New York Mar. & Gen. Ins. Co. v Evans Constr. of N.Y., LLC
2017 NY Slip Op 30837(U)
April 25, 2017
Supreme Court, New York County
Docket Number: 150700/15
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 63
---X
NEW YORK MARINE AND GENERAL INSURANCE COMPANY and TECHNOLOGY INSURANCE COMPANY a/s/o VIEW CONDOMINIUM ASSOCIATES,

Plaintiffs,

-against-

Index No. 150700/15

EVANS CONSTRUCTION OF NEW YORK, LLC and VIS PLUMBING, HEATING, AND MECHANICAL CORP.,

Defendants,

DECISION/ORDER

---X
HON. ELLEN M. COIN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This subrogation action, sounding in negligence and breach of contract, arises from alleged defects in the construction of a sprinkler system whose burst pipe caused water damage to the premises owned by plaintiffs' subrogor, View Condominium Associates (the View), located at 24-15 Queens Plaza North in Long Island City, New York. Plaintiffs New York Marine and General Insurance Company (NYMAGIC) and Technology Insurance Company (Technology) were the View's insurance carriers at the time of the loss. Defendant Evans Construction of New York, LLC (Evans) was the general contractor and construction manager hired by the prior owner of the premises, Crescent Street, LLC, to construct the premises, and co-defendant VIS Plumbing, Heating and Mechanical Corp. (VIS) was the subcontractor Evans retained to construct, *inter alia*, the sprinkler system on the premises (Kaplan Aff., ex. F).

In motion sequence number 001, Evans moves, pursuant to CPLR 3211(a)(5), to dismiss the complaint as barred by the statute of limitations. In motion sequence number 002, VIS

moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. For the reasons stated, the motions are denied.

I. Background and Procedural History

According to the complaint, prior to January 8, 2015, NYMAGIC and Technology insured the View for, among other things, physical loss and damage to its property and business income (Evangelista Aff., ex. D ¶¶ 10, 11 at 2).

On or about January 8, 2015, a sprinkler pipe failed/burst at the premises, causing water damage. As a result of the payments made or to be made to the View in amounts exceeding the deductible of each policy, the plaintiff insurers became subrogated to the rights of the View by law and by the terms of the policies.

In its answer to the complaint, VIS cross-claimed against co-defendant Evans for contribution, and for contractual and/or common law indemnification and/or contribution.

On March 11, 2008, the State Attorney General deemed the Condominium Offering Plan to be effective.

The New York City Department of Buildings (DOB) issued a temporary certificate of occupancy (TCO) for the View on May 29, 2008 for the period from May 29, 2008 to July 27, 2008. The first closing at the View occurred on June 5, 2008.

The record also includes TCOs issued for the periods from September 11, 2008 to December 10, 2008 and from December 10, 2008 to March 10, 2009.

The final certificate of occupancy (CO) was issued for the View on January 26, 2009. Subcontractor VIS executed its Receipt of Final Payment and Release and Waiver of Lien (the Release) on May 15, 2009.

It is undisputed that the sprinkler pipe failed on January 8, 2015. Plaintiffs commenced this action by filing a summons with notice on January 22, 2015.

II. Motion Sequence No. 001: Motion to Dismiss, Pursuant to CPLR 3211 (a) (5) Based on the Statute of Limitations

A. Standard of Review

On a motion to dismiss a cause of action as barred by the applicable statute of limitations, the moving defendant bears the initial burden to demonstrate that the time in which to sue has expired (*see Girozentrale v Tilton*, –AD3d–, 2017 NY Slip Op 01482 [1st Dept 2017]; *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). In order to make a prima facie showing, the defendant must establish, *inter alia*, when the cause of action accrued (*see Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). Once the defendant has satisfied its burden to demonstrate that the action is untimely, the burden then shifts to the plaintiff to set forth evidentiary facts sufficient to establish or raise a question of fact as to whether the cause of action is timely. Namely, plaintiff must show that the statute of limitations was tolled, or was otherwise inapplicable, or that the action was commenced within the applicable limitations period (*see Kitty Jie Yuan v 2368 W. 12th St., LLC*, 119 AD3d 674, 674 [2d Dept 2014]; *Beizer v Hirsch*, 116 AD3d 725, 725 [2d Dept 2014]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358, 1359 [2d Dept 2011]).

