SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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AIG PROPERTY CASUALTY COMPANY

Plaintiff,

- v -

DEMAR PLUMBING CORP.,

Defendant.

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INDEX NO. 157496/2024

MOTION DATE 03/06/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24

were read on this motion to/for DISMISS.

Plaintiff AIG Property Casualty Company, as subrogee of 443 Greenwich St PHC LLC, commenced this action on August 15, 2024, seeking $451,769.78 it paid its insured for water damage that occurred on September 1, 2021, when water allegedly infiltrated through the roof and waste drain of Penthouse C at 443 Greenwich Street.

Defendant Demar Plumbing Corp. had been retained by 443 Developer LLC under an August 12, 2014 subcontract to perform plumbing work, including installation of roof drainage piping, which the New York City Department of Buildings inspected and approved in May and September 2016, followed by issuance of a temporary certificate of occupancy on February 10, 2017. Demar argues its work was completed and approved years before the loss, rendering the complaint untimely, while AIG maintains that, as it was not in contractual privity with Demar, its negligence claim accrued on the date of the water damage and was timely filed within three years of that occurrence

Defendant Demar Contracting, Inc. moves to dismiss Plaintiff's complaint pursuant to CPLR 3211(a)(1), CPLR 3211(a)(5) and 3211(a)(7), arguing that Plaintiff's complaint should be dismissed pursuant to documentary evidence, and that it is untimely and fails to state a claim.

Pursuant to 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 [1994]).

Pursuant to CPLR 3211 (a)(7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion, the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. (*See* CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980)). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. (See *Leon v Martinez*, 84 NY2d 83, 87 (1994)).

New York law holds that "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." (*Espinal v. Melville Snow Contractors, Inc*, 98 NY2d 136 [2002]). There are also generally 3 scenarios in which a contractor may be liable to a third party – first, if the contractor causes or creates the condition alleged to have caused injury, second, if the contractor is responsible for the third-party's injury when that third-party detrimentally relies on the contractor's continued performance or third, when the contract is comprehensive and exclusive as to maintenance, such that the contractor assumes the owner or possessors duty to safely maintain the premises. (Id.). Here, the documentary evidence provided by Defendant does not sufficiently prove that Defendant did not create the condition alleged to have caused injury. Plaintiff alleges that the work done by Defendant was the cause of the injury, and none of the documentary evidence provided proves that Defendant's work was free of issue

which would absolve it of liability. Defendants rely on their contractual obligation and certificates of occupancy as proof that (1) defendant owed no duty to Plaintiff and (2) that Defendants work was adequate. Defendants provide a contract and certificates of occupancy by the DOB, which do not adequately prove that Defendant is free of negligence. Moreover, as no discovery has occurred, the court declines to grant Defendant's motion in light of the existing ambiguity. Similarly, the Court finds that Plaintiff does adequately plead causes of action sounding in negligence and breach of contract, and for the same reasons outlined above finds that Defendants have failed to make a prima facie showing of entitlement to dismissal.

Therefore, Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is denied.

On a CPLR 3211 (a)(5) motion to dismiss, "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Benn v Benn*, 82 AD3d 548, 548 (1st Dept 2011) (internal quotation marks and citation omitted). Upon such a showing, "the burden shift[s] to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action or interposed the subject cause of action within the applicable limitations period." (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 740 (2d Dept 2015) (internal citations omitted)). "[P]laintiff's submissions in response to the motion must be given their most favorable intendment." (*Benn*, 82 AD3d at 548 (internal quotation marks and citation omitted)).

Here, Defendant argues that the statute of limitations period began when the work was completed in 2016-2017, and as such that Plaintiff's complaint is time-barred under either a six-

year statute of limitations period for breach of contract or a three-year statute of limitation period for negligence. However, it is undisputed that Plaintiff (and Plaintiff's insured) is a stranger to the underlying contract – as they neither hired Defendant nor are they an intended beneficiary of the Contract. As such, the statute of limitations period did not begin when the work was completed, but rather accrued on the date of occurrence. *(See Town of Oyster Bay v. Lizza Industries, Inc.* 22 N.Y.3d 1024 (2013)). The alleged date of occurrence was September 1, 2021, and Plaintiff's complaint was filed on August 15, 2024. Plaintiff's action is therefore timely under both theories of liability, and Defendant's motion to dismiss pursuant to CPLR 3211(a)(5) is denied.

The court has considered the remaining arguments of the parties and finds such unavailing.

Accordingly; it is hereby

ORDERED that Defendant's motion to dismiss is denied in its entirety.

The foregoing constitutes the decision and order of the court.

12/12/2025
DATE

LESLIE A. STROTH, J.S.C.

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