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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Salaam Scarpulla Justice

PART 19

Index Number : 115755/2007

414 4TH AVENUE REALTY

vs.

WHEATON/TMW FOURTH AVENUE

SEQUENCE NUMBER : 005

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

is motion to/for _____

Its _____ No(s). _____

_____ No(s). _____

_____ No(s). _____

upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 2/29/12
which disposes of motion sequence(s) no.
004, 005, 006

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/29/12

Salaam Scarpulla, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----------X

TOWER INSURANCE COMPANY OF NEW YORK
a/s/o 414 4TH AVENUE REALTY CORP.,

Plaintiff,

-against-

Index No. 115755/07
DECISION AND ORDER

WHEATON/TMW FOURTH AVENUE LP, PREMIER CONTRACTING OF NEW YORK, INC., VACHRIS ENGINEERING, P.C., HE2 PROJECT DEVELOPMENT, LLC and S&S CONSTRUCTION GROUP, INC.,

Defendants.

----------X

For Plaintiff:
Law Office of Steven G. Fauth, LLC
40 Wall Street, 28th Floor
New York, NY 10005

For Defendant Vachris Engineering, P.C.:
Milber Makris Plousadis & Seiden, LLP
1000 Woodbury Road, Suite 402
Woodbury, NY 11797

For Defendant Premier Contracting of New York, Inc.:
Ahmuty, Demers & McManus, Esqs.
200 I.U. Willets Road
Albertson, NY 11507

For Defendant Wheaton/TMW Fourth Avenue LP:
Molod, Spitz & DeSantis, P.C.
1430 Broadway
New York, NY 10018

For Defendant HE2 Project Development, LLC:
Harris, King & Fodera
One Battery Park Plaza, 30th Floor
New York, NY 10004

For Defendant S&S Construction Group, Inc.:
11 Martine Avenue, Suite 750
White Plains, NY 10606

HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 004 through 006 in the above captioned action are consolidated for disposition.

In motion sequence number 004, defendant S&S Construction Group, Inc. ("S&S Construction") moves, pursuant to CPLR 3211(a)(5), to dismiss all claims and cross

claims as against it on the grounds that the action is time barred by the applicable statute of limitations. In motion sequence number 005, defendant Vachris Engineering, P.C. ("Vachris Engineering") moves, pursuant to CPLR 3211(a)(5), to dismiss the complaint and all cross claims as against it, based upon the applicable three-year statute of limitations. Alternatively, Vachris Engineering moves, pursuant to CPLR 3211(a)(5), to dismiss all claims against it with respect to property damage that occurred prior to July 20, 2007, based upon the applicable three-year statute of limitations. In motion sequence number 006, defendant HE2 Project Development, LLC ("HE2 Project") moves, pursuant to CPLR 3025, for leave to serve an amended answer to the complaint, and pursuant to CPLR 3211(a)(5), to dismiss claims and cross claims asserted against it as barred by the statute of limitations.

Plaintiff Tower Insurance Company of New York ("Tower") brings this action to recover approximately $87,844.72 in property damages, which it paid to its insured, 414 4th Avenue Realty Corp. ("414 Realty Corp."). 414 Realty Corp. is the owner of a seven-family residential apartment building located at 414 4th Avenue, Brooklyn, New York ("No. 414"), which was allegedly damaged during a construction project on the adjacent property at 410 4th Avenue, Brooklyn, New York ("No. 410").

Defendant Wheaton/TMW Fourth Avenue LP ("Wheaton") is the owner of No. 410, which is also known as 251 Seventh Avenue, Brooklyn, New York. Commencing in the spring of 2007, Wheaton demolished the existing building at No. 410 and constructed

a new multifamily condominium apartment building at the site. Wheaton hired HE2 Project as its construction manager and general contractor to oversee and manage the demolition, excavation and/or construction activities at No. 410. Wheaton also hired S&S Construction and defendant Premier Contracting of New York, Inc. ("Premier Contracting") as contractors, and Vachris Engineering to design and oversee construction activities at No. 410, including the underpinning, supporting, footing and/or foundation work.

