

**Anderson v Akam Assoc., Inc.**

2023 NY Slip Op 30578(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 159765/2021

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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CHARLOTTE ANDERSON,
Plaintiff,

- v -

AKAM ASSOCIATES, INC., SUTTON APARTMENTS
CORPORATION, THE BOARD OF MANAGERS OF THE
SUTTON CONDOMINIUM, BRADHURST 100
DEVELOPMENT LLC, DUVERNAY & BROOKS
LLC, DUVERNAY SUTTON LLC, JONI BROOKS,
PENNROSE PROPERTIES, LLC, RICHARD BARNHART,
MARK DAMBLY, MAGNUSSON ARCHITECTURE &
PLANNING, PC, WEST MANOR CONSTRUCTION CORP.

Defendant.

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INDEX NO. 159765/2021
MOTION DATE 09/13/2022, 01/03/2023
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 83

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, defendant's, Magnusson Architecture & Planning PC ("MAP"), motion to dismiss is granted and plaintiff's default judgment against defendant, West Manor Construction Corp. ("West Manor") is denied as moot<sup>1</sup>.

Background

Plaintiff is the owner of Unit #103, a unit of the Sutton Apartment Cooperation, located at 102 Bradhurst Avenue, New York, NY 10039. An alleged defect in the construction of the building caused a leak in Plaintiff's unit, resulting in mold and damage. Plaintiff commenced this

<sup>1</sup> The Court would like to thank Sarah Silbowitz for her assistance in this matter.

action against Defendants, including MAP and West Manor, to recover damages sustained as a result of the negligence of defendants, for their failure to act, the defective construction, and the known defects in the design and construction of Plaintiff's unit.

MAP was retained by Penrose Properties to render architectural design services for the development of the subject building into an "as of right" residential building with commercial space on the first floor, and an underground garage. West Manor was hired as the general contractor. The construction of the building and the deed to the Sutton Apartments Corporation were completed in 2007.

The action was commenced on October 27, 2021, by the filing of a Summons with Notice. In violation of CPLR § 306-b, Summons with Notice was served upon West Manor on July 28, 2022, beyond 120 days of filing. Subsequently, West Manor did not appear at court or file an answer.

**Mot. Seq. 002**

Defendant, MAP, moves to dismiss the Plaintiff's Complaint and all crossclaims pursuant to CPLR 3211(a)(1) and (7) for defenses founded upon documentary evidence and failure to state a cause of action upon which relief can be granted.

*Statute of Limitations- Breach of Contract/Breach of Warranty of Habitability*

This Court has previously ruled on this cause of action; accordingly, it is time barred as against MAP and the Court need not reach the merits of this cause of action.

*Claims Against Design Professionals*

The statute of limitations for claims against a design professional is three years, regardless of whether the underlying theory is based in contract or tort. *See* CPLR §214(6). The claim accrues upon completion of the professional's services. MAP completed its performance

of services in 2007 and Plaintiff commenced this action in 2021, more than ten years later. Therefore, even in the light most favorable to the plaintiff, the claims against MAP are time-barred.

*Intended Third-Party Beneficiary*

Plaintiff alleges that she is an intended third-party beneficiary of MAP's contract with Penrose Properties, the owner of the building. To assert rights as an intended third party beneficiary, a plaintiff must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his or her benefit and (3) that the benefit to him or her is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him or her if the benefit is lost. *State of California Public Employees' Retirement System v. Sherman & Sterling*, 95 NY2d 427, 434 [2000].

Here, the contract between MAP and Penrose Properties does not confer any benefit to a third party, including Plaintiff. The contract was executed January 1, 2004, two years before Plaintiff purchased the unit. There are no provisions in the contract that clearly evidences an intent to permit enforcement by a third party. The contract continuously states throughout that it is for the benefit of the owner, Penrose Properties. Therefore, Plaintiff is not an intended third-party beneficiary of the contract between MAP and Penrose Properties thus no viable cause of action exists.

**Mot. Seq. 003**

Plaintiff moves for default judgment pursuant to CPLR § 3215 against defendant, West Manor Construction Corp., and seeks to extend plaintiff's time to serve the Summons with Notice pursuant to CPLR § 2005. Defendant cross-moves to dismiss plaintiff's complaint against it on the grounds that plaintiff's claims are time barred, defendant is not in default because

defendant was never properly served, and plaintiff failed to set forth a reasonably sufficient excuse for failing to timely serve defendant.

The Court finds that plaintiff's claims against West Manor are time barred thus plaintiff's motion for default judgment is denied as moot. Accordingly, it is hereby

ORDERED that defendant, Magnusson Architecture & Planning PC, motion to dismiss plaintiff's complaint and all cross claims is granted; and it is further

ORDERED that plaintiff's motion for default judgment, motions sequence 003, is denied; and it is further

ORDERED that defendant West Manor Corp.'s cross-motion to dismiss the complaint is granted; and it is further

ORDERED that defendants' Kam Associates, INC., Sutton Apartments Corporation and The Board of Managers of The Sutton Condominium cross-claims as against West Manor Corp. survive the instant motion to dismiss; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further


ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

*Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).*

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2/27/2023

DATE

LYLE E. FRANK, 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