B. Contentions

The parties agree that an action for damages by a property owner against a contractor is governed by the six-year statute of limitations, pursuant to CPLR § 213(2), regardless of whether the allegations are characterized as negligence, malpractice or breach of contract.

Evans argues that in actions involving construction contracts, the statute of limitations begins to run at the time of substantial completion of the work, and that it is irrelevant that some incidental matters relating to the project may remain open or that a punch list or remedial items may remain. It is the completion of the actual physical work that is the relevant date.

The Attorney General declared the condominium offering plan effective in March 2008, and Evans alleges that the View retained a separate company to test and maintain the sprinkler system (Evangelista Aff. ¶ 13 at 3). The first TCO was issued on May 29, 2008. The first closing at the View occurred on June 5, 2008, and owners and tenants took occupancy of the premises thereafter. Evans contends that it did not have any involvement with the sprinkler system after it was installed in "early 2008" (Id. ¶ 8 at 2). Therefore, according to Evans, since construction at the premises and work on the sprinkler system were substantially complete on May 29, 2008, it follows that plaintiffs' action is time-barred.

Plaintiffs underscore, in opposition, that the rider to the subcontract between Evans and VIS states that VIS' scope of work included, among other items, all heating, ventilating, air conditioning, plumbing and fire protection work (O'Hara aff., ex. A at 27-28). Plaintiffs also cite article 5.1 of the subcontract, which provides in relevant part:

> "The final payment and any retained percentage shall be payable to the SUBCONTRACTOR within thirty (30) days after the last of the following to occur, the occurrence off [sic] all of which shall be conditions precedent to such final payment:
> (A) Full completion of the WORK by SUBCONTRACTOR;
> (B) Final acceptance of the work by the Architect and Owner;
> © Final payment by Owner to CONTRACTOR under the Contract;
> (D) The furnishing of a general release from SUBCONTRACTOR to CONTRACTOR on a form satisfactory to CONTRACTOR;"

(*id.* at p. 6).

Plaintiffs argue that the work at the premises was not completed and the statute of limitations did not begin to run until the CO was issued on January 26, 2009, at the earliest, or until VIS executed its Release on May 15, 2009, at the latest. Since both of these dates are within the six-year limitations period by which plaintiffs commenced this action, the action is timely.

Plaintiffs contend that performance of the construction contract had not been completed at the time the May 2008 TCO was issued, since the TCO expressly excluded fire protection equipment and referred to 42 outstanding requirements (Klarsfeld aff., ex. B).

In reply, Evans challenges plaintiffs' allegations about the language in the TCO by highlighting that the TCO provides in paragraph C: "Fire Protection Equipment: None associated with this filing" and in paragraph E: "This Certificate is issued with the following legal limitations: None" (Klarsfeld aff., ex. B). Evans argues that plaintiffs' failure to address Evans' argument that the DOB will not issue a TCO unless a building is substantially complete and ready for occupancy, and that in order to obtain a TCO, all building systems, including sprinkler systems, must be completed, installed and signed off on by DOB, should be deemed an admission of this "fact". Finally, Evans notes that plaintiffs failed to present any proof that the 42 outstanding requirements are anything other than a punch list and *de minimis* incidental requirements.

