SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** 17
Justice

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D.K. PROPERTY, INC.,

Plaintiff,

- v -

GZA GEOENVIRONMENTAL, INC.,DOUGLAS S. ROY, ROBERT SILMAN ASSOCIATES STRUCTURAL ENGINEERS, D.P.C.,MARVEL ARCHITECTS, LANDSCAPE ARCHITECTS, URBAN DESIGNERS PLLC,MACRO CONSULTANTS LLC

Defendant.

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INDEX NO. 152986/2021

MOTION DATE 06/21/2021, 06/21/2021, 06/25/2021, 06/25/2021

MOTION SEQ. NO. 001 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 63, 67, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 147, 160, 161, 162, 169, 170, 177, 181, 185

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 64, 68, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 148, 151, 163, 164, 165, 166, 171, 172, 180, 182, 186

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 65, 69, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 149, 153, 154, 155, 156, 173, 174, 178, 183, 187, 189, 190, 191

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 66, 70, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 150, 157, 158, 159, 175, 176, 179, 184, 188, 192, 193

were read on this motion to/for DISMISS.

In this action, inter alia, to recover damages for negligence, defendants Macro Consultants, LLC (Macro) (Motion Sequence 001), Marvel Architects, Landscape Architects, Urban Designers, PLLC (Marvel) (Motion Sequence 002), GZA GeoEnvironmental, Inc. and its principal Douglas S. Roy, P.E. (together GZA) (Motion Sequence 003), and Robert Silman

Associates Structural Engineers, D.P.C. (Silman) (Motion Sequence 004) each move pursuant to CPLR 3211 (a) (1), (5), and/or (7) to dismiss the complaint insofar as asserted against them respectively. Plaintiff opposes the motions and cross-moves to file an amended complaint pursuant to CPLR 3025 (b).

BACKGROUND

D.K. Property Inc. (plaintiff) is the owner of a property located at 40 Prince Street in Manhattan (the D.K. Property). Non-party 34 Prince Equities, LLC (the Owner) is the owner of an adjacent property located at 32-38 Prince Street (the Construction Property). The present action arises out of a construction project undertaken by the Owner involving the gut renovation and conversion of the Construction Property into condominium units and townhouses (the Project). Construction on the Project began in October 2014 and the final certificate of occupancy for the Project was issued in May 2019.

In 2016, during the course of the Project, plaintiff commenced an action against the Owner and the general contractor (*D.K. Properties Inc. v 34 Prince Equities, LLC*, [Sup Ct, NY County, Index No. 150920/2016]) (the 2016 Action). In that action, plaintiff alleges, among other things, that the foundation and exterior walls of the D.K. Property were improperly supported during the Construction Project, resulting in extensive damages to the D.K. Property. As of the date of this writing, the 2016 Action remains pending before this Court.

Defendants in the present action, commenced March 25, 2021, are entities allegedly retained by the Owner to perform the following functions on the Project: GZA as the support of excavation and geotechnical engineer; Silman as the structural engineer; Marvel as the architect; and Macro as the project manager (collectively defendants).

According to the complaint, GZA and/or Marvel and/or Silman designed the Project without underpinning the D.K. Property, despite the fact that in March 2014, GZA issued a report in which it concluded that it would be necessary to do so. Instead of adhering to GZA's original conclusion and accepted engineering standards, GZA and Silman created a plan providing for a lateral support system to justify the lack of underpinning at the D.K. Property. In creating this plan, GZA and Silman knew it would be insufficient to prevent shifting and movement of the D.K. Property.

The complaint further alleges that during the Project, one or more of the defendants removed the original rear masonry façade wall of the Construction Property which stood perpendicular to the east wall of the D.K. Property. The removal of the rear masonry wall further contributed to the movement and settlement of the D.K. Property in that the wall provided lateral support for the east wall of the D.K. Property. The masonry wall was replaced with a more flexible wall, thus disrupting and reducing the lateral support of the D.K. Property. This resulted in and/or contributed to the bulging of the east wall of the D.K. Property.

