SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

244 HOWARD AVENUE, LLC,

Plaintiff,

-against-

MT GROUP, LLC,
MR. DEMOLITION, INC.,
JS TOWER CONSTRUCTION CORP.,
and SAFETY SOLUTIONS NY, INC.,

Defendants.

X

DECISION/ORDER

Index No. 500590/2022

Motion Seq. No. 001

Date Submitted: 4/20/2023

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant MT Group, LLC's motion to dismiss the complaint

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed…….	10-17
Affirmation in Opposition, Affidavits, and Exhibits Annexed.....	23-29
Reply Affirmation.....	

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In motion sequence #1, defendant MT Group, LLC moves, pre-answer, to dismiss the complaint against it, pursuant to CPLR §3211(a)(1) and (7). After oral argument, the motion is granted, and the complaint is dismissed.

This action was commenced on January 6, 2022, by filing a summons with notice. Service of process was made by service on the NY Secretary of State on May 6, 2022, the last day of the 120 days available to serve process after purchasing an index number. Counsel for defendant MT Group, LLC (MT Group) filed a notice of appearance and demand for a complaint on September 1, 2022. On September 21, 2022, plaintiff's counsel and MT Group's counsel stipulated that plaintiff's time to file a complaint was extended until October

21, 2022 [Doc 8]. Plaintiff filed the complaint on October 21, 2022 [Doc 9]. Defendant MT Group, LLC filed this motion on November 10, 2022. Plaintiff then filed an amended complaint on January 25, 2023, which did not change the identity of any of the defendants. It was not served on the three non-appearing defendants. Plaintiff had the right to serve the amended complaint without leave of court, despite the fact that the amendment was not made within the time periods in CLR 3025(a), as it was after defendant moved to dismiss, which motion extended the time within which the plaintiff may amend the complaint as of course. CPLR §3211(f).

The amended complaint asserts claims against MT Group for negligence (Count I), and breach of contract (Count II). The statute of limitations for negligence (professional, against an engineer) is three years, and for breach of contract, is six years.

Defendant argues in the affirmation in support of the motion that the complaint should be dismissed pursuant to CPLR §3211(a) (1) [documentary evidence] and (7) [failing to state a cause of action]. In defendant's affirmation in support, counsel states that CPLR §214 is applicable to claims for engineering malpractice, and that the statute of limitations therein is three years, regardless of whether the underlying theory is based in contract or in tort. This argument for dismissal is also based upon CPLR §3211(a)(5) [statute of limitations]. Further, defendant claims that the statute of limitations to be imposed is not the period set forth in the CPLR, but a shortened statute provided for in the written contract between the parties. In addition, the movant argues that, if the complaint is not dismissed based on the statute of limitations, which counsel claims is "documentary evidence" as it is in the contract, not the CPLR, that the *ad damnum* must be reduced and the damages capped pursuant to another provision in the contract, which provides that the "aggregate amount of the liability of MT Group, its officers, employees and agents shall be limited to $25,000.00 or the total amount of the fee paid to MT Group for its work performed on the

project." Counsel states that with the change order in this matter, that this sum is $40,000.

Defendant's counsel also avers that the complaint should be dismissed for failing to state a claim for which relief may be granted. Specifically, defendant's counsel argues that "A Motion to Dismiss brought under CPLR §3211(a)(7), must be evaluated by the Court by assuming the truthfulness of the factual allegations of the pleadings and determine simply whether the allegations make out any cognizable cause of action. However, when such motion is supported by evidence extrinsic to the complaint, the inquiry becomes whether the petitioner indeed has a cause of action, not simply whether he or she has stated one in the complaint, and the petitioner no longer can rely only on the unsupported factual allegations of the pleadings, but must submit evidence demonstrating the existence of a cause of action. . . MT group has provided evidence showing that all its work was completed at the collapse site over two (2) years prior to the plaintiff's commencement of the instant action. Thus, in light of MT Group's extrinsic evidence, the plaintiff's claims must be evaluated to determine if he has a valid cause of action not simply whether he has stated one in the complaint" [Doc 11 ¶¶ 28, 34-34]. In sum, this branch of the motion, under CPLR §3211(a)(7) is also based on the statute of limitations in the contract.

