

**Power A.C. Corp. v Batirest 229 LLC**

2024 NY Slip Op 30188(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 156497/2016

Judge: Margaret A. Chan

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

**PRESENT: HON. MARGARET A. CHAN PART 49M**

*Justice*

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POWER AIR CONDITIONING CORP.,

Plaintiff,

- v -

BATIREST 229 LLC, AGL INDUSTRIES, INC., PIZZAROTTI IBC LLC, GMC CONTRACTING & ESTIMATING SERVICE, INC., LITHOS CONSTRUCTION SOLUTIONS, INC., JOHN DOE AND JANE DOE 1-200, DON EMANUEL, IBC BUSINESS GROUPS LLC D/B/A IBC GROUPS LLC, RANCE MACFARLAND, and ANDREAS CHRISTOFAKIS,

Defendants.

-----X

PIZZAROTTI IBC LLC

Third-Party Plaintiff,

-against-

RANCE MACFARLAND

Third-Party Defendant.

-----X

BATIREST 229 LLC

Second Third-Party Plaintiff,

-against-

NEW YORK DESIGN ARCHITECTS, LLP, and JOSEPH SMERINA

Second Third-Party Defendants.

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INDEX NO. 156497/2016

MOTION DATE 07/14/2023

MOTION SEQ. NO. 009

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595775/2018

Second Third-Party  
Index No. 595777/2022

The following e-filed documents, listed by NYSCEF document number (Motion 009) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 256, 258, 259, 260, 261, 262, 263, 264, 265, 266

were read on this motion to/for DISMISSAL

In this lien foreclosure action, defendant/second third-party plaintiff Batirest 229 LLC (Batirest) commenced a second third-party action against second third-party defendants Joseph Smerina and New York Design Architects, LLP (NYDA, together with Smerina, the NYDA defendants), alleging six causes of action, including breach of contract, professional malpractice, gross negligence, and common law contribution and indemnification. In this motion (MS 009), the NYDA

defendants move to dismiss the second third-party complaint in its entirety under CPLR 3211 (a) (1), (5), and (7). Batirest opposes.

### **Background<sup>1</sup>**

The court assumes the parties' familiarity with the background of this case, which was detailed in Hon. Cynthia S. Kern's Decision and Order dated April 13, 2017 (NYSCEF # 98). In short, this matter arises from a construction project taking place at the premises located at 229 East 60th Street, New York, New York (the Premises). Batirest, as the owner of the Premises, initially engaged Pizzarotti IBC LLC and IBC Business Groups LLC d/b/a IBC Groups LLC (collectively, IBC) as general contractor for the project but later retained Lithos Construction Solutions Inc. (Lithos) to substitute IBC as successor general contractor. Plaintiff Power Air Conditioning Corp. (Power Air), a subcontractor, contracted with Batirest, as well as IBC and Lithos, for payments for its work on the project. Upon Batirest's alleged failure to make such payments, Power Air filed a mechanic's lien against the Premises. In August 2016, Power Air filed this instant action seeking to foreclose on its mechanic's lien and recover monetary damages for breach of contract and an account stated. Similarly, IBC and Lithos also filed mechanic's liens against the Premises for payments owed under their contracts with Batirest and commenced their respective lien foreclosure actions against Batirest.<sup>2</sup> The three lien foreclosure actions were consolidated per Hon. Cynthia S. Kern's Decision and Order dated March 17, 2017 (NYSCEF # 246).

Four years later, in June 2021, Batirest commenced the second third-party action against the NYDA defendants for allegedly preparing defective designs and not properly supervising contractors' work on the project (NYSCEF # 183, Batirest's Compl). Batirest alleges that it retained NYDA to perform architectural and project management services for the project under two contracts, both dated June 14, 2013: (i) Architectural, Engineering, & Project Management Contract (Batirest's Compl, ¶ 6; NYSCEF # 241 – A/E Contract); and (ii) Interior Design Contract (Batirest's Compl, ¶ 22; NYSCEF # 242 – Interior Design Contract). According to Batirest, NYDA breached both contracts by failing to perform its obligations properly, causing delays of the project and inflicting monetary damages on Batirest (Batirest's Compl, ¶¶ 15-20, 27-29). The first two causes of action in Batirest's complaint are for breach of contract under both agreements.