In addition, during the course of the Project, the foundation beneath the west wall of the Construction Property crumbled. Concrete was then poured at the base of the Construction Property's west wall, thereby fusing it to the east wall of the D.K. Property. The fusion of these two walls increased the load on the loose, sandy ground soil which was disturbed by the excavation and underpinning of the Construction Property. The disturbed soil and the lack of support permitted the fused walls and the D.K. Property to settle even further, far in excess of the amounts permitted by the New York City Building Code (Administrative Code of City of NY, title 28, ch 7) (Building Code or BC) and/or the New York City Department of Buildings (DOB) Technical Policy and Procedure Notice (TPPN) 10/88.

The complaint further alleges that GZA's plans called for the installation of micro piles complete with pile caps to create a vertical support system intended to support the vertical line load of the eastern edge of the Construction Property's foundation. However, such micro piles were never installed. Instead, soldier piles were installed. The soldier piles did not provide the requisite vertical support for the west wall at the Construction Property, or for the two walls fused together, further contributing to the damage at the D.K. Property.

Finally, as is relevant here, the complaint alleges that plaintiff retained its own engineer to monitor the Project. When monitoring conducted by plaintiff's engineer demonstrated that the movement at the D.K. Property was problematic, instead of stopping the work and fixing the issue, defendants made excuses and misrepresentations in order to continue the Project unabated, exacerbating the damages.

Based upon the foregoing allegations, the complaint contains six causes of action. The first cause of action alleges that all defendants violated certain sections of the Building Code and TPPN 10/88. The second cause of action alleges that all defendants failed to properly support the D.K. Property during the Project, causing severe structural damage. In the third cause of action, plaintiff seeks damages for negligent design against GZA, Silman, and Marvel. The fourth cause of action seeks damages for negligence against Macro for breaching its duty as project manager. The fifth cause of action seeks damages for fraud against GZA and Silman for making certain misrepresentations to plaintiff's engineer during the course of the Project intended to persuade plaintiff not to take emergency measures to stop the Project. The sixth cause of action is for gross negligence against all defendants.

In Motion Sequences 1 through 4, all defendants move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a)(1), (5) and/or (7). Plaintiff opposes the motions and cross-moves to amend the complaint pursuant to CPLR 3025 (b). [1]

DISCUSSION

To succeed on motion to dismiss pursuant to CPLR 3211 (a) (5) on the ground that it is time-barred, "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired," including when the cause of action accrued (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal quotation marks and citations omitted]). "Once that showing has been made, the burden shifts to the plaintiff 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][internal quotation marks and citation omitted]).

Dismissal of the complaint is warranted under CPLR 3211 (a) (7) "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). When a defendant moves for dismissal under CPLR 3211 (a) (1), the documentary evidence must "utterly refute[] plaintiff's factual

[1] In connection with the instant motion practice, plaintiff filed supplemental letters to this court noting that GZA, Silman, Marvel, and Macro were all impleaded by the defendants in the 2016 Action (NYSCEF Doc. Nos. 190, 192). The letters to the court assert, with little elaboration or specificity, that the instant action and the 2016 Action arise out of a "common nucleus of operative facts" and that plaintiff "seek[s], by [writing the letters], to avoid inconsistent and/or contradictory outcomes, judgments and/or orders between the two cases." The letters state that while plaintiff is not making a "specific ask," they urge that "the motions in this case should be carefully reviewed and decided in conjunction with the handling of the appearances of these same four parties in the [2016] Action." As best can be discerned, plaintiff is suggesting consolidation. However, none of the parties have moved for such relief, which may not be granted *sua sponte* (*see* CPLR 602 [a]; *DeSilva v Plot Realty, LLC*, 85 AD3d 422, 423 [1st Dept 2011]; *AIU Ins. Co. v ELRAC, Inc.*, 269 AD2d 412, 412 [2d Dept 2000]).

allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

First Cause of Action – Building Code and TTPN 10/88 Violations

In the first cause of action, plaintiff alleges that defendants failed to comply with various sections of the Building Code and violated TTPN 10/88. Such claims are subject to the three-year statute of limitations set forth in CPLR 214 (2), which governs actions "created or imposed by statute" (CPLR 214 [2]; *see Barklee 94 LLC v Oliver*, 124 AD3d 459, 460 [1st Dept 2015]). The claims accrue at the time of the completion of the construction (*see New York Yacht Club v Lehodey*, 171 AD3d 487, 487 [1st Dept 2019]; *Mindel v Phoenix Owners Corp.*, 17 AD3d 227, 228 [1st Dept 2005]).