According to Tower, 414 Realty Corp. discovered the damage to its property in late 2007. On November 27, 2007, 414 Realty Corp. commenced an action against Wheaton and Premier Contracting by filing a summons and complaint ("the Original Complaint"). HE2 Project, S&S Construction and Vachris Engineering were not named as defendants in the Original Complaint. On May 16, 2008, 414 Realty Corp. submitted an insurance claim to Tower based upon the damage to its property as a result of the construction work at No. 410. Tower paid $87,844.72 to 414 Realty Corp., less a deductible of $2,500.00.

On February 11, 2010, Tower, as subrogee, took over the within action and its attorneys were substituted as counsel for 414 Realty Corp.'s personal counsel. On July 20, 2010, Tower filed a Supplemental Summons and Amended Complaint ("the Amended Complaint"), naming itself as plaintiff and adding HE2 Project, S&S Construction and Vachris Engineering as additional defendants. In its Amended Complaint, Tower asserts

claims against Wheaton for negligent hiring (first cause of action), negligent supervision (second cause of action), and negligence (third cause of action). As against Premier Contracting, Vachris Engineering, HE2 Project and S&S Construction, Tower alleges a cause of action against each based upon their alleged failure to use reasonable care (fourth, fifth, sixth and seventh causes of action, respectively).

On January 20, 2011, defendant HE2 Project served its answer to the Amended Complaint, alleging cross claims against co-defendants Wheaton, Premier Contracting, Vachris Engineering and S&S Construction. On April 8, 2011, defendant Premier Contracting served its amended answer to the Amended Complaint which included cross claims against co-defendants Wheaton, Vachris Engineering, HE2 Project and S&S Contracting.

The Motions to Dismiss

Defendants HE2 Project, S&S Construction and Vachris Engineering (together, "the moving defendants"), who were not named as defendants until Tower filed its Amended Complaint on July 20, 2010, assert that the action is time-barred as to them because the alleged property damage occurred more than three years prior to commencement of the action as against them.

CPLR 214(4) provides that an action to recover damages for injury to property must be commenced within three years. In New York, a cause of action for injury to property begins to accrue on the date of injury. *See Verizon-New York, Inc. v. Reckson*

Assoc. Realty Corp., 19 A.D.3d 291 (1st Dept 2005); *Manhattanville Coll. v. James John Romeo Consulting Engr., P.C.*, 5 A.D.3d 637 (2d Dept 2004). Thus, the moving defendants assert that any property damage claims arising prior to July 20, 2007 are barred by the statute of limitations.

In support of their contention that the damage to No. 414 occurred prior to July 20, 2007, the moving defendants cite the following allegations, which are in the Original Complaint:

> 9. On and about February 13, 2007, the plaintiff received a notice from defendant Wheaton/TMW ("the Notice") that demolition, excavation, and construction of a new building at 410 4th Avenue, a/k/a 251 Seventh Street, Brooklyn, New York 11215 would begin no less than five (5) days from the receipt of the notice. A true and accurate copy of the notice is annexed as Exhibit "A".
>
> 10. The notice further specified that no work would be performed unless the required approvals and permits are obtained.
>
> 11. *On and about February 13, 2007*, the defendants caused the property at the site located at 410 4th Avenue, a/k/a 251 Seventh Street, Brooklyn, New York 11215 to be excavated and the building located thereon to be demolished.
>
> 12. That during the excavation, demolition, and construction at 410 4th Avenue, a/k/a 251 Seventh Street, Brooklyn, New York, 11215, the defendants caused the foundation wall and the footing of the plaintiff's adjacent and abutting building to become exposed.
>
> 13. That *during the course of the excavation, demolition, and construction* at 410 4th Avenue, a/k/a 251 Seventh Street, Brooklyn, New York, 11215, and adjacent to