This action stems from a renovation project at 244-245 Howard Avenue, Brooklyn, NY. The plaintiff owned the property at the time, and defendant MT Group was hired by the owner for engineering services in connection with the project, by written contract [Doc. 14]. A change order was executed as well [Doc 15]. On January 9, 2019, there was a partial building collapse at the site, and plaintiff "fired" defendant. The project entailed converting a commercial building to residential, and adding two floors to the existing building.

The parties' contract provides that "no action or claim, whether in tort, contract or otherwise, may be brought against MT Group, arising from or related to MT Group's work, more than two years after the cessation of MT Group's work hereunder, regardless of the

date of discovery of such claim." Defendant claims that their work ceased on January 9, 2019, the date of the collapse, thus the action, brought more than two years after that date, but less than three years after, was untimely commenced.

Plaintiff opposes the motion and argues that defendant's work did not stop on the date of the collapse, but stopped on or about May 9, 2019, when MT Group conducted a special inspection of the project and prepared a Field Investigation Report [Doc 20]. Plaintiff's counsel notes that defendant also prepared and submitted "a TR-1 Technical Report Statement of Responsibility" [Doc 21] to the New York City Department of Buildings on behalf of plaintiff 244 Howard, in which it certified that it had performed and completed inspections/tests of certain aspects of the Project (NYSCEF No. 18, ¶ 37). In Section 4C of the TR-1, MT Group certified that "the date when the actual final inspection was performed" was October 28, 2019 (NYSCEF No. 21). A copy of the TR-1 is attached as Exhibit F. Thus, plaintiff argues, there is, at a minimum, a factual dispute regarding the actual date of the "cessation of MT Group's work" on the Project, and "dismissal based upon limitations grounds is therefore improper" [Affirmation at Doc 23 ¶¶14-15].

In addition, plaintiff avers that the Governor's Executive Orders issued during the Covid-19 pandemic also extended the statute of limitations by "tolling it" for 228 days, from March 20, 2020, until November 3, 2020. By counsel's calculations, this toll applies to the shortened statute of limitations the parties agreed to in their contract. He argues that the application of the 228-day toll to the date October 28, 2019, results in the conclusion that the action was timely.

Plaintiff also claims that there is "at a minimum, a factual dispute regarding the actual date of the 'cessation of MT Group's work' on the Project, and dismissal based upon limitations grounds is therefore improper" [Doc 23 ¶15].

In reply to plaintiff's opposition, defendant repeats its contention that its work ceased by January 9, 2019, and argues that adding 228 days to January 9, 2019, does not result in the action having been timely commenced. Specifically, counsel states that "once the building collapsed the owner stopped utilizing MT Group's professional services" [Doc 31 ¶ 4]. He states that the site meeting and inspection on May 9, 2019, was "mandatory" as it was directed by the NYC Department of Buildings to "investigate the collapse". Counsel also avers that there were violations imposed against MT Group and fines, and threatened criminal prosecution by the DOB, and that MT Group's principal went to the site involuntarily and prepared a written report for the DOB without compensation. He concludes that defendant "vehemently disputes the characterization of the May 9, 2019, DOB meeting as "work" for plaintiff [Doc 31 ¶ 7].

Discussion

The novel question raised here by plaintiff is whether the Governor's Executive Orders apply to a contractually shortened statute of limitations. There is no dispute that a contract can shorten the statute of limitations. Here, it was specifically shortened to two years, whether the claim sounds in tort or a breach of contract. The defendant engineering firm is a Delaware LLC, authorized to do business in New York, and is apparently a wholly owned subsidiary of Intertek, an international corporation. The defendant prepared the contract, and this court finds that it is enforceable against plaintiff with regard to the statute of limitations.

The court finds that it does not need to determine whether the toll imposed by the Executive Orders following the Pandemic applies here, as defendant has established that the work MT Group performed for this project had, in fact, stopped before the collapse on January 9, 2019, and did not resume thereafter. As a result, adding the 228-day toll period is totally unavailing, as even by adding the 228 days, the action was not timely commenced.

Therefore, the issue whether the Executive Orders apply to a contractually shortened limitations period need not be decided here.

In this matter, utilizing the date of the loss as the date the cause of action arose, January 9, 2019, the contractually reduced statute of limitations (two years) ran on January 8, 2021. While this court has previously concluded (*Baker v 40 Wall St. Holdings Corp.,* 74 Misc 3d 381) that where the statute of limitations did not run until a date after November 3, 2020, the Executive Orders merely created a temporary suspension of the running of the statute which was not applicable to extend it past November 3, 2020, the Second Department Appellate Division has very recently clarified their decision in *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]) and determined that the Governor's Executive Orders require the addition of 228 days to every statute of limitations, as they collectively operated as a toll, and not as a suspension (*McLaughlin v Snowlift, Inc*., 214 AD3d 720 [2d Dept 2023]). Thus, this court was incorrect in the conclusion reached in *Baker v 40 Wall St. Holdings Corp.,* 74 Misc 3d 381. Therefore, applying *McLaughlin v Snowlift,* as the cause of action here arose before the Covid-19 Pandemic started, and while the statute of limitations would not have run during the "toll period" of March 20, 2020, to November 3, 2020, if the Executive Orders are applied to the contractually shortened limitation period, 228 days would need to be added. But that still results in a date earlier than plaintiff commenced the action.

The issue here is when the cause of action arose. Defendant claims the collapse on January 9, 2019 is the date to use. Plaintiff claims that while it is true that plaintiff fired defendant on that date, the defendant completed an inspection and a report for the NYC Department of Buildings subsequently, “on or about May 9, 2019” [Doc 23 ¶12]. In addition, plaintiff further avers that “In Section 4C of the TR-1, MT certified that “the date when the actual final inspection was performed” was October 28, 2019” [id. ¶14].

Defendant disagrees with plaintiff's arguments to use these alternative dates, stating "It is undisputed that the last day of work (the performance of professional services) by MT Group at the premises was conducted on or before January 9, 2019" [Doc 11 ¶13].

The items in Document 19, from the Office of Administrative Trials and Hearings (OATH), indicate that the three violations issued to MT Group were issued on March 2, 2019, which resulted in a hearing, and fines were imposed on MT Group. However, this court finds that appearing at a hearing at OATH, an adjudicative body of the City of New York, is not "work" for plaintiff as contemplated by the contract. Filing a report requested by the NYC Department of Buildings (DOB) and completing paperwork required to be filed with the DOB to be removed from the job, are similarly not "work" for plaintiff as contemplated by the contract. The DOB website indicates that a final certificate of occupancy was issued for the project on October 27, 2020.

Adding 228 days to January 8, 2021, the expiration of the statute of limitations in the contract, does not result in a finding that this action was timely commenced on January 6, 2022. Even if the court added 228 days to May 8, 2021, the date of the defendant's inspection report [Doc 20], two years later would be December 22, 2021, which does not make the action timely either. Defendant's preparation of the TR-1 [Doc 21] on October 28, 2019, a document that defendant claims was required by the DOB, which plaintiff does not dispute, and does not constitute work done pursuant to the contract, as plaintiff had terminated defendant months earlier.

The court must conclude that this action was not timely commenced, and as such, defendant has made a prima facie case for dismissal.

Accordingly, it is

ORDERED that the motion of defendant MT Group, LLC is granted, and the complaint is dismissed as against it; and it is further

ORDERED that the court finds that this action has been abandoned with regard to the three non-appearing defendants as a default has not been taken against them and more than a year has expired since their default. Therefore, the complaint is dismissed as against defendants MR. DEMOLITION, INC., JS TOWER CONSTRUCTION CORP., and SAFETY SOLUTIONS NY, INC., as abandoned pursuant to CPLR §3215 (c), which provides that "the court shall . . . dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed."

As such, the complaint is dismissed in its entirety.

This constitutes the decision and order of the court.

Dated: July 6, 2023

ENTER:

Hon. Debra Silber, J.S.C.