Defendants all move under CPLR 3211 (a) (5) on the ground that this cause of action is time-barred. However, all defendants incorrectly use the statute of limitations standard for "injury to property" under CPLR 214 (4) rather than the standard for actions governed by statute under CPLR 214 (2). As such, the defendants did not provide evidence establishing that the relevant construction was completed on or before March 25, 2018, three years prior to the commencement of this action on March 25, 2021. Accordingly, the defendants did not meet their initial burden of demonstrating that this cause of action is time-barred and the action cannot be dismissed under CPLR 3211 (a) (5).

Defendants Marvel and Macro do not argue for dismissal under alternative sections of CPLR 3211 (a). As such, since the defendants did not meet their burdens of establishing that the first cause of action should be dismissed as time-barred, the motions to dismiss the first cause of action by Macro (Motion Sequence 001) and Marvel (Motion Sequence 002) are denied and the first cause of action remains as against those defendants.

However, defendants GZA (Motion Sequence 003) and Silman (Motion Sequence 004) argued for dismissal of the first cause of action pursuant to CPLR 3211 (a) (7) as well as under 3211 (a) (5). Dismissal of the first cause of action is warranted insofar as asserted against GZA and as against Silman pursuant to CPLR 3211 (a) (7). Most of the provisions at issue are codified in Chapter 33 of the Building Code, entitled "Safeguards During Construction or Demolition." Section 3309 of this chapter, entitled "Protection of Adjoining Property," includes the following provisions which plaintiff alleges were violated: BC 3309.1, BC 3309.4, BC 3309.4.1, BC 3309.4.4, and BC 3309.16.

BC 3309.1 provides: "Adjoining public and private property, including persons thereon, shall be protected from damage and injury during construction or demolition work in accordance with the requirements of this section. Protection must be provided for footings, foundations, party walls, chimneys, skylights and roofs." BC 3309.4 provides: "Whenever soil or foundation work occurs, regardless of the depth of such, *the person who causes such to be made* shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations" (emphasis added).

BC 3309.4 imposes strict liability for soil or foundation work that causes damage to adjoining structures (*see Moskowitz v Tory Burch LLC*, 161 AD3d 525, 527 [1st Dept 2018]). However, it only imposes liability upon "the person who causes" the soil or foundation work to be made (*see id.*). GZA, the geotechnical engineer on the Project, "was neither the owner of the [Construction] property nor the contractor who performed the excavation" (*87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541 [1st Dept 2014]). Similarly, Silman was neither the owner nor the contractor in its role as structural engineer on the Project (*see id.*). Therefore, GZA and Silman were not the persons "who caus[ed]" the work to be made within the meaning of BC 3309.4 (*see*

id.; see also Reiss v Professional Grade Constr. Group, Inc., 172 AD3d 1121, 1124 [2d Dept 2019]; *American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015]). For the same reason, GZA and Silman cannot be held liable under BC 3309.4.1 as it is also expressly applicable to persons "causing the excavation."

Sections BC 3309.4.4 and 3309.16 establish certain monitoring requirements applicable to excavation work. While these sections do not specifically mention that they are applicable to persons "causing" the work, reading them in the context of section 3309 as a whole, it is clear that GZA and Silman are not entities charged by the statute with ensuring that these requirements are adhered to.

The complaint also seeks damages for violation of BC 1814.3, alleging that this section "requires monitoring during any underpinning activities and during any site work within ninety feet of a landmarked building" (Complaint at ¶ 108). However, even assuming the D.K. Property is a landmarked building, this section of the Code, entitled "Determination of Allowable Loads," does not include such language or even mention monitoring or landmarked buildings.

