

Mahon v Villa Constr., Inc
2024 NY Slip Op 35247(U)
July 11, 2024
Supreme Court, Westchester County
Docket Number: Index No. 64548/2023
Judge: Janet C. Malone
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PATRICK MAHON and LORIANE ECHINARD, Index No. 64548/2023

Plaintiffs,

- against -

DECISION AND ORDER

VILLA CONSTRUCTION, INC, AMERICAN PILE
AND FOUNDATION, LLC, TOWN OF MAMARONEK¹
and VILLAGE OF MAMARONECK,

Motion Sequence No. 1-2

Defendants.

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MALONE, J.

Plaintiffs are the fee owners of residential property located at 640 Hillside Ave in Mamaroneck,² County of Westchester, State of New York (the “Premises”). This lawsuit commenced by Plaintiffs on August 2, 2023, alleges property damage sounding in negligence, arising from construction work performed at the Hillside Avenue Bridge, alleged to be owned and maintained by Defendants Town of Mamaroneck (the “Town”) and Village of Mamaroneck (the “Village”) (Complaint, NYSCEF Doc. No. 1). The Town and Defendants American Pile and Foundation, LLC (“Pile”), and Villa Construction, Inc. (“Villa”) appeared and answered with general denials and cross-claims (NYSCEF Doc. Nos. 4, 6, 24 respectively).

Now, before the Court for determination are two motions to dismiss Plaintiffs’ complaint: The first motion) is the Village’s pre-answer motion to dismiss the Complaint on the ground that Plaintiffs’ claim is time-barred in accordance with GML §50-i (CPLR R. 3211[a][5]) and to dismiss the Complaint and cross-claims on the ground that the Village has the defense of government immunity defense(Motion Sequence No. 1, NYSCEF Doc. Nos. 9-12; 38). Second, is the Town’s motion to dismiss the Complaint also on the ground that the action is time-barred

¹ Mamaroneck is misspelled in the caption of both the Summons and Complaint.

² The Court is unable to determine whether the premises are located in the Village and/or the Town of Mamaroneck.

(CPLR R. 3211[a][5]) and for summary judgment (CPLR R. 3212) on to dismiss the Complaint and cross-claims on the ground that the Town had no duty to Plaintiffs (Motion Sequence No. 2, NYSCEF Doc. Nos. 14-22, 39-42).

Plaintiff opposes both motions (NYSCEF Doc. Nos. 36 and 37). Defendants Pile and Villa did not file any opposition to the motions to dismiss the cross-claims against the Village and Town.

Upon the foregoing papers, the motions are consolidated and the motions are granted as follows:

Factual Allegations

The Hillside Avenue Bridge (the “Bridge”), which is owned and maintained by the Village and the Town, is adjacent to and abuts the Premises. At a time prior to April 29, 2018³, the Village entered into a contract with Villa to perform construction work at and adjacent to the Premises. Then prior to November 2021, the Town entered into a contract with Villa for Villa to perform certain construction work at and adjacent to the Premises (see Complaint [NYSCEF Doc. No. 1] at ¶¶ 30, 29).

The construction work that Villa and Pile started at the Bridge on or about November 2021 and continued through the summer 2022; and as a result of Villa’s and Pile’s construction work performed at the Bridge, Villa and Pile left the Premises in disrepair and in a dangerous condition; (*id.* at ¶¶ 32-34) with damage to an uninhabitable garage and the Premises, grounds and subsidiary structures (*id.* at ¶¶14-24).

The Village and the Town controlled the design, construction, layout, and approval process for all construction work done at the Bridge and/or adjacent to the Premises; and the Village and Town had a duty to properly design, construct, layout, inspect and approve all construction work which was the subject of permits and maintain the construction work on and/or adjacent to the Premises. (*id.* at ¶¶25-29). When the construction work by Villa and Pile was completed, the Town and Village inspected and approved the construction; and by virtue of these actions, the Town and the Village had prior actual notice, and prior written notice, of the improper construction work, and otherwise unreasonably caused damage to the Premises on and after November 2021 through the summer of 2022. Additionally, the Village and Town negligently constructed, designed, planned and supervised construction causing substantial damages to the Premises (*id.* at 34-37).

³ The Court notes this may be a scrivener’s error (see NYSCEF Doc. No. 21).

In August 2022,⁴ Plaintiffs filed a Notice of Claim on the Village and the Town and subsequent a hearing was held pursuant to GML §50-h. 41

Statute of Limitations

“A defendant who seeks dismissal of a complaint pursuant to CPLR R. 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired” *O'Brien v County of Nassau*, 164 AD3d 684, 685 (2d Dept 2018)(internal quotations and citations omitted). “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 [a question] of fact as to whether such an exception applies, or [as to whether] the cause of action was interposed within the applicable statute of limitations” *Sullivan v. Keyspan Corp.*, 155 AD 3d 804, 805 (2d Dept. 2017) (internal quotations and citations omitted).

