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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN Justice

PART 52

Index Number : 114296/2011
MAHERAS, MARK
vs.
AWAN, AYAZ
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

memo of law 5

Upon the foregoing papers, it is ordered that this motion is

please see attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE IAS part
FOR THE FOLLOWING REASON(S): City defendants no longer parties to action.

Dated: 3-28-13

MARGARET A. CHAN, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 114296/2011

MARK MAHERAS, DANA WHITTLE, CHRISTINA KELSEY, and ADRIAN SOLOMON,
Plaintiffs,

- vs. -

AYAZ AWAN, NEW YORK BEST DEVELOPMENT, INC., HIGH RISE DEVELOPMENT ENTERPRISES, SABBA SALEEMI, K.T. SEUNG, OSCAR JACKSON, CLEMENT CHAMBERS, KNC ELECTRIC, NEW YORK CITY DEPARTMENT OF BUILDINGS, CHRIS WOLF,
Defendants.

Plaintiffs are owners of a certain property known as 261 West 137th Street, New York, NY. The basis of their action is the alleged faulty construction and renovation work done by the various contractor defendants. Relevant to the motion at hand by the municipal defendants, New York City Department of Buildings (DOB) and one of its inspectors, Chris Wolf (Wolf), are plaintiffs' allegations of them committing fraud and conspiring with co-defendants to defraud plaintiffs, general negligence, and negligence under the theory of *respondeat superior*. The municipal defendants moved pursuant to CPLR 3211(a)(2),(5) and (7) to dismiss the complaint on the grounds that it is time barred pursuant to General Municipal Law § 50-i, failure to state a cause of action for allegations of fraud and conspiracy, and negligence; and improper procedural review of an administrative determination. The remaining defendants are silent as to this motion.

FACTS

Pursuant to plaintiffs' dissertation of the facts, it is learned that in March 2007, plaintiffs purchased the property as an investment and planned to do extensive rehabilitation and renovation. Plaintiffs engaged defendant Ayaz Awan (Awan), president of defendant New York Best Development (NY Best) to do the construction and renovation work. The reconstruction included a total demolition and gut renovation of the electric and HVAC systems. Through Awan, plaintiffs hired defendant K.T. Seung (Seung) as architect. Plaintiffs subsequently learned that Seung was an engineer, and not an architect. They charged that Chris Wolf and "possibly others" at the DOB, together with the contractor defendants schemed to defraud them (Aff in Opp p 5, ¶ 12).

On December 3, 2008, Wolf inspected the premises from roof to basement. Plaintiffs were not present at the inspection as Awan told them residents could not be present. Wolf issued the Certificate of Occupancy (C of O) despite the many open and notorious violations, some that are even extremely hazardous. On September 7, 2010, Wolf reinspected the premises. This time plaintiff Maheras was present, and pointed out the defects to Wolf. When Maheras realized Wolf was also the first inspector, Wolf "broke down", "by his speech and conduct that he had been exposed as a fraud, declaring unexpectedly that he was so sorry that he had caused [them] so much turmoil" (*id* at p 15 ¶ 41). According to Maheras, Wolf confessed to overlooking the building code violations, and gave him originals of the violations he found, but did not submit, in the December 3, 2008 inspection, so that plaintiffs would have a "paper trail" in possible future litigation. Wolf had told him that DOB inspectors were discouraged to find violations and that most inspectors were not qualified or had enough time to conduct a thorough inspection. Wolf also told Maheras that he had a personal relationship with Awan, who gave him stock tips; he even had Awan's cell phone number. Plaintiffs claim that due to the municipal defendants' collusion with Awan, Seung and other defendants, they were caused to declare bankruptcy.