The first cause of action also alleges that defendants failed to comply with TPPN 10/88. TPPN 10/88, dated June 6, 1988, sets forth the DOB's policy and procedure for the avoidance of damage to historic structures resulting from adjacent construction (NYSCEF Doc. No. 47). Even assuming the D.K. Property is a historic structure, TPPN 10/88 is not a statute and there is no support for the proposition that it creates a private right of action in favor of adjacent owners.

Thus, the first cause of action is dismissed insofar as asserted against GZA (Motion Sequence 003) and as against Silman (Motion Sequence 004).

Second, Third, and Fourth Causes of Action - Damages for failing to provide lateral and adjacent support to the D.K. Property, for negligently designing the support of excavation and foundation plans for the Construction Property, and breach of duty as project manager

The second, third, and fourth causes of action all sound in negligence. All defendants move to dismiss the second cause of action as asserted against them. Marvel, GZA, and Silman move to dismiss the third cause of action as asserted against them. Macro moves to dismiss the fourth cause of action as asserted against it.

Each defendant correctly argues that plaintiff's negligence claims are time-barred under the three-year statute of limitations applicable to actions seeking damages for "injury to property" (CPLR 214 [4]). Such claims accrue when the damage occurs (*see Verizon-New York, Inc. v Reckson Assoc. Realty Corp.*, 19 AD3d 291, 291 [1st Dept 2005]). To establish when the damage occurred, the defendants rely on documents filed in the 2016 Action.

Specifically, plaintiff filed documents, dated December 2015, wherein the engineer plaintiff hired to monitor the Project, Guy Lagomarsino, P.E., opined that the Project had caused bulging and cracking, and had undermined the strength and stability of the D.K. Property (NYSCEF Doc. No. 44). Plaintiff also stated that there was evidence of structural damage in 2014 and that the physical damage was noticed in 2015 in its Verified Bill of Particulars in the 2016 Action (NYSCEF Doc. No. 33). Thus, the defendants each established that the damage occurred, at the latest, in December 2015 and that plaintiff was aware of the damage at that time. Since the present action was not commenced within three years of that date, the negligence causes of action are time-barred.

In opposition, plaintiff argues that the three-year statute of limitations for malpractice against nonmedical professionals set forth in CPLR 214 (6) applies. Such claims accrue upon

"the actual completion of the work to be performed and the consequent termination of the professional relationship" (*Anderson v Pinn*, 185 AD3d 534, 535 [2d Dept 2020] [internal quotation marks and citations omitted]; *see Brushton-Moira Cent. Sch. Dist. v Thomas Assoc., P.C.*, 91 NY2d 256, 261 [1998]). Plaintiff argues that the Project was not completed until May 31, 2019, when the final certificate of occupancy was issued. Since plaintiff initiated this action within three years of that date, the aforementioned causes of action are timely. Plaintiff's contention in this regard is unavailing.

There is no dispute that plaintiff did not have a written agreement with any of the defendants. Rather, the complaint alleges that the defendants each contracted with the Owner for the work performed on the Project (Complaint ¶¶ 29-32). "Because the parties have no contractual relationship with each other, the claim must be viewed in terms of simple negligence with accrual occurring within three years of the date of injury, rather than a claim for professional negligence, which generally accrues upon the completion of the work at issue" (*All Craft Fabricators, Inc. v Syska Hennessy Group, Inc.*, 144 AD3d 435, 435-436 [1st Dept 2016] [citations omitted]; *see Cubito v Kreisberg*, 69 AD2d 738, 742 [2d Dept 1979], *affd* 51 NY2d 900 [1980]; *905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]). As such, the second, third, and fourth causes of action are general negligence claims against Macro (Motion Sequence 001) (second and fourth causes of action), Marvel (Motion Sequence 002) (second and third causes of action), GZA (Motion Sequence 003) (second and third causes of action), and Silman (Motion Sequence 004) (second and third causes of action) for property damage, not professional malpractice claims, and are therefore time-barred.