Generally, “[a]n action seeking to recover damages for an injury to property must be commenced within three years of accrual” *Russell v. Dunbar*, 40 AD3d 952, 952 (2d Dept. 2007). However, in an action against a municipality “General Municipal Law §50-i provides that tort actions against municipalities shall be commenced within one year and 90 days after the happening of the event upon which the claim is based.” *Methal v. Village of Ardsley*, 218 AD3d 561, 562 (2d Dept. 2023). Further, a “cause of action for property damage "accrues when the damage is apparent"” *Klostermeier v. City of Port Jervis*, 200 AD 3d 866 (2d Dept. 2021); *Atlantic Express Trans. Corp. v. Weeks Mar., Inc*, 69 A.D.3d 903 (2nd Dept. 2009) (damage to the building accrued when the roof leak occurred, not when additional damage including cracks and molding separation from the wall developed. The statute of limitations begins to run at the first sign of damage, even when the damage progressed).

To the extent that Plaintiffs allege that the Town and the Village “unreasonably caused damage to the [] Premises on and after November 2021 and continuing to through summer of 2022” (NYSCEF Doc. No. 1, ¶ 36), and as the action was commenced on August 2, 2023, the Town and the Village have carried their burdens, thereby shifting the burden to Plaintiff. Giving Plaintiffs the benefit of every possible favorable inference (*Cruz v. City of New York*, 211 AD3d 1011, 1011 [2d Dept. 2022]), they have failed to meet their burden.

⁴ The Complaint states that the Notice of Claim was served on August 22, 2012 (NYSCEF Doc. No. 1, ¶40).

Plaintiffs argue that this Court should not consider the “date of loss of November 2021 for statute of limitations purposes” because the damage alleged from each act of piling the ground is a continuing tort that tolls the limitations period (NYSCEF Doc. No. 36 at ¶¶26; No. 37 at ¶¶29, 31) relying on the case of *Tompkins v. State*, 33 Misc. 2d 828 (Ct of Claims, 1962, which is misplaced.

The *Tompkins* case does not address what constitutes a continuing tort in a property damage action but simply addresses the period of time for which a plaintiff in a continuing tort action can obtain damages and “in those cases involving suits against governmental bodies where Statutes of Limitation and prior notice govern the plaintiff's right to sue.” The *Tompkins* court found that plaintiff lost “the right to include in the relief an award of damages antedating by more than thirty days the presentation of the notice in statutory form” *id.* at 829-830. Moreover, *Tompkins* is not binding authority on this Court as it is from the Court of Claims, a court of coordinate jurisdiction.

Further, Plaintiffs do not set forth a separate nuisance cause of action, and thus, have failed to allege a continuous tort. *Town of Oyster Bay v. Lizza Indus, Inc.*, 22 NY 3d 1024 (2013)(“It is well-settled, however, that injuries to property caused by a continuing nuisance involve a “continuous wrong” and, therefore, generally give rise to successive causes of action that accrue each time a wrong is committed”). Here, Plaintiffs have not set forth the dates of separate acts by the Town and Village that brought about damage to their property.

Regardless, GML §50-i was enacted in 1959 and GML §50-e in 1945, and remain the statutory authority when assessing if the statute of limitations against a plaintiff’s property damage claim has run against a municipality. Thus, the Village’s and the Town’s motions are granted.

Any issues raised by the parties that are not addressed herein lack merit or are moot based on the foregoing.

Accordingly, it hereby

ORDERED, that Defendant Village of Mamaroneck’s motion to dismiss (Motion Seq. No. 1) is granted in its entirety; and the Complaint and cross-claims against it are dismissed; and it is further

ORDERED, that the Defendant Town of Mamaroneck’s motion to dismiss (Motion Seq. No. 2) is granted; and the Complaint and cross-claims against it are dismissed; and it is further

ORDERED, that based on the foregoing, the caption is conformed as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
PATRICK MAHON and LORIANE ECHINARD,

Index No. 64548/2023

Plaintiffs,

- against -

VILLA CONSTRUCTION, INC, AMERICAN PILE
AND FOUNDATION, LLC,

Defendants.
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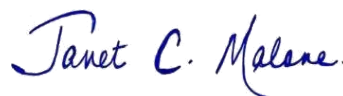
and it is further,

ORDERED, that the remaining parties are hereby directed to submit a fully executed proposed preliminary conference stipulation which can be located at [west-general-civil-preliminary-confstip-form.pdf \(nycourts.gov\)](#) no later than **July 31, 2024** or appear for a preliminary conference on **August 5, 2024 at 3:00 pm** via Microsoft Teams – [Click here for the videoconference](#) .

This constitutes the Decision and Order of the Court.

Dated: July 11, 2024
White Plains, New York

ENTER:



HON. JANET C. MALONE, J.S.C.