The remaining causes of action in Batirest's complaint are tort-based claims for negligence/professional malpractice (third cause of action), negligent misrepresentation (fourth cause of action), gross negligence (fifth cause of action), and common law contribution and indemnification (sixth cause of action). For these

<sup>1</sup> Except for facts in the first paragraph, which are taken from Hon. Cynthia S. Kern's Decision and Order dated April 13, 2017 (NYSCEF # 98), the following facts are derived from Batirest's second third-party complaint (NYSCEF # 183). For purposes of the NYDA defendants' motion to dismiss (MS 009), the allegations in Batirest's third-party complaint are accepted as true unless contradicted by documentary evidence.

<sup>2</sup> See action Index Nos. 156955/2016 and 157382/2016.

claims, Batirest asserts that the NYDA defendants failed to exercise due care in performing services for the project, breaching an architect's duty to (i) design architectural plans in compliance with applicable building codes and regulations, (ii) inspect the performance of work for construction defects, and (iii) inform Batirest of any non-conforming work (*see id.* ¶¶ 30-53). Batirest further avers that Power Air, IBC, and Lithos may recover their respective alleged damages from the NYDA defendants' negligence. And Batirest seeks common law indemnification or contribution from the NYDA defendants (*see id.* ¶¶ 54-59).

The NYDA defendants now move to dismiss the Batirest's third-party complaint in its entirety (NYSCEF # 254, MOL). They argue that Batirest's first five causes of action are subject to a three-year statute of limitations under CPLR 214 (6), which expired before Batirest filed its second third-party complaint (*id.* at 6-10). According to the NYDA defendants, the three-year limitations period is measured from the date that the architect's work on the project is substantially complete, which, in this case, is January 8, 2018, based on a letter of completion issued by the New York City Department of Buildings (NYSCEF # 235, DOB Letter). The NYDA defendants point out that Batirest's second third-party complaint filed on June 5, 2022, is more than four years past the January 8, 2018 date of completion (NYSCEF # 183).<sup>3</sup> Therefore, the NYDA defendants argue, Batirest's first five causes of action should be dismissed as time barred under CPLR 3211 (a) (1) and (5).

Additionally, the NYDA defendants contend that Batirest's tort-based claims—the third through fifth causes of action—should be dismissed under CPLR 3211 (a) (7) because they are for pecuniary losses only and are duplicative of Batirest's breach of contract claims (NYSCEF # 254 at 10-17). Finally, as to Batirest's sixth cause of action for common law contribution and indemnification, the NYDA defendants aver that (i) Batirest's contribution claim should be dismissed because it concerns only pecuniary losses, not personal injury, wrongful death, or injury to property, as required by CPLR 1401; and (ii) Batirest's common law indemnification claim should be dismissed because Batirest engaged in active wrongdoing by not paying Power Air, IBC, and Lithos the amounts owed under their respective contracts with Batirest, meaning that Batirest's liability in the main actions is not vicarious (*id.* at 17-18).

In opposition, Batirest argues that its claims are timely raised (NYSCEF # 261, Opp at 1-7). Batirest acknowledges that (i) a three-year statute of limitations applies to its claims regarding the NYDA defendants' architectural services, and (ii) the limitations period started running on January 8, 2018, when the architectural services on the project was substantially completed (*id.* at 2). However, Batirest asserts that the NYDA defendants "w[ore] multiple hats" on the project and acted as a project manager, not an architect, under the A/E Contract (*id.* at 3-7). Batirest

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<sup>3</sup> As shown in the case docket on NYSCEF, the second third-party complaint was initially filed on June 5, 2022, but subsequently returned for correction and then re-filed on September 30, 2022.

further asserts that its breach of contract claims for project administration services, unlike those for architectural services, are subject to a six-year statute of limitations under CPLR 213 (2) (*id.*). Thus, the first cause of action for breach of the A/E Contract is timely raised within the six-year period (*id.*). Further, Batirest argues that the statutes of limitations for its claims are tolled by its co-defendant Rance MacFarland's bankruptcy proceeding from January 7, 2019, to September 29, 2021, as well as by the Covid-19 executive orders from March 20, 2020, through November 3, 2020 (*id.* at 2-3, 6-7). Given this purported tolling of the limitations period, Batirest avers that all claims in the second third-party complaint are timely (*id.* at 7).