Plaintiff argues that even though it was not in direct privity with any of the defendants, it had a privity-like relationship with each defendant and therefore, it has the right to bring an

action for professional malpractice against the defendants. In support of its argument that such a relationship exists, plaintiff characterizes the second and third causes of action as negligent misrepresentation claims and cites to case law holding that liability may be imposed on third parties for negligent misrepresentation where certain prerequisites are satisfied (*see e.g. Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989][liability for negligent misrepresentation may attach in favor of a party not in direct privity with plaintiff only where (1) there is an awareness by defendant that the statement will be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the defendant linking it to the relying party and evincing its understanding of that reliance]). The problem with plaintiff's argument is that it relies upon the rule applicable to sustaining a claim for negligent misrepresentation, whereas the second and third causes of action are not based upon allegations of negligent misrepresentation. They are based upon allegedly negligent acts or omissions taken by the defendants in the context of performing under its contract with the Owner which damaged plaintiff's property. These causes of action do not allege that any misrepresentations made by the defendants damaged plaintiff's property.

In arguing that a relationship close to privity exists, plaintiff also argues that "[w]here as here, a third party is the only party that can recover for damage and that third party is not a stranger to the contract, it is the functional equivalent of privity" (Plaintiff's Mem of Law at 7, NYSCEF Doc. No. 127, citing). The case relied upon by plaintiff for this proposition, *Dormitory Auth. of the State of N.Y. v Samson Constr. Co.* (30 NY3d 704, 710 [2018]), involves a third party's right to enforce a contract. In that case, the Court of Appeals stated that "a third party's right to enforce a contract [exists] in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was an

intent to permit enforcement by the third party" (*id.* [internal quotation marks and citations omitted]). Plaintiff's reliance on *Dormitory Auth. of the State of N.Y.* is misplaced because under the second, third, and fourth causes of action, plaintiff is not seeking to enforce a contract and, in any event, plaintiff is not the only party who could recover for breach of the contracts between the defendants and the Owner. Nor is plaintiff contending that the contract includes an intent to permit enforcement by plaintiff.

Finally, plaintiff argues that the negligence claims are not time-barred because of the "doctrine of continuous violation." In this regard, plaintiff contends that the concrete which fused the east wall of the D.K. Property to the Construction Property encroaches/trespasses on the D.K. Property without plaintiff's permission, tolling the statute of limitations until the concrete is removed. However, the complaint does not seek damages for trespass. The complaint alleges that the fusing of the walls contributed to the property damage.

Thus, the second and third causes of action are dismissed insofar as asserted against Marvel (Motion Sequence 002), GZA (Motion Sequence 003), and Silman (Motion Sequence 004) and the second and fourth causes of action are dismissed insofar as asserted against Macro (Motion Sequence 001).

Fifth Cause of Action - Damages for Fraud

A cause of action to recover damages for fraudulent misrepresentation must be commenced within six years of the fraud or within two years of the time the fraud was discovered "or could with reasonable diligence have [been] discovered," whichever is greater (CPLR 213 [8]; *see* CPLR 203 [g]). Here, plaintiff alleges in support of the fifth cause of action that GZA made two fraudulent misrepresentations to Lagomarsino during the course of the Project and alleges that

Silman made fraudulent misrepresentations over the course of a letter exchange between Silman and Lagomarsino.

One alleged misrepresentation by GZA occurred on or about January 14, 2015. The complaint alleges that on that date, GZA issued a statement wherein it represented that an "integral and material part of the underpinning design of the Construction Property was the installation of micro piles for support of the Construction Property's foundations" (Complaint at ¶ 65). Plaintiff alleges that, contrary to GZA's statement, micro piles were not installed at the Construction Property. Rather, "soldier piles [were installed,] which do not provide the requisite vertical support for the West Wall at the Construction Property alone, never mind the two walls fused together" (*id.* at ¶ 69). The complaint alleges that plaintiff "detrimentally, but justifiably relied upon GZA's statement [as to the installation of micro piles] in deciding not to affirmatively act to prevent the continuation of the support of excavation and foundation process at the Construction Property" (*id.* at ¶ 154).

Plaintiff did not commence this action within six years of this alleged misrepresentation -- i.e., before January 14, 2021. Therefore, the question is whether plaintiff discovered, or with reasonable diligence could have discovered, the alleged fraud more than two years before commencement -- i.e., before March 25, 2019.