C. Discussion

As Evans contends, plaintiffs' claim, arising out of defective construction, accrued on the date of completion, since "all liability has its genesis in the contractual relationship of the parties" (*City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 537-538 [1995], citing *Sears, Roebuck & Co. v Enco Assocs.*, 43 NY2d 389 [1977]). Thus, in *City of*

Newburgh, the Court of Appeals held that when a defectively assembled pipe fitting burst, damaging property, the owner's cause of action against an architect or contractor accrued upon completion of construction. Therefore, plaintiffs' breach of contract action must be commenced within six years from the accrual of the cause of action, pursuant to CPLR 213 (2) (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1029-1030 [2013], citing *City of Newburgh, supra*).

Completion of the construction work means completion of the actual physical work (*Phillips Constr. Co. v City of New York,* 61 NY2d 949, 951 [1984]), and for statute of limitations purposes, a construction project "may be complete even though incidental matters relating to the project remain open." (*State of New York v Lundin*, 60 NY2d 987, 989 [1983]).

Determination of substantial completion may depend on more than one factor. In *Cabrini Med. Ctr. v Desina* (64 NY2d 1059, 1061 [1985]), the Court of Appeals determined that by instructing its architect to release to defendants the funds retained pending completion of punch-list work, the owner "signaled" completion of work under the contract. The architect's issuance of a final certificate of payment and complete occupancy of the building prior to the release of those funds further indicated completion.

Partial or full occupancy of a building, without more, is not determinative as to whether there has been substantial completion of a construction project (*Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 167 AD2d 6 [1st Dept 1991]). Instead, "occupancy, partial or full, is simply a factor to be considered in ascertaining whether there has been completion" (*id.* at 12)(although temporary certificate of occupancy obtained and students occupying premises, question of fact as to whether work substantially complete and whether university accepted that work).

In support of its contention that the 42 outstanding requirements in the TCO are not incidental to the project, plaintiffs offer the affidavit of a mechanical/civil engineer. He avers that the TCO "clearly excludes fire protection equipment" and that the 42 outstanding items "are not minor punch list items, but substantial construction work that must be completed prior to the issuance of the final certificate of occupancy" (Urinyi aff. at ¶ 5).

Plaintiffs' engineer claims that issuance of the CO on January 26, 2009 (O'Hara aff., ex. B) and satisfaction of the conditions precedent to the final payment on May 15, 2009 (O'Hara aff., ex. C), including the fulfillment by VIS of its responsibilities under the subcontract, set forth in the rider and in article 5, determine when the work was complete (Urinyi aff. at ¶¶ 6-9).

In support of its claim as to the relevance and importance of the issuance of the TCO, Evans alleges: "DOB will not issue a TCO unless the building is substantially complete and ready for occupancy by tenants or owners. In order to obtain a TCO, all building systems, including sprinkler systems, must be completed, installed and signed off by DOB." (Evangelista aff., ¶¶ 10, 11). Evans fails, however, to support this contention with anything other than its member's self-serving allegation. Evans has failed to meet its burden of demonstrating prima facie that the cause of action accrued in May 2008.

Plaintiffs, in turn, have demonstrated that there is, at the very least, a genuine factual dispute as to whether the 42 outstanding items referenced in the TCO were essential to substantial completion of the project, or whether the work was substantially complete only when the Release was executed and/or the CO was issued.

Accordingly, Evans' motion to dismiss pursuant to CPLR 3211 (a) (5) is denied.

III. Motion Sequence No. 002:
Motion for Summary Judgment, Pursuant to CPLR 3212, to Dismiss the Complaint

A. Standard of Review

The principle is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact." (CPLR 3212[b]).

B. Contentions

VIS moves to dismiss plaintiffs' complaint on two grounds. First, VIS alleges that plaintiffs' claims are barred by the statute of limitations. Secondly, it contends that plaintiffs lack standing to sue VIS because their subrogor was not in privity of contract with VIS.

