

**Board of Mgrs. of 255 Hudson Condominium v  
Hudson St. Assoc., LLC**

2012 NY Slip Op 32669(U)

October 22, 2012

Sup Ct, NY County

Docket Number: 101578/12

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ  
*Justice*

PART 13

BOARD OF MANAGERS OF 255 HUDSON  
CONDOMINIUM, on behalf of all unit owners,

Plaintiff,

-against-

HUDSON STREET ASSOCIATES, LLC,  
CHRISTOPHER M. MATORELLA, RICHARD MACK,  
GOTHAM GREENWICH CONSTRUCTION CO., LLC,  
ETTINGER ENGINEERING ASSOCIATES, HANDEL  
ARCHITECTS, LLP and DESIMONE CONSULTING  
ENGINEERS PLLC,

Defendants.

INDEX NO. 101578/12  
MOTION DATE 10-03-2012  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

**FILED**

OCT 24 2012

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 7 were read on this motion to dismiss the complaint:

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answering Affidavits – Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1 - 3	_____
4 - 6	_____
7	_____

Cross-Motion:     Yes     No

Plaintiff brought this action as the governing body of a condominium association, and seeks to recover damages caused to 255 Hudson Street Condominium by those individuals and entities responsible for its construction. The damages alleged include water leaks, malfunctioning heating and cooling units and missing sprinkler heads. This action was commenced on February 14, 2012, against Hudson Street Associates, LLC (hereinafter referred to as the "Sponsor"), Christopher Matorella and Richard Mack (principals of the Sponsor); Gotham Greenwich Construction Co., LLC, (hereinafter referred to as "Gotham") as the contractor and construction manager; Ettinger Consulting Engineering (hereinafter referred to as "Ettinger") as an engineering consulting firm; Handel Architects, LLP (hereinafter referred to as "Handel"), as the architect and DeSimone Consulting Engineers, PLLC (hereinafter referred to as "DeSimone") as structural engineers. The complaint asserts causes of action for breach of contract against all defendants; negligence in performance of services against the contractor, engineers and architect; and breach of express warranty only as against the Sponsor. The plaintiff entered into a contract with the Sponsor, it alleges incorporated the agreements with all the other parties.

HANDEL seeks an Order pursuant to CPLR §3211[a][1], [5],[7] dismissing the complaint and all cross-claims asserted against it.

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

**DESIMONE** moves under motion seq. 002, seeking an Order pursuant to CPLR §3211[a][1],[5],[7] dismissing the complaint and all cross-claims asserted against it.

**GOTHAM** moves under motion seq. 003, seeking an Order pursuant to CPLR §3211[a][1],[7] dismissing the causes of action asserted in the complaint against it.

Plaintiff cross-moves against **GOTHAM** under motion seq. 003, seeking an Order pursuant to CPLR §3211 dismissing the counter-claim stating that the cause of action against them as stated in the complaint are frivolous and result in malicious prosecution.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (See, *Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994] and *Blonder & Co., Inc. v. Citibank, N.A.*, 28 A.D. 3d 180, 808 N.Y.S. 2d 214 [N.Y.A.D. 1<sup>st</sup> Dept., 2006]). Pursuant to CPLR §3211[a][5], an action may be dismissed based on a specific claim that, "the cause of action may not be maintained because of ...statute of limitations...." A motion to dismiss pursuant to CPLR §3211[a][7], for failure to state a cause of action, requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (*Leon v. Martinez*, 84 N.Y. 2d 83, 614 N.Y.S. 2d 972, 638 N.E. 2d 511 [1994]). Documentary evidence that contradicts the allegations, are a basis for dismissal (*Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]).

The statute of limitations on a claim against an architect that is essentially stated as breach of the ordinary professional obligations, pursuant to CPLR §214[6], has a three year statute of limitations, regardless of whether it is asserted as breach of contract or negligence (*R.M. Klimment & Frances Halsband, Architects v. McKinsey & Company*, 3 N.Y. 3d 538, 821 N.E. 2d 952, 788 N.Y.S. 2d 648 [2004]). The statute of limitations on a claim against a design professional pursuant to CPLR §214[6], has a three year statute of limitations, regardless of whether it is asserted as breach of contract or malpractice. The three year statute of limitations begins to run from the date of termination of the professional relationship between the parties and the completion of, "performance of significant (i.e. non-ministerial) duties under the the parties contract" (*Sendar Development Co., LLC v. CMA Design Studio, P.C.*, 68 A.D. 3d 500, 890 N.Y.S. 2d 534 [N.Y.A.D. 1<sup>st</sup> Dept., 2009] citing to *Parsons Brinckerhoff Quade & Douglas v. EnergyPro Constr. Partners*, 271 A.D. 2d 233, 707 N.Y.S. 2d 30 [N.Y.A.D. 1<sup>st</sup> Dept., 2000]). The date of the final certificate of occupancy, is not controlling for statute of limitations purposes, where there is no contractual responsibility for its issuance. Additional billing or a minimal amount of subsequent work does not alter the completion date for the project (*State of New York v. Lundin*, 60 N.Y. 2d 987, 459 N.E. 2d 486, 471 N.Y.S. 2d 261 [1983]).