"[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*Aozora Bank, Ltd. v. Credit Suisse Group*, 144 AD3d 437, 438 [1st Dept 2016] [quotation marks and citation omitted]). GZA must make a prima facie showing that plaintiff was on such inquiry notice of its fraud claim more than two years

before the action was commenced. The burden then shifts to plaintiff to establish that even if it had exercised reasonable diligence, it could not have discovered the basis for its fraud claim (*see id.*).

In support of its motion, GZA proffered evidence demonstrating that plaintiff discovered or could have discovered the alleged fraud by February 2016. Specifically, an affidavit submitted by Lagomarisno on plaintiff's behalf in the 2016 Action, dated February 3, 2016, states that Lagomarisno conducted a "Property Condition Assessment" in order to "provide an independent, professional study of the deep excavation, *underpinning*, removal of soil, shoring, *and piles at the Project*, and its impact on" the D.K. Property (the Lagomarsino Affidavit) (NYSCEF Doc. No. 43 at ¶ 6 [emphasis added]). Lagomarsino concluded, among other things, that the piles installed at the Construction Property failed to provide proper protection for the D.K. Property (*id.* at ¶ 10). This demonstrates that by February 2016, plaintiff was on inquiry notice. In opposition, plaintiff failed to satisfy its burden to show that if it had exercised reasonable diligence, it could not have discovered the basis for its claim.

The complaint alleges that the second misrepresentation by GZA occurred in December 2015, when GZA "misrepresented in a letter that 'ongoing automated survey monitoring of the east façade [of the DK Property] has shown minimal vertical and lateral movement since our initial installation'" (*id.* at ¶ 83). The complaint alleges that this false statement was made even though prior data showed that movement exceeded permissible limits and the fact that there was a gap in data between October 14, 2015 through November 15, 2015. GZA was "informed that cracks were forming at the [DK Property] at the very beginning of this gap in data, which calls into question as to whether this gap in data was missed, lost or purposefully suppressed or destroyed" (*id.* at ¶ 87). According to the complaint, plaintiff "justifiably relied" on GZA's statements about

the recorded movement "in permitting construction to continue without taking emergency measures to stop the Project and have the condition immediately remediated" (id. at ¶ 159).

Since plaintiff commenced this action within six years of the date this statement was made, i.e., before December of 2021, it is not time-barred. Nevertheless, the claim is subject to dismissal pursuant to CPLR 3211 (a) (1).

"A cause of action to recover damages for fraudulent misrepresentation requires a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*R. Vig Props., LLC v Rahimzada*, 213 AD3d 871, 872 [2d Dept 2023][internal quotation marks and citations omitted]; see (*see Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 139 [1st Dept 2014]). A material element of negligent misrepresentation is "reasonable or justifiable reliance" (*Izhaky v Izhaky*, 215 AD3d 588, 589 [1st Dept 2023]).

Plaintiff alleges that GZA's misrepresentation about the recorded movement induced it to forgo taking emergency measures to stop the construction. However, plaintiff sought an injunction to do so less than two months later in the 2016 Action. More importantly, the Lagomarsino Affidavit states that he assessed the condition of the D.K. Property before the Project began and thereafter monitored the Project, including the movement, and its impact on the D.K. Property on a regular basis beginning in December 2014. Other documents submitted by GZA in support of the motion also demonstrate the Lagomarsino continually monitored the Project on site, took regular measurements of the movement, documented the damage and challenged the construction, measurements, and design throughout the Project (NYSCEF Doc. No. 44). Therefore, plaintiff

had the means to, and did in fact, collect its own data. In light of the foregoing, the reasonable reliance element is refuted by the documentary evidence.

