

**Prismatic Dev. Corp. v Mueser Rutledge Consulting
Engrs.**

2023 NY Slip Op 34001(U)

November 8, 2023

Supreme Court, New York County

Docket Number: Index No. 654802/2022

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: <u>HON. LYLE E. FRANK</u> <i>Justice</i> -----X PRISMATIC DEVELOPMENT CORPORATION Plaintiff, - v - MUESER RUTLEDGE CONSULTING ENGINEERS, Defendant. -----X	PART 11M INDEX NO. <u>654802/2022</u> MOTION DATE <u>07/07/2023</u> MOTION SEQ. NO. <u>001</u> DECISION + ORDER ON MOTION
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 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

were read on this motion to/for DISMISS.

The dispute in this case between Plaintiff Prismatic Development Corporation (“PDC”) and Defendant Mueser Rutledge Consulting Engineers (“MRCE”) regards an alleged breach of contract and professional malpractice due to, *inter alia*, MRCE allegedly providing incorrect recommendations regarding a construction projected PDC first bid on, then after winning the bid, performed services on for New York City Transit Authority (“NYCTA”)¹.

MRCE gave the initial recommendation prior to PDC submitting a bid to NYCTA. After PDC won the contract with NYCTA, the Complaint alleges that MRCE gave additional recommendations to PDC.

MRCE moves to dismiss pursuant to CPLR 3211(a)(1) and (5) on the grounds that the statute of limitations has expired. PDC argues that, based on the continuous representation doctrine and a tolling agreement, the claims in this action are timely.

¹ The Court would like to thank Jason Lowe Esq., for his assistance in the matter.

Alternatively, PDC argues that this action must be dismissed because, before bringing this action MRCE was contractually required to mediate the dispute.

Standard of Review

On a motion to dismiss under CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

In order to obtain dismissal of an action based on expiration of statute of limitations under CPLR 3211(a)(5), the movant must demonstrate “prima facie, that the time within which to commence the cause of action has expired” (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 644, 102 N.Y.S.3d 25 [1st Dept 2019]). If the movant succeeds, then the opposing party has the burden to “raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period” (*id.* at 645). The parties agree that the statute of limitations for the causes of action alleged in the complaint, both based on professional malpractice, is 3 years. (*R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co.*, 3 N.Y.3d 538 [2004]).

Discussion

Statute of Limitations

MRCE has failed to meet its prima facie burden to show that the statute of limitations bars the claims asserted in the complaint. Initially, to the extent MRCE relies on facts to meet its burden which are solely attested to in an attorney affirmation, those facts must be disregarded as the attorney has no personal knowledge and thus the facts stated in the affirmation are without probative value. (*Luong v. Ha The Luong*, 67 Misc. 3d 1210(A), 126 N.Y.S.3d 850 [N.Y. Sup. Ct. 2020] [“To the extent [facts] are contained solely within the attorney affirmations for the

parties, the affirmation of an attorney without personal knowledge of the facts lacks probative value unless the statements are substantiated by documentary evidence or by proof of the attorney's personal knowledge." [internal citations omitted]).

MRCE argues that the claims in this action accrued on or before November 8, 2016. The basis for MRCE's argument is that the alleged faulty recommendations were made in the period of time before PDC submitted its bid to the NYCTA and the PDC submitted its bid to NYCTA on November 8, 2016. However, for professional malpractice, the cause of action, "accrues upon termination of the professional relationship—that is, when it completes its performance of significant (i.e. non-ministerial) duties under the parties' contract" (New York City Sch. Constr. Auth. v Ennead Architects LLP, 148 AD3d 618, 618, 49 NYS3d 462 [1st Dept 2017] [internal quotation marks omitted]; CPLR 214 [6]).

Though it is unclear if the initial scope of services agreement was ever fully executed, PDC's statements in opposition that the parties always contemplated MRCE continuing to provide services if the bid was accepted is supported by MRCE's July 6, 2016, proposal which includes post bid services. NYSCEF #14. The Complaint specifically states that MRCE submitted a report on March 14, 2018, which repeated the alleged negligent recommendations. NYSCEF #4, ¶15. Therefore, at this stage, PDC has not met its burden of showing that the causes of action alleged by MRCE accrued on or before November 8, 2016.

The parties entered into a tolling agreement with an effective date of March 12, 2021. This is within 3 years of the March 14, 2018, report referred to in the Complaint. Pursuant to the tolling agreement, various claims are tolled from the effective date until the termination date, which is defined as "90 days after the full and final disposition of all proceedings related to the Differing Site Conditions Claims, including but not limited to the Appeal..." NYSCEF #23, ¶ 6.

MRCE argues that an April 2022 email (NYSCEF #26) constituted a withdrawal by PDC from the tolling agreement. However, that email did not state that Plaintiff was withdrawing from the tolling agreement. Rather the email stated:

"[T]he time for filing an appeal to the Court of Appeals will run as of May 12. Based on your communication, I take it that MRCE does not want to pursue that avenue. In the absence of foiling [sic] such an appeal, we will take the April 12 date as the final disposition of the appeal and proceed accordingly."
NYSCEF #26.

Thus, if permission for an appeal to the appellate division had not been filed, it seems that the parties would be in agreement that April 12, 2022, would have been the disposition date for the appeal. That is academic though because an application for permission to appeal to the court of appeals was filed. The Court of Appeals denied that permission on September 15, 2023 (NYSEF #37) and there is no record of any further proceedings on the appeal after that denial.

Thus, based on the record before the Court, PDC has not met its prima facie burden of showing that the tolling agreement was withdrawn prior to September 15, 2022. Absent such a withdrawal, the termination date of the tolling agreement is 90 days after September 15, 2022, or December 14, 2023. Since this action was commenced on December 13, 2023, at this stage, the complaint cannot be dismissed on the basis of the statute of limitations.

This decision is made without prejudice to PDC renewing this argument at a later time on a more developed record.

Mediation

Both causes of action in the complaint reference a contract. Article 9 of the contract at issue contains a dispute resolution section. NYSCEF #7. That section requires that "the parties shall endeavor to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association..." before any action or litigation is initiated.

This Court has the authority to stay, rather than dismiss, this action while the mediation proceeds (*Lakeland Fire Dist. v. East Area General Contractors, Inc.*, 16 A.D.3d 417, 417-18 [2d Dept 2005]) which the Court elects to do in this case, in the interest of justice.

The contract requires the mediation to be concluded within 60 days of requesting the mediation. In light of that agreed on time period, the Court shall stay this action until January 16, 2023, and the Court directs the parties to update the Court on or before January 16, 2023, regarding the progress of the mediation.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss is denied; and it is further

ORDERED that the parties shall mediate this dispute pursuant to the terms of the contract; and it is further

ORDERED that this action is stayed pending mediation until January 16, 2023; and it is further

ORDERED that the parties shall update the Court on the progress of mediation on or before January 16, 2023.

11/8/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

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LYLE E. FRANK, J.S.C.