

**Gordon v 476 Broadway Realty Corp.**

2023 NY Slip Op 34356(U)

December 12, 2023

Superme Court, New York County

Docket Number: Index No. 103951/2012

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART 59

Justice

-----X

ANTHONY GORDON, and MARTINA GORDON,

Plaintiffs,

- v -

476 BROADWAY REALTY CORP., and BOARD OF MANAGERS OF 476 BROADWAY CONDOMINIUM,

Defendants.

-----X

ANTHONY GORDON, and MARTINA GORDON,

Third-Party Plaintiffs,

-against-

C AND D RESTORATION INC., ADELPHI RESTORATION CORP., VIDARIS, INC., JMA CONSULTANTS, INC., and JMA CONSULTANTS & ENGINEERS P.C.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 038) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 29, 45, 46, 48, 51, 52, 53, 54, 55, 56, 57, 72, 73, 76, 77, 78, 79

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 039) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 49, 58, 59, 60, 61, 62, 63, 64, 74, 80

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 040) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 50, 65, 66, 67, 68, 69, 70, 71, 75, 81, 82, 83, 84

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 042) 199, 200, 201, 202, 211, 230, 233, 236

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT

INDEX NO. 103951/2012

MOTION DATE 04/28/2022

MOTION SEQ. NO. 038 039 040

042 043

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 043) 203, 204, 205, 206, 208, 209, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 234, 238, 239, 240

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of the third-party defendant ADELPHI RESTORATION CORP. to dismiss the second, sixth, and tenth causes of action in the third-party complaint (motion sequence number 038) is GRANTED; and it is further

ORDERED that the motion of the third-party defendants JMA CONSULTANTS, INC., and JMA CONSULTANTS & ENGINEERS P.C., to dismiss the fourth, eighth, and twelfth causes of action in the third-party complaint (motion sequence number 039) is GRANTED; and it is further

ORDERED that the motion of the third-party defendant C AND D RESTORATION INC., to dismiss the first, fifth, ninth, and fifteenth causes of action in the third-party complaint (motion sequence number 040) is GRANTED; and it is further

ORDERED that the motion of the plaintiff/third-party plaintiff MARTINA GORDON to modify or reject the report of the Special Referee (motion sequence number 042) is DENIED; and it is further

ORDERED that the motion of the defendant 476 BROADWAY REALTY CORP., to confirm in part and reject in part the report of the

Special Referee (motion sequence number 043) is GRANTED, to the extent of confirming the report of the Special Referee, and denied in all other respects; and it is further

ORDERED that the cross-motion of the plaintiff/third-party plaintiff ANTHONY GORDON to modify or reject the report of the Special Referee, is DENIED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant 476 BROADWAY REALTY CORP and against plaintiffs Anthony Gordon and Martina Gordon for attorneys' fees in the amount of \$727,083, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

#### DECISION

Plaintiffs ANTHONY GORDON and MARTINA GORDON (collectively, the "Gordons") commenced the instant action seeking to avert an eviction, which arose by virtue of a dispute between the parties related to leaks in the Gordons' cooperative apartment located at 38 Crosby Street (the "Building") and culminated in the Gordons' refusing to pay maintenance charges and assessments related to their apartment (the "Main Action"). Plaintiffs withheld payment of such maintenance, citing the failure of the defendants 476 BROADWAY REALTY CORP. (the "Coop") and BOARD OF MANAGERS OF 476 BROADWAY CONDOMINIUM (the "Condo") to remedy the leaks in the apartment.

For a full recitation of facts, see this court's decision and order, dated On May 19, 2014 (NYSCEF Doc. No. 183), which, inter alia, granted summary judgment on the Coop's first counterclaim against the Gordons and referred the issue of reasonable attorney's fees and maintenance fees abatement to a Special Referee (NYSCEF Doc. No. 183).

On March 24, 2017, the Gordons, as counterclaim defendants, commenced a third-party action against the third-party defendants JMA CONSULTANTS, INC., JMA CONSULTANTS & ENGINEERS P.C. (collectively, "JMA"), C AND D RESTORATION INC. ("CDR"), ADELPHI RESTORATION CORP. ("Adelphi", together with "CDR" and "JMA", the "Contractors"), and VIDARIS, INC.<sup>1</sup>, seeking indemnification, contribution, and damages for negligence on the basis that the Contractors failed to remedy the leaks in the apartment. It is undisputed that each of the Contractors were retained by the Coop and/or Condo to perform work at the Building.

Each of the Contractors argue that the Gordons' claims are time-barred. JMA asserts that it completed its work at the Building around January 10, 2010 (NYSCEF 28, ¶¶ 4-5). Adelphi asserts that it completed its work in the Building in 2010 (NYSCEF

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<sup>1</sup> On October 11, 2017, the Gordons discontinued the third-party action against VIDARIS, INC., i.e., the third, seventh, eleventh, thirteenth, and fourteenth causes of action of the third-party complaint (NYSCEF Doc. No. 96).

10, ¶¶ 4-5). CDR asserts that it completed its work in the Building in December 2012 (NYSCEF 40, ¶¶ 4).

It is well settled that a cause of action sounding in negligence must be commenced within three years from the date of completion of construction work. See City Sch. Dist. of City of Newburgh v Hugh Stubbins & Assocs., Inc., 85 NY2d 535, 538 (1995). Thus, the Gordons were required to commence the third-party action against JMA and Adelphi no later than February 2013 and against CDR no later than January 2015. As stated above, the instant third-party action was not commenced until 2017.