Plaintiff's cause of action for fraud against Silman is not time-barred because the alleged statements were made less than six years before the action was commenced. Nevertheless, they, too, can be dismissed under CPLR 3211 (a) (1). First, plaintiff alleges in its complaint that Silman made a series of misrepresentations in letters between Silman and Lagomarsino. Specifically, plaintiff first alleges that in one such letter in January 2016, Silman falsely claimed that the South Wall was not providing lateral support to the neighboring property and stated that "there is a visible gap between the two buildings for the entire length of the wall" of the Construction Property (Complaint at ¶¶ 59, 163). Plaintiff alleges that it "detrimentally though justifiably relied" on the statement by not "forcing . . . restoration of the buttressing between the Replacement wall and the east wall of the Neighboring Property" (*id.* at ¶ 164). Plaintiff alleges that Silman knew the statement was false or had reckless disregard for the truth while making the statement because "there is zero evidence of this claim" and that the Neighboring Property in fact shifted when the South Wall was removed (*id.* at ¶ 165). Plaintiff similarly alleges that an October 2015 statement made by Silman "misrepresented that the data showed movement in [the] amount of under a quarter of an inch" (*id.* at ¶ 157). Plaintiff allegedly detrimentally relied on this statement by "permitting construction to continue without taking emergency measures to stop the Project and have the condition immediately remediated" (*id.*at ¶ 159).

In support of its motion, Silman argues that the documentary evidence shows that Plaintiff could not have, and did not, reasonably rely on the statements because plaintiff's own engineer had the same opportunity to examine the condition of the walls and came to the opposite conclusion with respect to both the 2015 and the 2016 statements. Silman relies on the same Lagomarsino

affidavit from the 2016 Action to show that Lagomarsino had been "monitoring and evaluating the structure at 40 Prince Street since December of 2014, with survey points and 7 motion sensors placed at critical points around the structure," providing him the opportunity to come to a different conclusion (NYSCEF Doc. No. 43 at ¶ 11). This refutes the statements made in plaintiff's opposition that plaintiff exercised reasonable reliance as it "was at the mercy of Defendants to ensure that no harm would occur to its property" (NYSCEF Doc. No. 146 at 13). As such, plaintiff did not sufficiently meet the requirement of alleging that it justifiably relied on this statement (*See Izhaky*, 215 AD3d at 589).

To refute the allegation that plaintiff relied on the January 2016 statement Silman, like GZA, proffers that plaintiff filed an order to show cause in the 2016 action seeking a temporary restraining order to stop the construction less than two weeks after these alleged misrepresentations were made. Silman also submits the letter exchanges between Silman and Lagomarsino showing that Lagomarsino had been conducting its own monitoring of the movement on the property and coming to different conclusions, negating the allegation that plaintiff justifiably relied on Silman's conclusions (*see, e.g.*, NYSCEF Doc. Nos. 56-59).

As plaintiff did not adequately plead fraudulent misrepresentation, plaintiff's fifth cause of action is dismissed insofar as asserted against GZA (Motion Sequence 003) and Silman (Motion Sequence 004).

Sixth Cause of Action - Damages for Gross Negligence for, inter alia, failing to stop work contrary to the SOE Plans once movement thresholds were met and/or exceeded in reckless disregard for the condition and/or consequence to the D.K. Property

Plaintiff's claim for gross negligence is governed by the three-year statute of limitations applicable to tort actions set forth in CPLR 214 (4) (*see Zuckerbrod v New York Tel. Co.*, 87 AD2d

574, 575 [2d Dept 1982]). As already noted, such claims accrue when the damage occurs (*see Verizon-New York, Inc. v Reckson Assoc. Realty Corp.*, 19 AD3d at 291) and for the reasons already discussed, all parties demonstrated that the alleged damage to the D.K. Property occurred no later than December 2015. Since the present action was not commenced within three years of that date, the gross negligence cause of action is time-barred.

Thus, the sixth cause of action is dismissed insofar as asserted against Macro (Motion Sequence 001), Marvel (Motion Sequence 002), GZA (Motion Sequence 003), and Silman (Motion Sequence 004).

PLAINTIFF'S CROSS-MOTION TO AMEND THE COMPLAINT

Plaintiff cross-moves for an order granting leave to serve an amended complaint in accordance with CPLR 3025 (b). Leave to amend a complaint pursuant to CPLR 3025 (b)

> "should be freely granted, so long as there is no surprise or prejudice resulting from the delay to the opposing party and the proposed amendment is not palpably insufficient or patently devoid of merit. Whether to grant an amendment is committed to the discretion of the court. The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt"

(*Ferrer v Go N.Y. Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023] [internal quotation marks and citations omitted]).

