| **Board of Mgrs. of the Norfolk Atrium Condominium v 115 Norfolk Realty LLC** |
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| 2017 NY Slip Op 30348(U) |
| February 23, 2017 |
| Supreme Court, New York County |
| Docket Number: 652529/16 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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THE BOARD OF MANAGERS OF THE NORFOLK ATRIUM CONDOMINIUM,

Plaintiff,

Index No.652529/16

-against-

Mot Seq 001, 002 & 003

115 NORFOLK REALTY LLC; AMAZON REALTY GROUP LLC; NATAN VINBAYTEL; GARY VINBAYTEL; ABRAHAM LOKSHIN; NAUM LOKSHIN; and CLARA LOKSHIN,

Defendants.

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115 NORFOLK REALTY LLC; NATAN VINBAYTEL; ABRAHAM LOKSHIN; and NAUM LOKSHIN,

Third-Party Plaintiffs,

-against-

GRZYWINSKI + PONS LTD.; BETRO DESIGN GROUP LTD.; K-SQUARE DEVELOPERS, INC.; and V & P ALTITUDE CORP.,

Third-Party Defendants.

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OSTRAGER, J.:

Before the Court are three motions by various third-party defendants to dismiss the claims against them pursuant to CPLR §3211(a)(5) and (7) based on the statute of limitations and for failure to state a cause of action. For the reasons set forth below, the motions are granted in part and denied in part.

Plaintiff The Board of Managers of the Norfolk Atrium Condominium, a recently constructed luxury condominium building at 115 Norfolk Street in Manhattan ("the Board"), commenced this action against the sponsor/developer 115 Norfolk Realty LLC ("the Sponsor"), its managing agent Amazon Realty Group LLC, and various individual

members of the Sponsor. The Board seeks to recover $8 million in damages pursuant to eight different causes of action primarily related to claimed defects in the design and construction of the building.

Defendants commenced a third-party action against the two firms involved in the architectural aspects of the project, Grzywinski + Pons Ltd. ("G+P") and Betro Design Group Ltd. ("Betro"), the general contractor K-Square Developers, Inc., and V & P Altitude Corp., the firm involved in the window and facade work. The complaint asserts claims against G+P and Betro sounding in negligence, indemnification and contribution (the First Cause of Action), breach of contract (the Second Cause of Action) and attorney's fees (the Third Cause of Action). In the Fourth through Seventh Causes of Action, similar claims are asserted against K-Square, who has not moved to dismiss. The Eighth Cause of Action asserts claims against V&P for negligence, indemnification and contribution, and the Ninth seeks attorney's fees against V&P. Betro has asserted cross-claims for indemnification against the other third-party defendants.

G+P, V & P, and Betro all filed motions to dismiss pursuant to CPLR §3211(a)(5) and (7) (mot. seq. nos. 001, 002 and 003), and the first two entities also sought to dismiss Betro's cross-claims. In their opposition papers, and as confirmed during oral argument on the record (NYSCEF Doc. No. 123), the third-party plaintiffs withdrew all claims against G+P and Betro but for indemnification, acknowledging that claims for negligent performance of architectural and design services were barred by the three-year statute of limitations governing professional malpractice set forth in CPLR 214(6), whether framed as negligence or breach of contract. *See, e.g., Boslow Family Ltd. Partnership v Kaplan Kaplan, PLLC,* 52 AD3d 417 (1st Dep't 2008), *citing Matter of*

*R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538 (2004).

The third-party plaintiffs opposed the dismissal of their claims for common law indemnification, which is subject to a six-year statute of limitations given its "quasi contractual character." *See McDermott v City of New York*, 50 NY2d 211, 217 (1980). Additionally, third-party plaintiffs sought to maintain their negligence claim against V & P, arguing that as a contractor, V & P was subject to a six-year statute of limitations rather than the three-year limitations period applicable to the architect professionals.

At the conclusion of the oral argument, as confirmed in a short form order (NYSCEF Doc. No. 122), the Court denied the motion to dismiss by Betro on the ground that a motion pursuant to CPLR 3211 could not lie in light of the Answer filed by Betro (NYSCEF Doc. No. 19). The Court will nevertheless dismiss all the third-party claims against Betro, but for the indemnification claim, based on the third-party plaintiff's withdrawal of those claims in the opposition papers.

As indicated earlier, one remaining issue is the request by G+P, Betro, and V & P to dismiss the indemnification claims asserted against them by the third-party plaintiffs. G+P and V & P also seek to dismiss Betro's indemnification cross-claims against them. The principle of common law indemnification permits a vicariously liable party to shift all liability to the party whose negligence actually caused the loss. *See, 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dep't 1999). However, "[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the

benefit of the doctrine." *SSDW Co. v Feldman-Misthopoulos Assoc.*, 151 AD2d 293, 296 (1st Dep't 1989). Thus, to be entitled to indemnification, the party seeking indemnity "must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought ..." *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.,* 259 AD2d 75, 80 (1st Dep't 1999) (citations omitted).