The Gordons counter that their third-party negligence claims relate back to the negligence claim in the Main Action, which alleges that the Coop and the Condo were negligent in fixing the leaks that damaged the apartment and should be deemed interposed as of the date of the commencement of this action in 2012.

The relation-back doctrine, now codified in CPLR 203(f), provides that a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions or occurrences to be proved pursuant to the amended pleading.

O'Halloran v Metro. Transp. Auth., 154 AD3d 83, 86 (1st Dept 2017) (internal quotations omitted).

To avail themselves of the relation back doctrine, the Gordons must establish that: (1) the claims in the Main Action and the third-party action arise out of the same transaction or occurrence;

(2) the Contractors and the first party defendants are united in interest; and (3) the Contractors knew or should have known that, but for a mistake by the Gordons, the action would have been brought against them as well. See Ramirez v Elias-Tejada, 168 AD3d 401, 403 (1st Dept 2019).

This court finds that the relation back doctrine is inapplicable to the instant third-party action.

The Gordons' amended complaint asserts two claims for negligence against the Coop and the Condo (seventh cause and eighth causes of action), while the other seven claims asserted in the amended complaint relate to the Coop's decision to terminate the Gordons' proprietary lease because of issues related to obtaining access to the apartment to repair the leaks. In any event, despite the Gordons' conclusory arguments to the contrary, the defendants and the Contractors are not united in interest.

"The classic test for determining unity of interest is whether the defenses between the parties are the same such that their interests stand or fall together." Ellis v Newmark & Co. Real Estate, Inc., 209 AD3d 520, 521 (1st Dept 2022). "Where the relationship between parties is such as to give rise to vicarious liability of one for the conduct of the other, a unity of interest will be found (see id.)." It is undisputed that the Contractors were retained by the Coop to perform certain work at the building, but that fact alone does not create vicarious liability. In fact,

to establish unity of interest "[m]ore is required than a common interest in the outcome" of the lawsuit. For example, there must be factual allegations that the Condo/Coop are vicariously liable for the conduct of the Contractors, or that the Condo/Coop's common interest with the Contractors in the outcome is such that "a judgment against one will similarly affect the other[s]" 27th St. Block Assn. v Dormitory Auth. of State of New York, 302 AD2d 155, 164-165 (1st Dept 2002). Such is not the case here, as the complaint alleges that the Contractors were independent contractors of the Coop/Condo rather than their agents or employees, and the exception that makes owners liable in damages for property damage arising from premises that are allegedly in disrepair does not make the Contractors vicariously liable for such damages under the Multiple Dwelling Law § 78, which exception could be applied to cast the Coop in damages for any negligence of the Contractors, had plaintiff sued the Contractors, and not the Coop, directly. See Stagno v 143-50 Hoover Owners Corp, 48 AD3d 548 (2d Dept 2008) and Worth Distributors, Inc v Latham, 59 NY2d 231, 237-238 (1983).

Moreover, the Gordons fail to establish that the failure to include the Contractors was a result of a mistake. Anthony Gordon's affidavit states that he agreed to provide access to CDR for an inspection of the apartment in May 2012 (NYSCEF Doc. No. 70, ¶ 46). "(K)nowing the identity of the proper party indicates

the absence of a mistake" Benitez v Patel, 204 AD3d 529, 530 (1st Dept 2022). A plaintiff cannot claim mistake if plaintiff intentionally decides not to assert a claim against a party that is potentially liable and "should not be given another opportunity to assert that claim after the limitations period has expired". 27th St. Block Assn, supra, 302 AD2d at 164. Lastly, the Gordons fail to submit an affidavit establishing any diligent inquiry into the identities of the Contractors before the expiration of the statute of limitations. See Diaz v City of New York, 160 AD3d 457 (1st Dept 2018).

As the Gordons have failed to establish the three elements required to invoke the relation-back doctrine, their claims for negligence against the third-party Contractors must be dismissed as time-barred pursuant to CPLR § 214(4).

The Gordons also fail to establish that they are third-party beneficiaries of any contracts between the Coop and the Contractors, or that the Gordons themselves have privity with the Contractors. The law in New York is clear that a "plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship" and therefore, the Gordons' causes of action must be dismissed. Residential Bd. of Managers of Zeckendorf Towers v Union Sq.-14th St. Assoc., 190 AD2d 636 (1st Dept 1993).

The Gordons' claims seeking contribution or indemnification from the Contractors lack merit under CPLR 3211(a) (7) because they fail to allege breach of any duty running from the third-party Contractor defendants to themselves or that the Contractors were negligent in carrying out work on their behalf, in either case resulting in damages to the Coop/Condo. See Billig v Schwartz, 217 AD3d 493 (1<sup>st</sup> Dept 2023)

Finally, the court denies the parties' respective motions to modify or reject certain portions of the Referee Report, issued by Special Referee Alan Marin on March 15, 2022 (NYSCEF Document Number 194), and will confirm such Referee Report. The court finds that the Special Referee was in the best position to determine the issues referred to him, that the Referee Report demonstrates his consideration of the relevant factors, and that the resulting recommendations are supported by the evidentiary record. See Sichel v Polak, 36 AD3d 416 (1<sup>st</sup> Dept 2007); see also Namer v 152-54-56 W 15<sup>th</sup> St Realty Corp, 108 AD2d 705, 705-706 (1<sup>st</sup> Dept 1985).

*Debra A. James*

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12/12/2023  
DATE

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DEBRA A. JAMES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: