Board of Mgrs. of Cipriani Club Residences at 55 Wall Condominium v Zimmerman
2023 NY Slip Op 31867(U)
May 10, 2023
Supreme Court, New York County
Docket Number: Index No. 650480/2022
Judge: Dakota D. Ramseur

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M

Justice

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THE BOARD OF MANAGERS OF CIPRIANI CLUB RESIDENCES AT 55 WALL CONDOMINIUM,

Plaintiff,

- v -

HOWARD L. ZIMMERMAN ARCHITECTS & ENGINEERS DPC,HOWARD L. ZIMMERMAN,

Defendant.

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INDEX NO. 650480/2022

MOTION DATE 03/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HOWARD L. ZIMMERMAN ARCHITECTS & ENGINEERS DPC

Plaintiff,

-against-

MILLENNIUM POWER, LLC

Defendant.

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Third-Party Index No.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 14

were read on this motion to/for DISMISS.

Plaintiff, the Board of Managers of Cipriani Club Residences at 55 Wall Condominium (plaintiff), commenced this action for breach of contract, malpractice, and negligent misrepresentation, against defendants Howard L. Zimmerman Architects & Engineers DPC (HLZ) and Howard L. Zimmerman (Zimmerman) (collectively, defendants), stemming from renovation work defendants allegedly performed at the premises located at 55 Wall Street, New York, New York (premises). Zimmerman now moves pursuant to CPLR 3211 (a)(5) to dismiss plaintiff's second cause of action for professional malpractice as against him and plaintiff's third cause of action for negligent misrepresentation. The motion is opposed. For the following reasons, the motion is granted.

This action stems from work performed by defendants as part of a project to upgrade and replace the aging mechanical systems of a nine-story condominium with a cogeneration energy system and related electrical systems at the premises. Plaintiff hired HLZ pursuant to a written contract wherein HZL agreed "to serve as [plaintiff's] construction representative and to provide

Architectural/Engineering Consulting Services" in connection with the project (NYSCEF doc. no. 2, compl at ¶ 13). HLZ further agreed to oversee the technical design and construction work to be carried out by plaintiff's contractor, Millennium Power LLC (Millennium), the company hired by plaintiff to serve as a "design-builder" to install the cogeneration system and replace and/or upgrade other existing systems. The complaint alleges that Zimmerman is licensed by the State of New York to practice architecture and that he is the president of HLZ (*id.* at ¶ 9).

According to the complaint, pursuant to the agreement, HLZ was to review the detailed bid and scope of work prepared by Millennium, conduct regular site visits, attend project meetings to oversee ongoing construction, prepare regular field reports, and direct Millennium to make changes and adjustments "necessary to produce a system that would perform as depicted on construction documents" (*id.* at ¶17). The complaint alleges that on June 15, 2016, on or about October 10, 2016, and on or about October 19, 2016, Millennium submitted a series of five invoices which HLZ approved, and which contained certified statements in support of Millennium's payment applications that were signed by Zimmerman. The complaint alleges that, based upon defendants' recommendations and Zimmerman's certifications, plaintiff paid the invoices. According to the complaint, defendants did not advise plaintiff that the first invoice included a charge which was in an amount disproportionate to the design work expected to be performed, and that the second and third invoices were for the purchase of chillers for work that was required to be completed no later than September 13, 2016, but which Millennium failed to complete by that time. The fourth invoice related to cogeneration units that were supposed to be ready for delivery to the building by October 16, 2016, and involved work which Zimmerman certified as, but was not, 59.53% complete, and the fifth invoice related to the line-item value for the "Boiler/MBS Purchase and Mobilization" work which was represented by defendants to be 72.61% completed, but which had barely been commenced in October 2016. The series of invoices allegedly included charges totaling nearly $12,000,000.

The complaint further alleges that Millennium failed to pay several of its subcontractors, who filed mechanic's liens against the property, and plaintiff had to pay between $1-$2 million to the subcontractors to release their liens in connection with work for which the plaintiff had already paid Millennium. As a result, on April 26, 2017, plaintiff sent a written notice to Millennium notifying it of its breaches of its written agreement with plaintiff. When Millennium failed to cure its breaches, on June 30, 2017, plaintiff provided notice to Millennium that it was terminating its agreement with Millennium for cause.

According to the complaint, after Millennium was terminated, plaintiff learned that Millennium had never completed its design and construction drawings for the project, and that the scope of the system designed by Millennium was beyond what was required to meet performance requirements and would have cost approximately $3 million dollars more than necessary.

On or about July 10, 2017, plaintiff executed an addendum to its agreement with HLZ, in which HLZ "agreed to provide Consulting Services and to take over as the engineer/architect of record for the Project []" (the addendum) (*id.* at ¶ 58). Pursuant to the addendum, HLZ agreed to prepare all required mechanical, electrical, structural and architectural plans for filing with New York City, and to provide construction administration services to oversee the various trades

through the completion of the project. According to Zimmerman, HLZ's role as plaintiff's architectural/engineering consultant ended when Millennium's services were terminated in June 2017, and HLZ agreed to take over as the engineer/architect of record under the addendum. The complaint does not include any allegations specifically against Zimmerman after the work under the agreement was completed or any work in the second phase of the project.

The complaint alleges that the project was dormant for nearly one and a half years while plaintiff sought additional funding. A scaled down project resumed in January 2019 and was ultimately completed in November 2020.

On or about January 31, 2022, plaintiff filed the complaint alleging: that defendants' failure to properly perform their construction and administration services caused plaintiff to spend approximately $6 million of the original $8 million contract price when only about 35% of the work had been performed; that the original project design was excessive and beyond what was required for the project; that defendants had only approximately $2 million in funds remaining in loans and grants, which was insufficient to complete the project; and that plaintiff had to borrow an additional $3 million to complete a scaled down version of the project, which was completed in November 2020, at the cost of more than $12 million, for a project that was only 2/3 of the original scope.

In support of his motion to dismiss, Zimmerman argues that the second and third causes of action are barred by the statute of limitations. Zimmerman contends that the claim for architectural malpractice and negligent misrepresentation is governed by a three-year statute of limitations. He further argues that the statute of limitations began to run when the work was completed. According to Zimmerman, the last authorization for payment that was signed by him was issued by Millennium on October 16, 2016, plaintiff terminated Millennium by letter dated June 30, 2017, and HLZ became the architect of record on the project, pursuant to the addendum replacing Millennium in July 2017. Thus, according to Zimmerman, his work was completed no later than July 2017, and the complaint, which was filed on January 31, 2022, is untimely and must be dismissed. Zimmerman further argues that although HLZ continued to work on the project until November 2020 under the addendum, plaintiff cannot avail itself of the doctrine of continuous representation to extend the statute of limitations. According to Zimmerman, the doctrine of continuous representation does not apply because HLZ's work pursuant to the agreement and its work pursuant to the addendum constituted two separate projects.

In its opposition to the motion, plaintiff contends that the causes of action are timely because the doctrine of continuous representation applies to toll the statute of limitations on plaintiff's claims against Zimmerman because the work performed under the agreement is related to the work under the addendum, thereby forming a continuous course of services.

DISCUSSION

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its

allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal citation omitted]).

" 'On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired' " (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], quoting *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). "To meet its burden, 'the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued' " (*id.*, quoting *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). "The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies" (*Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405 [2d Dept 2007] [citations omitted]).

Here, the parties do not dispute that a three-year statute of limitations applies to both causes of action, nor is there any dispute that HLZ continued to be employed by plaintiff on the project until it was completed; however, they disagree whether the continuous representation exception applies, extending the three-year period until the project at issue was completed in November 2020. According to the plain language of the complaint, the last mention of Zimmerman taking any personal action was on October 19, 2016, when it signed Millennium's fifth payment application. Thus, as plaintiff, commenced this action on January 31, 2022, beyond the three-year statute of limitations for a claim sounding in malpractice, plaintiff's claim for malpractice against Zimmerman is untimely and must be dismissed.

Plaintiff contends that the continuous representation doctrine saves its claim for malpractice. It does not. The continuous representation doctrine, as applied to professionals including architects and engineers, applies when a plaintiff shows that he or she relied upon a uninterrupted course of services related to the particular professional duty allegedly breached (*Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]; *see Pace v Horowitz*, 190 AD3d 619 [1st Dept 2021 [finding that the continuous representation doctrine did not toll the statute of limitations where the plaintiff failed to allege that the particular course of representation which gave rise to the malpractice allegations continued so as to make the instant malpractice claim timely filed]; *Booth v Kriegel*, 36 AD3d 312, 314 [1st Dept 2006] ["The continuous representation doctrine tolls the running of the statute of limitations on a claim arising from the rendition of professional services only so long as the defendant continues to advise the client in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship] [internal quotation marks and citations omitted]).

Zimmerman correctly contends that the services provided by HLZ under the addendum were not related to the original services provided under the agreement and, therefore, do not constitute "continuous representation." Under the agreement, the services provided by HZL consisted of acting as plaintiff's representative. Plaintiff duties were limited to "represent [plaintiff's] interests with respect to the Project and to oversee, monitor and approve the work performed by Millennium" (compl at ¶ 13). Under the addendum, plaintiff paid HLZ to complete the design and construction documents that Millennium was supposed to have completed (*id.* at ¶

64). The work HLZ was required to perform under the addendum included "to prepare all required mechanical, electrical, structural and architectural plans for filing at the NYC LPC, DOB, and DEP for the Project, and to provide construction administration services to oversee the various trades through the completion of the project" (*id.* at ¶ 59). It is clear from the allegations in the complaint that the course of services, including the nature of HLZ's work and Zimmerman's absence from work on the agreement, had materially changed. Thus, while the project remained incomplete at the time the parties entered into the addendum, the work HLZ performed under the addendum was unrelated to the specific matter that gave rise to the alleged malpractice, to wit, Zimmerman and HLZ's work pursuant to the agreement (*see Sendar Dev. Co., LLC*, 68 AD3d at 504 [finding that the continuous representation doctrine was inapplicable where the second inspection that the defendant performed at the premises was for an incidental matter not related to the defendant's contractual duty to provide structural engineering for the light gauge steel framing]).

Plaintiff cites to *Mut. Redevelopment Houses, Inc. v Skyline Eng'g, L.L.C.* (178 AD3d 575, 576 [1st Dept 2019]) in support of its argument that Zimmerman's work under the addendum was related to HZL work under the agreement. Unlike in *Mut. Redevelopment Houses, Inc.*, where the court determined that the continuous representation doctrine tolled the statute of limitations where the defendant rendered services to correct the engineering and construction defects that it failed to identify during the phase one of the inspection, here, the addendum did not require HZL to perform remediation of work it previously agreed to perform, but rather the nature of the work HLZ agreed to perform pursuant to the addendum was distinct from that which it agreed to perform under the agreement. Thus, the finding in *Mut. Redevelopment Houses, Inc.* is inapplicable to the facts herein.

Plaintiff's claim for negligent misrepresentation is also dismissed. A claim for negligent misrepresentation has a three-year statute of limitations (CPLR 214[4]; *see Broecker v Conklin Prop.*, LLC, 189 AD3d 751 [2d Dept 2020]; *Colon v Banco Popular North Am.*, 59 AD3d 300, 301 [1st Dept 2009]; *see ShareStates Invs., LLC v Creagh & Assocs., Inc.*, 187 AD3d 961, 962 [2d Dept 2020] [a negligent misrepresentation claim incidental to malpractice has a three-year statute of limitations]).

The third cause of action alleges that Zimmerman negligently misrepresented that he and HLZ were qualified to perform architectural and construction administration services when they entered into the agreement and when he personally and repeatedly certified Millennium's work on the project, the last of such certifications relating to an October 2016 invoice. First, plaintiff alleges that on or about February 23, 2016, Zimmerman falsely represented that he and HLZ were qualified to perform work under the agreement, including architectural and construction administration services. And second, plaintiff alleges that Zimmerman incorrectly certified that certain work at the project was completed, when it was not. The last certification occurred on October 19, 2016. Thus, the statute of limitations accrued, at the very latest on October 19, 2016, when plaintiff paid the fifth invoice (*see IFD Const. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89, 92 [1st Dept 1999] [claim for negligent misrepresentation accrues on date the injured party could have relied upon the misrepresentation]). Accordingly, the statute of limitations for plaintiff's negligent misrepresentations was to lapse on October 19, 2019. As

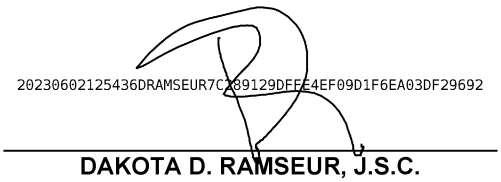
plaintiff commenced this action on January 31, 2022, over two years after the expiry of the statute of limitations, the claim is untimely.

Accordingly, it is hereby

ORDERED that Zimmerman's motion pursuant to CPLR 3211(a)(5) is granted, and the complaint is dismissed as against Zimmerman; and it is further

ORDERED that Zimmerman shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



5/10/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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