In reply, the NYDA defendants argue that the bankruptcy automatic stay does not toll the statute of limitations for Batirest's claims for the stay only applies to debtors and does not prevent Batirest from pursuing claims against the NYDA defendants, who are non-debtor third parties to MacFarland's bankruptcy proceedings (NYSCEF # 266, Reply MOL at 6-9). The NYDA defendants add that the A/E Contract should be governed by a three-year, not six-year, statute of limitations because all services provided under the A/E Contract are "common and ordinary services provided by a professional architect" (*id.* at 9-14).

### Discussion

The party seeking dismissal on statute of limitations grounds under CPLR 3211 (a) (5) bears the initial burden of establishing, prima facie, that the time in which to sue has expired (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept. 2011]). This, in turn, requires a showing of "when plaintiff's cause of action accrued" (*Swift v N. Y. Med. College*, 25 AD3d 686, 687 [2d Dept. 2006]). If, and only if, that showing is made, the burden shifts to the non-movant to raise a question of fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept. 2020]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). CPLR 3211 (a) (1), accordingly, allows for dismissal where "a defense is founded upon documentary evidence" (CPLR 3211).

However, dismissal under CPLR 3211 (a) (1) may result “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [internal citation and quotation omitted]).

*Applicable Statutes of Limitations (First Cause of Action)*

At the outset, the court notes that Batirest has conceded that (i) its claims against the NYDA defendants accrued on January 8, 2018, when the NYDA defendants’ work on the project was substantially completed, and (ii) its second through fifth causes of action are subject to a three-year statute of limitations under CPLR 214 (6) (NYSCEF # 261 at 2). However, Batirest argues that its first cause of action for breach of the A/E Contract should be governed by the six-year statute of limitations under CPLR 213 (2) (*id.* at 3-7). The court disagrees.

CPLR 213 (2) provides a six-year statute of limitations for breach of contract actions (CPLR 213 [2]; *Hagman v Swenson*, 149 AD3d 1, 5 [1st Dept 2017] [“[g]enerally, breach of contract actions are governed by CPLR 213 [2], which provides for a six-year statute of limitations”). In contrast, nonmedical malpractice actions, including architectural malpractice actions, are subject to a three-year statute of limitations under CPLR 214 (6), “regardless of whether the underlying theory is based in contract or tort” (CPLR 214 [6]). The legislative history of the 1996 amendment of CPLR 214 (6) demonstrates a clear legislative intent prohibiting “actions that were technically malpractice actions [from] proceed[ing] under a six-year contract statute of limitations” (*Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 541 [2004], citing Revised Assembly Mem in Support, Bill Jacket, L 1996, ch 623). This is to prevent “what is essentially a malpractice claim to be couched in breach of contract terms in order to benefit from the six-year statute of limitations” (*id.* at 543).

Determining whether a claim is essentially a claim for negligence/malpractice regardless of its theory of liability requires a court to “discern[] the essence of [the] claim” (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 68 [1st Dept 2015]). In confronting an analogous situation, the Court of Appeals in *Kliment* held that an apparent breach of contract claim against an architect is fundamentally a malpractice/negligence claim time-barred by CPLR 214 (6), where the contract provision that was breached simply required that the architect prepare design plans in compliance with building codes and regulations, thereby obligating the architect to meet its “ordinary professional obligations” (*Kliment*, 3 NY3d at 542-543; *see also Johnson*, 129 AD3d at 68 [“Thus, in *Kliment*, a breach of contract claim against an architect was barred because it merely sought to enforce a provision in an agreement that required the architect to prepare its plans in accordance with law, and failure to do so would have been the same as failing to carry out its professional obligations.”]).

Applying these principles, the court rejects Batirest’s argument that CPLR 213 (2) should apply to its first cause of action for breach of the A/E Contract.

Batirest relies on clauses in the A/E Contract that required the NYDA defendants to administer the project and review contractors' payment applications in order to argue that the NYDA defendants acted as project managers, not architects, in performing these services (NYSCEF # 261 at 5). But these obligations are among the standard terms in an architectural contract and are even included in the American Institute of Architects' Standard Form of Agreement Between Owner and Architect (NYSCEF # 265 – AIA Standard Form, §§ 3.6.2, 3.6.3). Moreover, the A/E Contract has specified that “provisions of the [AIA Standard Form] shall strictly apply to this agreement,” indicating that services provided under the A/E Contract are ordinary architectural services within the scope of the AIA Standard Form (NYSCEF # 241 at 4). Therefore, the breaches of the A/E Contract alleged by Batirest, such as failure to prepare design documents in compliance with building codes and regulations (Batirest's Compl, ¶ 15), fall within “an architect's ordinary professional obligations” and are essentially allegations of malpractice subject to CPLR 214 (6) (*Kliment*, 3 NY3d at 542-543).