> the west wall of plaintiff's building, the defendants in a negligent and/or grossly negligent, reckless, and wonton fashion, undermined the foundation of the plaintiff's building causing permanent and irreparable damage

The Amended Complaint was later changed to read as follows:

> 33. That during the course of demolition, excavation and/or construction activities at the Property, the Defendants, jointly and severally, caused the foundation wall and the footing of [414] Realty Corp.'s Building to become exposed.
>
> 34. That during the course of demolition, excavation and/or construction activities at the Property *over the course of many months*, and adjacent to the west wall of [414] Realty Corp.'s Building, the Defendants, jointly and severally, in a negligent and/or grossly negligent, reckless, and wonton fashion, undermined the foundation of [414] Realty Corp.'s Building

The moving defendants contend that, pursuant to paragraphs 10 - 13 of the Original Complaint, plaintiff 414 Realty Corp. admitted that the damage to its building occurred on February 13, 2007, and that the action is therefore barred by the applicable three-year statute of limitations. Vachris Engineering further argues that the allegations in the Original Complaint constitute a formal judicial admission which is now binding upon Tower.

It is well settled that on a motion to dismiss, the facts in the pleadings must be construed in favor of the nonmovant and the court must "accord plaintiffs the benefit of every possible favorable inference." *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d

561, 570 [2005]; *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). This is true even on a motion to dismiss on the ground that the action is barred by the applicable statute of limitations. *See 190 Murray St. Assoc., LLC v. City of Rochester*, 19 A.D.3d 1116 (4th Dept 2005); *Barnard Coll. v. Tishman Constr. Corp. of N.Y.*, 261 A.D.2d 193 (1st Dept 1999).

As an initial matter, the moving defendants' interpretation of the above allegations is incorrect. The Original Complaint clearly alleges that on and about February 13, 2007, 414 Realty Corp. received a notice stating that demolition at No. 410 was to begin no earlier than five days after receipt of the notice, that on and about February 13, 2007, the defendants caused the property to be excavated and the building thereon demolished, and that during the course of excavation, demolition and construction of the new building, the plaintiff's building was damaged. Excavation, demolition and construction does not occur within a single day and, in any event, 414 Realty Corp. did not allege that the damage to its building occurred *on* February 13, 2007, but rather *on and about* February 13, 2007.

In addition, even if 414 Realty Corp. had alleged that the damage to its building occurred on February 13, 2007, where a complaint is amended, any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which requires further explanation. *Imprimis Invs. v. Insight Venture Mgt.*, 300 A.D.2d 109 (1st Dept 2002); *see also Stauber v. Brookhaven Natl. Lab.*, 256 A.D.2d 570

(2d Dept 1998). Accordingly, since 414 Realty Corp.'s allegation that the damage to No. 414 occurred on and about February 13, 2007 has been relegated to the status of an informal judicial admission, requiring further explanation, the remainder of the motion must be considered in this light.

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. *Benn v. Benn,* 82 A.D.3d 548 (1st Dept 2011); *see also Baptiste v. Harding-Marin*, 88 A.D.3d 752 (2d Dept 2011). "Only if the defendant makes such a prima facie showing does the burden then shift to the plaintiff to 'aver evidentiary facts establishing that the case falls within an exception to the [s]tatute of [l]imitations'." *Philip F. v. Roman Catholic Diocese of Las Vegas*, 70 A.D.3d 765, 766 (2d Dept 2010) *quoting Savarese v. Shatz*, 273 A.D.2d 219 (2000).

Here, the moving defendants have failed to make a prima facie showing that the complaint is untimely. Their motion rests entirely upon the allegations in the Original Complaint, which, at most, raise an issue as to when the damage to No. 414 occurred. It is noteworthy that in its Verified Answer, Wheaton asserts that the Department of Buildings did not issue a New Building Work Permit until April 11, 2007, thereby indicating that damages due to alleged faulty underpinning did not occur until after that date. Discovery has not yet taken place and it is the moving defendants who are in

possession of information regarding when various construction activities took place. The issue as to whether the plaintiffs' claims are time-barred may be re-visited after discovery on a motion for summary judgment.

