marks and citation omitted]).

Under this standard, this Court finds that Transit's evidence, the Patel affidavit and the MTA's work records, do not establish entitlement to dismissal (*see Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563, 563-564 [1st Dept 2015]). The Patel affidavit alone does not establish the City's ownership of the storm sewer drain. Instead, it alleges that upon information and belief, the City owns and controls the drain (see *DeJesus v Todaro*, 2 AD3d 282, 282 [1st Dept 2003]). The map of the worksite is submitted without context and merely draws a yellow line at 88th Street and Second Avenue but does not indicate the location of the property involved and does not show the distance from that property or the distance from the yellow line to the drain. Further, it does not include information about when various parts of the work were completed. The evidence also does not establish the parameters of the work, part of which concededly occurred across the street from Plaintiff's property. Therefore, the two documents, even considered collectively are insufficient and this prong of the motion is denied.

Summary Judgment Argument

The Court also rejects Transit's alternative request to consider summary judgment. First, at this juncture, pre-note of issue and without discovery, the Court declines to convert this

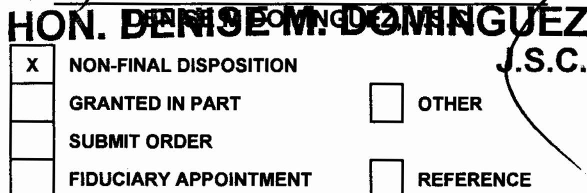
motion into a summary judgment motion and it is therefore denied without prejudice (*see* CPLR § 3211 [c]). Further, even if considered, the materials submit at this time are insufficient to establish entitlement to judgment as a matter of law.

Accordingly, it hereby

ORDERED that Transit's motion is denied in its entirety without prejudice; and it further

ORDERED that Plaintiff's motion is also denied in its entirety without prejudice; and it is further

ORDERED that in accordance with Part 21 rules, the parties are to submit a joint proposed preliminary conference order by March 2, 2023.



1/31/23
DATE

HON. DENISE M. DOMINGUEZ
J.S.C.

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