At bottom, because the Legislature intended CPLR 214 (6) to govern nonmedical malpractice claims “regardless of whether the underlying theory is based in contract or tort” (*id.*; CPLR 214 [6]), Batirest cannot “circumvent the shorter statute of limitations for [nonmedical] malpractice” by coloring a malpractice claim as something else (*see New Canaan Capital Mgt., LLC v Chadbourne & Parke LLP*, 194 AD3d 424, 425 [1st Dept 2021] [applying CPLR 214 [6] to a fraud claim that is essentially a malpractice claim] [internal citations and quotations omitted]). The three-year statute of limitations under CPLR 214 (6) applies to Batirest's first cause of action for breach of the A/E Contract, which is fundamentally a malpractice/ negligence claim.

*Bankruptcy Automatic Stay (First Through Fifth Causes of Action)*

Batirest next argues that, even if its first five causes of action are subject to a three-year statute of limitations, the limitations period should be tolled from January 7, 2019 to September 29, 2021 by virtue of the automatic bankruptcy stay imposed by bankruptcy proceedings involving co-defendant MacFarland (NYSCEF # 261 at 2-3, 6-7). The court disagrees.

As provided in section 362 of the Bankruptcy Code, a bankruptcy automatic stay prohibits an action from continuing against a *debtor* in bankruptcy (*see* 11 USC § 362 [a] [1] [a bankruptcy petition “operates as a stay . . . of the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor”]). The stay pertains to the debtor and concerns property of interest to the debtor's estate (*see* 11 USC § 541 [a] [1]). The automatic bankruptcy stay, however, does not extend to claims against non-debtors (*Empire Erectors and Elec. Co., Inc. v Unlimited Locations LLC*, 102 AD3d 419 [1st Dept 2013]), unless such claims would have “an immediate adverse economic consequence of the debtor's estate” (*Queenie, Ltd. v Nygard Intern.*, 321 F3d 282, 287 [2d Cir 2003]).

Generally, in a lawsuit against multiple defendants, if one defendant files for bankruptcy, the automatic stay does not apply to non-debtor codefendants or “other defendants in the third-party action” (*see Iervolino v St. Mary’s Hosp. for Children*, 44 Misc 3d 1219[A], at \*3 [Sup Ct, Queens County, Aug. 4, 2014], citing *Rosenbaum v Dane & Murphy*, 189 AD2d 760, 761 [2d Dept 1993]; *see also Maynard v George A. Fuller Co.*, 236 AD2d 300, 300 [1st Dept 1997] [“The automatic stay provisions of the Federal bankruptcy laws apply only to the parties in the adversary proceeding in Bankruptcy Court and do not extend to nonbankrupt codefendants”). Thus, the underlying action and any third-party actions may proceed as against the nonbankrupt codefendants on claims that do not involve the bankrupt’s property (*see United Airlines, Inc. v Ogden New York Servs., Inc.*, 305 AD2d 239, 240-241 [1st Dept 2003] [“Contrary to respondent’s contention, the bankruptcies of other parties, and the resulting automatic stays, do not bar our resolution of this matter”]; *Goodstein v Enbar*, 2019 NY Slip Op 33339 [U], at \*8 [Sup Ct, New York County, Nov. 7, 2019], citing *Croyden Assocs. v Alleco, Inc.*, 969 F2d 675, 677 [8th Cir 1992] [“if during a litigation brought against two or more defendants, one of them seeks bankruptcy protection, the plaintiff may proceed as against the nonbankrupt codefendants on claims that do not involve the bankrupt’s property”]).

Under these rules, Batirest’s action against the NYDA defendants is not stayed by MacFarland’s bankruptcy proceedings. The NYDA defendants are non-debtor third parties to MacFarland’s bankruptcy proceedings, and Batirest’s claims against them for negligent architectural services do not concern MacFarland’s estate. Therefore, Batirest was free to commence and proceed with its claims against the NYDA defendants, and the automatic bankruptcy stay of MacFarland’s bankruptcy petition did not toll the three-year statute of limitations for Batirest to do so (*see Bank of New York Mellon v DeMatteis*, 222 AD3d 1, 4-5 [2d Dept 2023] [holding that a bankruptcy stay does not toll the statute of limitations for actions against nonbankrupt defendants, unless such actions concern the properties of debtor’s estate]).