Plaintiff's proposed amended complaint, inter alia, seeks to assert a new, alternative, cause of action against all defendants sounding in breach of contract on a third-party beneficiary theory. This cause of action is patently devoid of merit.

> "[A]n intention of the parties to a contract to benefit a third party, thereby conferring on the third party the right to enforce the contract, will be found (apart from situations where the third party is the only party that could recover for the breach) only when it is . . . clear from the language of the contract that there was an intent to permit enforcement by the third party. Thus, it is well established that a third party cannot be deemed an intended beneficiary of a contract unless the parties' intent to benefit the third party . . . [is] apparent from the face of the contract"

(*Commissioner of the Dept. of Social Servs. of the City of N.Y. v New York-Presbyt. Hosp.*, 164 AD3d 93, 98 [1st Dept 2018] [internal quotation marks and citations omitted]).

Here, plaintiff does not allege that it is the only party that could recover for breach of the contract between each defendant and the Owner. Therefore, in order for plaintiff to be deemed a third-party beneficiary, it must be otherwise clear from the face of the subject contract that there was an intent to permit enforcement by plaintiff. However, plaintiff does not allege that it is clear from the language of the contract that there was an intent to permit enforcement by plaintiff (*see Merlino v Knudson*, 214 AD3d 642, 645 [2d Dept 2023]). Moreover, in opposition to the cross-motion, each defendant argues that plaintiff cannot prove it is an intended third-party beneficiary able to recover under each defendant's respective contract with the Owner. GZA submits a copy of the contract between itself and the Owner, which clearly indicates that plaintiff is not the only party who could recover for a breach and that the contract was not intended to benefit plaintiff (*see* GZA Contract at ¶¶ 7, 13, 20[j] [NYSCEF Doc. No. 155]). Macro, Marvel, and Silman each submit a copy of its respective contract with the Owner, where there is no mention of Plaintiff or any third-party beneficiary able to enforce or recover under any of their three contracts (*see* Macro Contract [NYSCEF Doc. No. 162]; Marvel Contract [NYSCEF Doc. No. 164]; Silman Contract [NYSCEF Doc. No. 60]).

Plaintiff also seeks to amend its cause of action for fraud by setting forth new allegations to the effect that while Lagomarsino made observations and raised issues where possible with regard to the construction and damage caused by the Project, the Owner denied Lagomarsino access to the Construction Property, thereby depriving Lagomarsino of information he needed to reach "firm conclusions" regarding whether the Project was being performed in a manner which would protect the D.K. Property and not cause damage to it (Amended Complaint at ¶ 172,

NYSCEF Doc. No. 113). These allegations, intended to bolster plaintiff's contention that its reliance on the alleged misrepresentations was reasonable and justified, are not sufficient to render the fraud claim as asserted against GZA or Silman viable. Given Lagomarsino's own data collection, observations, and concerns, the Owner's alleged denial of access in order for him to investigate further would suggest to a person of ordinary intelligence the probability that plaintiff was being defrauded.

Thus, the cross-motion is denied insofar as it seeks to amend and/or add claims against all defendants.

CONCLUSION

On the basis of the foregoing, it is

ORDERED that the motions by defendants GZA GeoEnvironmental, Inc. and Douglas S. Roy, P.E. (Motion Sequence 003) and by Robert Silman Associates Structural Engineers, D.P.C. (Motion Sequence 004) to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a) is granted; and it is further

ORDERED that the motion by defendants Macro Consultants, LLC (Motion Sequence 001), dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) is granted to the extent that the second, fourth, and sixth causes of action are dismissed as against it but denied to the extent that the first cause of action is not dismissed as against it and remains; and it is further

ORDERED that the motion by and Marvel Architects, Landscape Architects, Urban Designers, PLLC (Motion Sequence 002) to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) is granted to the extent that the second, third, and sixth causes of

action are dismissed as against it but denied to the extent that the first cause of action is not dismissed as against it and remains; and it is further

ORDERED that plaintiff's cross-motion for leave to file an amended complaint pursuant to CPLR 3025 (b) is denied.

January 26, 2024
DATE

SHLOMO S. HAGLER, J.S.C.

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