The moving third-party defendants argue that they may not be held vicariously liable for the alleged wrongs by the Sponsor, and that the Sponsor did not delegate exclusive responsibility to them for the duties that give rise to the claims asserted by the plaintiff Board. Rather, it is alleged that the Sponsor itself participated, at least to some degree, in the alleged wrongdoing. The Sponsor argues in opposition that the Board is, in fact, seeking to hold the Sponsor vicariously liable for the negligence of the architects and contractors and that the Sponsor itself committed no wrong as it did not perform the work at issue.

While the evidence may ultimately prove otherwise, the pleadings contain sufficient allegations to withstand the motions to dismiss and allow discovery to proceed. The pleadings do allege, for example, that the Sponsor delegated to the third-party defendants the duty to properly perform the design and construction work at issue and that none of the damages are attributable to any fault, want of care or negligence by the Sponsor. The Court thus declines to dismiss the Sponsor's indemnification claims based largely on the standard governing pre-answer motions to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, where the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit

of every possible favorable inference, and determine only whether facts as alleged fit within any cognizable legal theory ...." *Leon v Martinez,* 84 NY2d 83, 87-88 (citations omitted). And while indemnification would not lie for certain claims by plaintiff against the Sponsor, such as fraudulent misrepresentation and inducement, no need exists to parse the claims at this time. Based on the same analysis, the Court declines to dismiss Betro's cross-claims at this time as the precise role played by Betro with respect to the other third-party defendants and the degree of shared responsibility, if any, particularly with respect to G+P, is in dispute.

The final issue is whether V & P is entitled to the dismissal of the third-party plaintiff's claim for negligence as time-barred. V & P alleges that the governing statute of limitations is three years pursuant to CPLR § 214(4) applicable to actions "to recover damages for an injury to property." Such a cause of action accrues on the date when the plaintiff became aware of, or discovered, the damage to its property. *See Verizon New York Inc. v Consolidated Edison, Inc.,* 127 AD3d 621 (1st Dep't 2015). The three possible discovery dates are the June 27, 2011 closing, the date when the plaintiff Board took control from the Sponsor in the Fall of 2012, and the date the Certificate of Occupancy was issued on or about April 5, 2013. Even accepting the latest date, the commencement of the action on July 25, 2016 was untimely.

Citing cases such as *Hart v Moray Homes, Ltd.,* 158 AD2d 890 (3rd Dep't 1990) and *Cabrini Med. Ctr. v Desina,* 64 NY2d 1059 (1985), the Sponsor urges that a six-year statute of limitations applies to construction defect cases. However, as V & P correctly notes, those cases are distinguishable based on the existence of a contract between the parties, and contract claims are specifically subject to a six-year statute of

limitations under CPLR §213(2). In contrast here, no contract existed between the Sponsor and V & P. Also, the issue in the cases cited by the Sponsor was the accrual date, not the length of the applicable statute of limitations, so the cases cannot be relied upon to hold that all construction defect cases are subject to a six-year statute of limitations.

The Court accepts the point urged by V & P as correct: "In the absence of a contractual relationship between the parties relative to the construction and design of the [work a issue], plaintiff is not entitled to assert a six-year limitations period," and the applicable period is the three years applicable to negligent injury to property under CPLR §214(4). *Harbour Pointe Vil. Homeowners Assn. v Marrano/Marc Equity Joint Venture,* 185 AD2d 648, 648-49 (4th Dep't 1992); cited with approval in *Shurka v Thurman,* 264 AD2d 730 (2nd Dep't 1999) (action to recover damages to property due to defective construction is governed by the three-year statute of limitations in CPLR §214(4).) Thus, V & P is entitled to the dismissal of the negligence claim asserted against it by the Sponsor.

Accordingly, it is hereby

ORDERED that the motion by Grzywinski + Pons Ltd. (seq. 001) is granted to the extent of directing the Clerk to sever and dismiss all claims against third-party defendant Grzywinski + Pons Ltd. in the First, Second and Third Causes of Action, except that the motion is denied with respect to the indemnification claim in the First Cause of Action; and it is further

ORDERED that the motion by V & P Altitude Corp.(seq. 002) is granted to the extent of directing the Clerk to sever and dismiss all claims against third-party

defendant V & P Altitude Corp. in the Eighth and Ninth Causes of Action, except that the motion is denied with respect to the indemnification claim in the Eighth Cause of Action; and it is further

ORDERED that the motion by Betro Design Group Ltd. is granted on consent to the extent of directing the Clerk to sever and dismiss all claims against third-party defendant Betro Design Group Ltd. in the First, Second and Third Causes of Action, except that the motion is denied with respect to the indemnification claim in the First Cause of Action, and the January 18, 2017 decision and order is supplemented accordingly; and it is further

ORDERED that all parties who have not done so shall efile an Answer by March 10, 2017, and all counsel shall appear for a preliminary conference on March 14, 2017 at 9:30 a.m.

Dated: February 23, 2017

J.S.C.
BARRY R. OSTRAGER
JSC