Motion Sequence Number 004

In motion sequence number 004, S&S Construction also raises several objections to Tower's service of Amended Complaint in July 2010. As already noted, plaintiff 414 Realty Corp. commenced the within action on November 27, 2007, naming only Wheaton and Premier Contracting as defendants. Tower filed the Amended Complaint in July 2010, adding itself as a plaintiff and naming Vachris Engineering, HE2 Project and S&S Construction as additional defendants.

S&S Construction first contends that the Amended Complaint is improper because S&S Construction was not served until March 17, 2011. However, by Stipulation dated February 2, 2011 and "So Ordered" by this court, Tower's time to serve its Amended Complaint on S&S Construction was extended until April 2, 2011.

S&S Construction also asserts that CPLR 305(a) requires that, in order for a new party to be joined in the action, a stipulation of all parties, or an order of the court must be obtained. S&S Construction further contends that under CPLR 3211(a)(3), Tower does not have the legal capacity to step in as plaintiff and bring suit against S&S Construction.

As to S&S Construction's contention that Tower does not have the legal capacity to step in as plaintiff, "[t]he doctrine of subrogation 'allows an insurer to stand in the

shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse [additional quotation marks and citations omitted]'." *Spectra Audio Research, Inc. v. Chon,* 62 A.D.3d 561, 563 (1st Dept 2009). CPLR 1004 specifically authorizes an insurance company to bring the action in the name of its insured. However, an insurer who has made payment to the plaintiff may also may enforce its right of subrogation by intervening in an action between the insured and the wrongdoer. *See Rink v. State of New York*, 27 Misc.3d 1159 (Ct. Cl., 2010), *affd for reasons stated below* 87 A.D.3d 1372 (4th Dept 2011); *cf. 11 Essex St. Corp. v. Tower Ins. Co. of N.Y.*, 70 A.D.3d 402 (1st Dept 2010). Under CPLR 1012 (a) (3), a party may intervene as of right "when the action involves . . . a claim for damages for injury to, property and the person may be affected adversely by the judgment." Here, Tower was entitled to intervene as of right.

S&S Corporation is, however, correct in its assertion that a party may be added to a pending action only with leave of court. CPLR 1003 provides, in part, that:

> Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.

CPLR 305 (a) provides, in part, that:

> Where, upon order of the court or by stipulation of all parties or as of right pursuant to section 1003, a new party is joined

998, 998 (2d Dept 2010), *quoting Endicott Johnson Corp. v. Konik Indus.*, 249 A.D.2d 744, 744 (3d Dept 1998). Here, Tower can hardly be heard to complain of any delay due to HE2 Project's delay in serving an amended answer, given Tower's failure to move for leave to add HE2 Project as a defendant. However, as previously noted, the moving defendants have not met their burden of proving that the statute of limitations has expired and have merely raised a question as to that issue. The issue may be raised again after discovery on a motion for summary judgment.

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence number 004, the motion by defendant S&S Construction Group, Inc. to dismiss the action and all cross claims against it is granted and the complaint is dismissed in its entirety as against said defendant and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for that moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 300) and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that as to motion sequence number 005, the motion by defendant Vachris Engineering, P.C. to dismiss the complaint and all cross claims as against it is denied in its entirety; and it is further

ORDERED that as to motion sequence number 006, the motion by defendant HE2 Project Development, LLC to dismiss the action and all cross claims against it and for leave to serve an amended answer it is granted only to the extent that the amended answer in the proposed form annexed to moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof upon the County Clerk (Room 300) and the Clerk of the Trial Support Office (Room 158) within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 29, 2012

ENTER:

Saliann Scarpulla

Saliann Scarpulla, J.S.C.