Indemnification permits the party compelled to pay for the loss, regardless of fault, to shift liability to a subcontractor whose negligence caused the loss. A party that has actually participated in causing the wrongdoing cannot receive the benefit of indemnification (*17 Vista Fee Associates v. Teachers Ins. and Annuity Assoc. of America*, 259 A.D. 2d 75, 693 N.Y.S. 2d 554 [N.Y.A.D. 1<sup>st</sup> Dept., 1999] and *Trustees of Columbia Univ. v. Mitchell/ Giurgola Assoc.*, 109 A.D. 2d 449, 492

N.Y.S. 2d 371 [N.Y.A.D. 1<sup>st</sup> Dept., 1985]). Indemnification is available when there are allegations of vicarious liability for plaintiff's injuries and negligent misrepresentation, even if there is no privity of contract (Richards Plumbing and Heating Co., Inc. v. Washington Group International Inc., 59 A.D. 3d 311, 874 N.Y.S. 2d 410 [N.Y.A.D. 1<sup>st</sup> Dept., 2009] and Beck v. Studio Kenji, Ltd, 90 A.D. 3d 462, 935 N.Y.S. 2d 5 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]). The statute of limitations on a claim for indemnification on a contractual liability is six years, which starts to run upon payment to the injured party (CPLR §213 [2], State of New York v. Stewart's Ice Cream Co., Inc., 64 N.Y. 2d 83, 473 N.E. 2d 1184, 484 N.Y.S. 2d 810 [1984] and McDermott v. City of New York, 50 N.Y. 2d 211, 406 N.E. 2d 460, 428 N.Y.S. 2d 643 [1980]).

Common-law contribution is codified in CPLR §1401, it applies to damages for personal injury, injury to property and wrongful death. Individuals or entities that are subject to liability for damages, may seek contribution regardless of whether they are parties to an action or there is a judgment. Injury to property does not apply where plaintiff's underlying claims seek only the benefit of the bargain regardless of the tort language. Contribution does not apply where the underlying claim is for purely economic damages as a result of breach of contract and fails to assert an independent legal duty resulting in injury to property (Board of Education of the Hudson City School Dist. v. Sargent, Webster, Crenshaw & Foley, 71 N.Y. 2d 21, 517 N.E. 2d 1360, 523 N.Y.S. 2d 475 [1987] and Children's Corner Learning Center v. A. Miranda Contracting Corp., 64 A.D. 3d 318, 879 N.Y.S. 2d 418 [N.Y.A.D. 1<sup>st</sup> Dept., 2009]). An independent legal duty applies where there is an unduly dangerous product or circumstance which threatens the public. Damage caused by water leaks, does not constitute a danger to the public (Structure Tone, Inc. v. Universal Services Group, Ltd., 87 A.D. 3d 909, 929 N.Y.S. 2d 242 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]).

Unit owners lack standing to seek relief for damage and defects against general contractors, architects and engineers on a project where at best they are, "only incidental rather than an intended, beneficiary of the contracts" entered into with a sponsor (Kerusa Co., LLC, v. W10Z/515 Real Estate Ltd. Partnership, (50 A.D. 3d 503, 858 N.Y.S. 2d 109 [N.Y.A.D. 1<sup>st</sup> Dept., 2008] and Bd. of Mgrs. of Chelsea 19 Condominiums v. Chelsea 19 Associates, 73 A.D. 3d 581, 905 N.Y.S. 2d 8 [N.Y.A.D. 1<sup>st</sup> Dept., 2010]). The board of managers causes of action for economic loss based on negligent construction can be dismissed if it is an incidental beneficiary to agreements and there is no privity of contract (Residential Bd. of Mgrs. Of Zeckendorf Towers v. Union Sq.- 14<sup>th</sup> St. Assoc., 190 A.D. 2d 636, 594 N.Y.S. 2d 161 [N.Y.A.D. 1<sup>st</sup> Dept., 1993]).

