SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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TODD WIDER,

Plaintiff,

-against-

270 WEST END TENANTS CORP.,

Defendant.

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INDEX NO. 102455/10

JOAN A. MADDEN, J.:

Defendant cross-moves[1] for an order pursuant to CPLR 3211(a)(5) dismissing plaintiff's first cause of action for negligence and property damages, on the grounds that such claim is time-barred by the applicable statute of limitations.

In May 2004, plaintiff Todd Wider purchased the five-story apartment building located at 266 West End Avenue. Defendant 270 Went End Tenants Corp. is the cooperative corporation that owns the 13-story apartment building located at 270 West End Avenue, which is directly adjacent to plaintiff's building. In February 2010, plaintiff commenced the instant action, seeking compensatory and consequential damages, based on claims of negligence (first cause of action), breach of a stipulation (second cause of action) and "unpaid license fees" (third cause of action).

Defendant is cross-moving to dismiss only the first cause of action for negligence and property damages, which alleges that in August 2009, plaintiff's architect informed him "that

[1]Plaintiff's motion for temporary access to defendant's property pursuant to RPAPL § 881 was resolved by stipulation. Only defendant's cross-motion to dismiss the first cause of action remains for determination.

there was serious damage to an area on the North side of his building identified by Wider's mason as in extremely poor condition," and this area, which is approximately 22' 6" long by 10' 8" high, "is located at the junction of Wider's building and 270 West End Avenue." The complaint alleges that on August 7, 2009, plaintiff provided defendant with "a copy of his architect's preliminary findings regarding this damage," and alleges that the "condition described in that letter was caused by 270's use of 'waterproof' paint on Wider's building," and that the "remaining walls of 270's property that make up the courtyard are painted with the same paint." The complaint also alleges that "270's use of this paint has caused deterioration to the mortar and brick work on this portion of Wider's building," and that the "wall in question is a load bearing wall supporting the entire height of the building." The complaint further alleges that at all times defendant "controlled the courtyard separating its property from Wider's including the north wall of Wider's property," defendant "owed a duty to maintain its property and courtyard with appropriate care and, and to the extent it engaged contractors or agents to paint a portion of Wider's or did so itself, it had an obligation to first obtain Wider's consent and to utilize the skill necessary to meet the standards of workmanlike quality and care, or to insure that its contractors or agents did, so as not to cause harm to Wider's property." The complaint alleges that the "damage has caused Wider's property to deteriorate and take on water from rain and melting snow," that defendant "was negligent in the maintenance and painting of Wider's north wall," and that "[b]y reason of the foregoing, Wider is entitled to access to the area into order effect repairs and damages . . . in excess of $25,000."[2]

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[2]As noted above, the portion of the first cause of action for access has been resolved by the parties' stipulation.

In seeking dismissal of the first cause of action, defendant asserts that it is time-barred under CPLR 214(4), the three-year statute of limitations for an action to recover damages for injury to property. Defendant points out that the complaint contains no allegations as to the date or time frame when the waterproofing paint was allegedly applied to plaintiff's property. Addressing that issue, defendant submits affidavits from Vincent Coniglairo, the resident manager of 270 West End Avenue from 2005 until December 31, 2009, and Martin Adupeasah, an elevator operator at the building since 1974. Coniglairo states that as the resident manager for the building, "I am fully familiar with the building and the courtyard," and that "[t]he walls in the courtyard and the walls of plaintiff's building were the same color the entire time that I was working there, and the walls were not repainted during that time period." Mr. Adupeasah states that he is "familiar with the building and the courtyard," and that the "walls in the courtyard, including the wall of plaintiff's building, have been the same color since I started working there, and the walls have not been repainted since 1974." Relying on these affidavits, defendant asserts that any waterproof paint that was allegedly applied to the north wall of plaintiff's building, was applied prior to 1974, and therefore, plaintiff's first cause of action for property damages arising out of defendant's negligence in using that waterproof paint is barred by the three-year statute of limitations for an action for injury to property. CPLR 214(4).

In opposing the motion, plaintiff cites to the discovery accrual rule of CPLR 214-c and argues that the waterproof paint that defendant allegedly applied to his property without permission "constitutes 'any substance,' the effect on which Wider's property was surely 'latent,' as the degradation it caused within Plaintiff's wall was hidden, and only recently discovered."

Plaintiff asserts that the court "must look to the plain language of CPLR 214-c, as both its language and core purpose apply, and calculate the Statute of Limitations from Plaintiff's discovery of the latent negative effect of the waterproof paint application." Alternatively, plaintiff argues that his claim is timely under CPLR 214(4), as a continuing nuisance or trespass, since "the effects of the degradation caused by the waterproof paint constitute a continuing wrong."

Plaintiff's arguments are without merit. CPLR 214-c is not applicable, as the instant action does not involve a toxic substance. See Blanco v. American Telephone & Telegraph Co., 90 NY2d 757 (1997); Bloomindales Inc. v. New York City Transit Authority, 52 AD3d 120 (1st Dept 2008), aff'd 13 NY3d 61 (2009); Benitez v. Board of Higher Education of the City of New York University, 308 AD2d 410 (1st Dept 2003). Plaintiff does not take the position that the waterproof paint allegedly applied to the wall of his building was a toxic substance. Plaintiff simply asserts that under the broad language of the statute, "substance" means any type of substance, including waterproof paint. The Court of Appeals, however, explicitly rejects that interpretation, and limits the applicability of CPLR 241-c to toxic substances alone. See e.g. Blanco v. American Telephone & Telegraph Co., supra.

While plaintiff alternatively argues that his claim is timely as a continuing tort of trespass or nuisance, the complaint does not contain sufficient factual allegations to support either theory, and plaintiff has not requested leave to amend the complaint. In the event plaintiff does make a motion for leave to amend, the court notes that such a motion must be supported by an affidavit of merit. See Jebran v. LaSalle Business Credit, LLC, 33 AD3d 434 (1st Dept 2006); Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352 (1st Dept 2005).

Based on the foregoing, the court concludes that the first cause of action for property damages and negligence is time-barred, and defendant's cross-motion to dismiss that claim is granted.

Accordingly, it is

ORDERED that defendant's cross-motion to dismiss the first cause of action is granted, and the first cause of action is severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on February 3, 2011 at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

DATED: December 30, 2010

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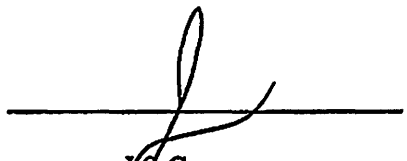

J.S.C.
HON. JOAN A. MADDEN
J.S.C.