VIS claims that the complaint is time-barred because VIS substantially completed its sprinkler construction work for Evans by March 12, 2008 and Evans substantially completed construction of the premises by May 29, 2008. According to VIS, the sprinkler system was fully installed and operational, as documented by the sprinkler permits issued by DOB between December 10, 2007 and March 12, 2008 (Kaplan aff., ex. G), and the construction of the premises was substantially complete by May 29, 2008, when the DOB issued the first TCO for the period of May 29, 2008 to July 27, 2008 (*id.*, ex. H). Furthermore, VIS argues that as the first closing on a residential unit at the premises occurred on June 5, 2008 (*id.*, ex. I), the premises were thereafter occupied for their intended use.

On the issue of standing, VIS alleges that it was the sponsor of the condominium, Crescent Street, LLC, (Crescent or the sponsor), that contracted with Evans for construction of the premises (Kaplan aff., ex. D at ¶¶ 5, 6). The subcontract between Evans and VIS identifies Crescent as the owner, Evans as the contractor, and VIS as the subcontractor (*id*., ex. F). It was also Crescent that closed on the first residential unit (*id*., ex. I) and sold the other condominium units (*id*., ex. E). The owners of the units then succeeded to the ownership of the common elements of the premises owned by Crescent, and plaintiffs stand in the shoes of the View, and seek to enforce the rights to which the unit owners succeeded when they purchased their units from Crescent. VIS claims that as a subcontractor of Evans, it was not in privity with Crescent or the unit owners, who collectively are Crescent's successors.

In opposition, plaintiffs claim that VIS failed to provide any evidentiary proof in admissible form from any of its principals regarding when it completed the work under the subcontract, and relies only on Evans' affidavit and other documents. Plaintiffs also counter that VIS failed to address their allegations based upon maintaining and/or servicing of the sprinkler system. Plaintiffs argue that the action is not barred by the statute of limitations, as the limitations period began to run at the earliest on January 26, 2009 when the CO was issued, or at the latest, on May 15, 2009, when VIS executed its Release, in accordance with the express terms of the rider and articles 2 and 5 of the subcontract. Furthermore, plaintiffs have standing to sue VIS as an intended beneficiary of the subcontract.

In reply, VIS argues that where the date of accrual is deemed within the unilateral control of the owner, the date of substantial completion is not governed by the date when a final certificate of occupancy is issued or by the date that the final payment is due to the contractor. VIS claims that Urinyi's affidavit is unsupported by facts or data, is inconsistent, contradictory,

and ignores the sprinkler permits issued by DOB. VIS submits an affidavit of its Vice President, Bryan Ng (Kaplan reply aff., ex. K), its Application and Certificate for Payment (the Application) dated May 31, 2008, along with a spreadsheet, which, it urges, demonstrate that VIS completed 100% of the work as of May 31, 2008 (Kaplan reply aff., ex. L). As of May 31, 2008, the Application and spreadsheet list a retainage of $135,882 as a line item pursuant to article 4.3 of the subcontract and corresponding to 10% of the completed work, as well as a balance due of $281,952. The Release dated May 15, 2009 (O'Hara aff., ex. B) represents the payment of the 10% retainage that had been withheld, or $125,528, as adjusted per a March 27, 2009 letter agreement regarding adjustments in change orders (Kaplan reply aff., ex. N). VIS also submits TCOs for the periods from September 11, 2008 to December 10, 2008 and from December 10, 2008 to March 10, 2009 (Kaplan reply aff., ex. J).

C. Discussion

1. Standing

Turning first to the issue of standing, it is settled that generally "the ordinary construction contract –i.e., one which does not expressly state the intention of the parties is to benefit a third party – does not give third parties who contract with the promisee the right to enforce the latter's contract with another." (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 [1976]). However, VIS's reliance on *Port Chester* for the proposition that only those parties that are specifically mentioned in the construction contract as intended beneficiaries may sue to enforce it, is misplaced *(see Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 456-457 [2d Dept 1988]).