Batirest’s reliance on *Lubonty v U.S. Bank N.A.* (34 NY3d 250, 255 [2019]) is misplaced (NYSCEF # 261 at 2-3, 6-7). While the *Lubonty* court determined that an automatic bankruptcy stay constitutes a CPLR 204 (a) statutory prohibition that tolls the statute of limitations for actions against a *debtor*, it did not hold the same for actions against *non-debtor third parties* (*Lubonty*, 34 NY3d at 258).

In sum, the automatic stay resulting from MacFarland’s bankruptcy did not toll the statute of limitations for Batirest to commence the second third-party action against the NYDA defendants. And because Batirest failed to commence this action within three years after its claims against the NYDA defendants accrued on January 8, 2018, Batirest’s first five causes of action are dismissed as time barred

under CPLR 3211 (a) (5) and CPLR 214 (6).<sup>4</sup> The court need not and does not reach the NYDA defendants' alternative argument that Batirest's tort-based claims (third through fifth causes of action) should also be dismissed under CPLR 3211 (a) (7) for failure to state a claim.

*Common Law Contribution and Indemnification (Sixth Cause of Action)*

Batirest's sixth cause of action is for common law contribution and indemnification. Both contribution and indemnification are predicated on the contributor/indemnitor' negligence (*see Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004] [a common law indemnification claim requires proof of some negligence on the part of the indemnitor]; *see also Burgos v 213 W. 23rd St. Group LLC*, 48 AD3d 283, 284 [1st Dept 2008] [a party "may seek contribution from another party whose culpable fault was also a cause of the injury"]). Here, the court has already dismissed Batirest's negligence claims against the NYDA defendants as time barred. Consequently, without any existing negligence claims as against the NYDA defendants, Batirest's claim for common law contribution and indemnification cannot stand (*see Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 504 [1st Dept 2009] [on a motion to dismiss where plaintiff's negligence claim was time-barred, plaintiff's common law indemnification claim also fails]; *see also Lulgjuraj v Brown Harris Stevens Residential Mgt. LLC*, 185 AD3d 502, 503 [1st Dept 2020] [granting summary judgment dismissing claims for common law indemnification and contribution because the negligence claims against the indemnitor/contributor had been dismissed]).

In any event, Batirest's common law contribution claim is dismissed under the economic loss doctrine. "Claims for contribution are governed by CPLR 1401 and apply to damages for personal injury, injury to property or wrongful death" only (*Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]). "[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property'" (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009]). Accordingly, "contribution is unavailable where a plaintiff's direct claims against a codefendant seek only a contractual benefit of the bargain recovery, tort language notwithstanding" (*Sendar Dev. Co., LLC*, 68 AD3d at 504; *see Bd. of Managers of Hudson St. Condominium v 195 Hudson St. Assoc., LLC*, 37 AD3d 312, 312 [1st Dept 2007] ["[b]ecause the damages sought by plaintiff on all of its causes of action are merely for economic loss, contribution is unavailable"] [internal citation and quotation omitted]). Here, Power Air in its lien foreclosure action against Batirest seeks recovery of purely economic loss for breach of contract and account stated (NYSCEF # 1). Contribution is therefore not available in these contract-based claims for purely economic loss

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<sup>4</sup> Batirest also argues that the Covid-19 executive orders tolled the statute of limitations of its claims from March 20, 2020 to November 3, 2020 (NYSCEF # 261 at 6-7). This argument is unavailing. Even assuming that the tolling is applicable to CPLR 214 (6)'s three-year period, Batirest still needed to commence its third-party action against the NYDA defendants no later than August 24, 2021, almost a year before June 5, 2022 (NYSCEF # 183).

(see *Children's Corner Learning Ctr.*, 64 AD3d at 323 [dismissing contribution claims for pure economic loss under CPLR 3211 [a] [7]]).

In short, Batirest's sixth cause of action for common law indemnification and contribution is dismissed under CPLR 3211 (a) (7).

**Conclusion**

In view of the above, it is hereby

ORDERED that second third-party defendants' motion to dismiss the second third-party complaint in its entirety is granted; and it is further

ORDERED that counsel for second third-party defendants New York Design Architects, LLP and Joseph Smerina shall serve a copy of this decision, along with notice of entry, on all parties within ten days of entry.

01/12/2024  
DATE

  
MARGARET A. CHAN, 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