Pursuant to CPLR §3211[d] a motion to dismiss may be denied for discovery, if there are facts essential to justify opposition that may exist but cannot be stated (Copp v. Ramirez, 62 A.D. 3d 23, 874 N.Y.S. 2d 52 [N.Y.A.D. 1<sup>st</sup> Dept., 2009]).

Handel and DeSimone seek to dismiss the causes of action and the cross-claims asserted against them, claiming that their actual physical work was completed more than three years before plaintiff commenced this action. Handel claims that as of January 8, 2007, it had completed performance of significant duties under the contract and the three year statutory period ran as of that date. Richard Kearns a senior associate in support of Handel, contends that the statute of limitations commences to run no later than the date of Substantial Completion of Performance or

the date of issuance of the final certificate of payment (Kearns Aff. Exh. A §1.3.7.3). He annexes to his affidavit a copy of the certificate of substantial completion for January 8, 2007 and the ledger showing completion by that date (Kearns Aff. Exhs. C & D). Handel claims that all cross-claims for indemnification should be dismissed because both Gotham as construction manager and the Sponsor are also sued as defendants. There are no claims asserted for vicariously liability. Handel contends that since plaintiff is only seeking to recover for economic damages, the cross-claim for contribution should be dismissed.

DeSimone claims that it had completed its performance of significant duties as of July 29, 2005 and on August 5, 2005 submitted its final invoice starting the statute of limitation period (DeSimone, Exhs. B & C). Stephen V. DeSimone, P.E., president and chief executive of DeSimone claims that there is no agreement or privity of contract with the plaintiff which has no standing. DeSimone only entered into an agreement with the Sponsor which provides all disagreements would be resolved at mediation. DeSimone contends that all cross-claims for indemnification should be dismissed because both Gotham as construction manager and the Sponsor are also sued as defendants. DeSimone is not vicariously liable to the plaintiffs. DeSimone claims that since plaintiff is only seeking to recover for economic damages the cross-claims for contribution should be dismissed.

Plaintiff opposes Handel and DeSimone's motions claiming that the statute of limitations for breach of contract is six years from September 18, 2007, which is a longer period than for professional malpractice. Plaintiff contends that it was a third-party beneficiary of the Handel and DeSimone's agreements with the Sponsor, therefore it has standing. Plaintiff did not acquire rights under the contract prior to September 18, 2007, the date of the first annual Board meeting, which is when it claims the statute of limitations started to run. The first annual Board meeting took place four days after September 14, 2007, the date of issuance of the certificate of occupancy (Opp. Exh. A). Plaintiff contends that a motion to dismiss pursuant to CPLR §3211[a][7], requires the Court to determine whether the facts as alleged in the pleadings fit into any cognizable legal theory and it is not required to establish them.

Gotham and the Sponsor oppose Handel and DeSimone's motions claiming there is no basis to dismiss the counter-claims for indemnification and contribution. Gotham claims that Handel and DeSimone can be found vicariously liable and the damages sought are not purely economic. Alternatively, Gotham contends that pursuant to CPLR §3211[d], the motion is premature because there has been no discovery and facts essential to justify opposition may exist. The Sponsor contends, that the statute of limitations for its cross-claim of actual or implied indemnification have not commenced to run. Handel and DeSimone as the parties that performed the actual work might be found vicariously liable and their motions are premature.

Gotham's motion seeks to dismiss the complaint claiming that the plaintiff did not have any privity of contract and is only an incidental beneficiary to Gotham's Construction Management Agreement with the Sponsor. The Construction Management Agreement Section 12.02 does not name plaintiff under "sole beneficiaries" and plaintiff is not an intended third-party beneficiary (Mot. Exh. A). Gotham contends that the Construction Management Agreement expressly limited its exposure to third party beneficiary claims. Gotham claims that because there is no privity of contract, plaintiff's claims for negligence fail.

Plaintiff opposes Gotham's motion claiming it is a third-party beneficiary of any agreements with the Sponsor. Even if it is not named it is implicit in the Construction Management Agreement. Plaintiff claims that there is no authority for Gotham's claim that it cannot bring a claim for breach of contract as an implied third-party beneficiary. Plaintiff concedes that its negligence claim against the Sponsor is time-barred and offered to withdraw that claim as to Gotham.

Plaintiff's cross-motion pursuant to CPLR §3211 seeks to dismiss Gotham's counter-claim for malicious prosecution based on the complaint failing to state a cause of action and as being frivolous. Plaintiff contends that there is no cause of action for a frivolous complaint and Gotham's cross-claim has not stated the elements of a malicious prosecution cause of action and is premature.