While a subcontractor is not generally considered a third-party beneficiary of the contract between an owner and the general contractor, or cannot hold an owner liable as in *Port Chester*,

the converse is not necessarily true. Indeed, an owner is often considered a foreseeable and intended beneficiary of the subcontract (*R. H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316 [1st Dept 1989]). In *R. H. Sanbar Projects*, the owner of the premises retained R. H. Sanbar Projects (Sanbar) as its developer and coordinator to build a residential condominium apartment building. Defendant contended that plaintiff owner lacked privity with it and was not a third-party beneficiary of the contract between defendant and Sanbar. The court determined that there was an issue of fact as to whether the owner was a third-party beneficiary of the contract by virtue of an agency relationship with Sanbar, stating, "It is almost inconceivable that these professional engineers or architects who render services in connection with a major construction project would not contemplate that performance of their contractual obligations would ultimately benefit the owner of that development" (*id.* at 319, quoting *Key Intl. Mfg.*, 142 AD2d at 455 [internal quotation marks omitted]).

Furthermore, it is well established that in order to assert third-party beneficiary rights under a contract, a non-party must show:

> "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost"

(*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]).

Here, plaintiffs have established the existence of a valid subcontract between Evans (contractor) and VIS (subcontractor). In the subcontract Crescent is identified as the owner, and the View succeeded to Crescent's interest. It is inconceivable that VIS would not contemplate that the performance of its contractual obligations, i.e., installation of plumbing and sprinklers,

would not ultimately benefit the View (*see Key Intl. Mfg.*, 142 AD2d at 455). The language in the subcontract speaks for itself:

> "WHEREAS, CONTRACTOR [Evans] has entered into written contract referred to herein as the PRIME CONTRACT with Crescent Street, LLC., as OWNER, to perform various labor and services and/or furnish certain structures or materials for the construction of View 59 Condominium hereinafter called the PROJECT, in accordance with the plans, specifications, general and special conditions, addenda, etc., forming a part of the PRIME CONTRACT, all of which are incorporated by reference herein and made a part hereof and copies of which PRIME CONTRACT are on file in CONTRACTOR'S office and have been read and examined by SUBCONTRACTOR."
>
> 2.1 The SUBCONTRACTOR [VIS] shall, under the direction and *to the satisfaction of the OWNER* and the CONTRACTOR, perform and complete the work and labor and furnish and install the materials....

(Kaplan af.f, ex. F at 1, ¶ 2 at 1-2 [emphasis added]).

These provisions of the VIS subcontract demonstrate that the View was a foreseeable and intended beneficiary of the contract (*see Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015], quoting *R. H. Sanbar Projects, supra*; *see also Board of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488 [1st Dept 1992]).

Therefore, plaintiffs have standing to sue VIS.

2. Timeliness of the Action

As noted, plaintiffs' claim is governed by a six-year limitations period pursuant to CPLR 213 (2) (*City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d at 537-538). Accrual of the breach of the construction contract is "upon substantial completion of the work," i.e., completion of the actual physical work (*Phillips Constr. Co. v City of New York*, 61 NY2d at 951). And, for statute of limitations purposes, "a construction project may be complete even though incidental matters relating to the project remain open" (*State of New York v Lundin*, 60 NY2d at 989).

Even in light of the new evidence submitted by VIS on reply, plaintiffs have raised triable issues of fact as to the date of substantial completion of the work and the timeliness of the action sufficient to defeat the motion for summary judgment for the reasons stated as to Evans' motion (*see Cabrini Med. Ctr. v Desina*, 64 NY2d 1059 and *Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 167 AD2d 6). Therefore, summary judgment is denied.

IV. Conclusion

Accordingly, it is

ORDERED that the motion of defendant Evans Construction of New York, LLC to dismiss the complaint pursuant to CPLR 3211 (a) (5) is denied, and it is further

ORDERED that the motion of defendant VIS Plumbing, Heating, and Mechanical Corp. for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied.

This constitutes the decision and order of the court.

ENTER:

Dated: April 25, 2017

Ellen M. Coin, A. J. S. C.