The elements of a claim for malicious prosecution are, (1) proof of the commencement of an action against the defendant; (2) the termination of the action in the defendant's favor; (3) the absence of probable cause; (4) actual malice and special damages. Special damages must be more burdensome than the physical, psychological or financial demands of defending a lawsuit (*Engel v. CBS*, 93 N.Y. 2d 195, 711 N.E. 2d 626, 689 N.Y.S. 2d 411 [1999] and *Wilhelmina Models, Inc. v. Fleisher*, 19 A.D. 3d 267, 797 N.Y.S. 2d 83 [N.Y.A.D. 1<sup>st</sup> Dept., 2005]). There is no independent cause of action for frivolous sanctions as defined under 22 NYCRR 130-1.1 (360 W. 11<sup>th</sup> LLC v. ACG Credit Co. II, LLC, 90 A.D. 3d 552, 935 N.Y.S. 2d 289 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]).

Gotham opposes plaintiff's cross-motion contending that it is premature because there has been no discovery and facts essential to justify opposition may exist. Gotham claims that discovery is needed to determine whether plaintiff's motives were malicious.

Upon review of all the papers submitted, this Court finds that Handel and DeSimone have established a basis to dismiss the causes of action asserted against them in the complaint based on the expiration of the three year statute of limitations prior to the commencement of this action. This Court finds unavailing, plaintiff's claims that the statute should begin running as of September 18, 2007, the date it assumed control of the building from the sponsor. DeSimone completed its work on August 5, 2005, even if there was a six year statute of limitations plaintiff's claim would have expired as of August 5, 2011. Plaintiff has not demonstrated that the causes of action asserted in the complaint against Handel and DeSimone allege more than breach of the ordinary professional obligations or professional malpractice. Gotham and the Sponsor were named as defendants in this action and there is no assertion in the counter-claims that Handel or DeSimone were vicariously liable for plaintiff's alleged damages. There are no allegations of an independent legal duty claim as to Handel or DeSimone.

Plaintiff cannot establish it is more than an incidental beneficiary of the agreements between the Sponsor, Gotham, Handel and DeSimone. The complaint, affidavits and documents submitted in opposition to Handel, DeSimone and Gotham's motions do not state a basis to find that essential facts exist but cannot be stated. Plaintiff does not have privity of contract with Gotham. Plaintiff has established that Gotham's cross-claim for malicious prosecution based on the complaint failing to state a cause of action and as being frivolous is premature, invalid and not properly stated.

Accordingly, it is ORDERED that, HANDEL ARCHITECTS, LLP 's motion to dismiss the causes of action asserted against it in the complaint and all cross-claims, is granted, and it is further,

ORDERED, that all cross-claims asserted in GOTHAM GREENWICH CONSTRUCTION CO., LLC, HUDSON STREET ASSOCIATES, LLC, CHRISTOPHER M. MATORELLA and RICHARD MACK's answers and the causes of action in the complaint asserted against HANDEL ARCHITECTS, LLP , are severed and dismissed, and it is further,

ORDERED that, DESIMONE CONSULTING ENGINEERS, PLLC's motion submitted under Motion Seq. 002, to dismiss the causes of action asserted against it in the complaint and all cross-claims, is granted, and it is further,

ORDERED, that all cross-claims asserted in GOTHAM GREENWICH CONSTRUCTION CO., LLC, HUDSON STREET ASSOCIATES, LLC, CHRISTOPHER M. MATORELLA and RICHARD MACK's answers and the causes of action in the complaint asserted against DESIMONE CONSULTING ENGINEERS, PLLC, are severed and dismissed, and it is further,

ORDERED that, GOTHAM GREENWICH CONSTRUCTION CO., LLC's motion submitted under Motion Seq. 003, to dismiss the causes of action asserted against it in the complaint, is granted, and it is further,

ORDERED, that all causes of action in the complaint asserted against GOTHAM GREENWICH CONSTRUCTION CO., LLC's, are severed and dismissed, and it is further,

ORDERED, that plaintiff's cross-motion submitted under Motion Seq. 003, seeking to dismiss GOTHAM GREENWICH CONSTRUCTION CO., LLC's counter-claim asserted against it, is granted, and it is further

ORDERED, that the causes of action asserted against, HUDSON STREET ASSOCIATES, LLC, CHRISTOPHER M. MATORELLA, RICHARD MACK and ETTINGER ENGINEERING ASSOCIATES, in the complaint are continued, and it is further,

ORDERED, that counsel for the remaining parties are directed to appear for a preliminary conference in Room 307, at 80 Centre Street, on November 28, 2012, at 9:30 a.m.

**FILED**

ENTER: OCT 24 2012

NEW YORK  
COUNTY CLERK'S OFFICE

MANUEL J. MENDEZ,  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: October 22, 2012

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