Based on Wolf's break down, and other indicators, plaintiffs surmised that the DOB must have been in cahoots with Awan and Seung's fraud and conspiracy. One such indicator of collusion is that Seung was able to somehow persuade the DOB to "restore" the building permit which had expired before the C of O was issued (*id.* at pp 8-9). Seung was also able to get a DOB mechanical waiver without submitting any mechanical drawing or paperwork; yet DOB could not explain how that could be done. Plaintiffs charged that the C of O was improperly issued because there were multiple major construction and mechanical defects, and deduced that, if the defects were uncovered before a proper C of O was issued, Awan and Seung "could be forced outside their comfort zone with the co-conspirators in the DOB" (*id* at p 9 ¶ 23).

The municipal defendants corrected the facts with exhibits to reflect that no C of O was issued after the December 3, 2008 inspection due to Wolf's objections. A temporary C of O was issued on January 16, 2009 after an inspection by another inspector, and the final C of O, effective April 9, 2009, was issued on April 4, 2009 upon yet another inspection by a different inspector (Defts' Exhs. B, C, and D). Plaintiffs filed a notice of claim on September 27, 2010, and the instant action on December 20, 2011.

DISCUSSION

I. Statute of Limitations

Addressing first the Statute of Limitations argument, the municipal defendants assert that the plaintiffs' negligence claims against them are time-barred pursuant to General Municipal Law (GML) § 50-i[c], which provides plaintiffs with one year and ninety days from the date of the occurrence to commence an action. The municipal defendants posit that even if the occurrence giving rise to the negligence claims arose on the later date of April 9, 2009, when the final C of O took effect, the action commenced on December 20, 2011, is untimely.

Plaintiffs argue that Wolf's representations, made in bad faith, precluded the municipal defendants from asserting the Statute of Limitations defense. Quoting *General Stencils, Inc. v Chiappa* (18 NY2d125, 128 [1966]), plaintiffs argue that under the doctrine of equitable estoppel, the statute of limitations defense cannot be used when the delay is caused by defendants' affirmative wrongdoing. Plaintiffs claim that they learned of the collusion between Wolf and Awan on September 7, 2010, thus "[t]his [a]ction was timely commenced on December 20, 2010 [emphasis added]" (Pltfs' Memo of Law p 12).

A review of the summons and complaint shows that they were filed on December 20, 2011, not 2010[1]. Assuming that it was a typographical error, plaintiffs' argument is nonetheless unavailing as one year and ninety days from September 7, 2010 is December 7, 2011. That said, plaintiffs' argument fails because the date of the occurrence is the effective date the final C of O, April 9, 2009. Plaintiffs' equitable estoppel argument does not serve them either because plaintiffs must show "that subsequent and specific actions by defendants somehow kept them from timely bringing suit" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006] [declining to extend *General Stencils*]; *Nichols v Curtis*, 2013 WL 1111088 [1st Dept, Mar 19, 2013]). In the instant case, there is no showing that even in the scenario that plaintiff would have this court adopt - the accrual date being the date from Wolf's alleged confession - the municipal defendants did anything subsequent to that to keep them from commencing the action.

Citing *Kiernan v Thompson* (134 AD2d 27 [3d Dept 1987] *aff'd* 73 NY2d 840 [1998]), plaintiffs also argued that the negligence is continuous, meaning that the statute of limitations renews each day as the condition exists. In *Kiernan,* plaintiff was injured when she tripped on a crack on the sidewalk that the City created when it removed a tree stump two years earlier. The Appellate Division, Third Department found that the City created an unsafe condition when it removed the tree stump. Consequently, notice of the defect was not required. And as the City has a duty to maintain its public sidewalks in a safe condition, failure to do so is a continuing breach of its duty and each day the unsafe condition existed served to renew the accrual of time for purposes of GML § 50- i (*id.* 134 AD2d at 29-30). However, the Court of Appeals, which affirmed the Appellate Division's order, nonetheless found the Appellate Division had erred in construing a separate cause of action based on the City's removal of the tree stump rather than its failure to properly maintain the sidewalk. The Court of Appeals reasoned that if the negligence was the discrete act of removing the tree stump, the statute of limitations had long expired for purposes of GML § 50-i (*Kiernan*, 73 NY2d 840, 842). Here, the duty of the DOB is to approve or disapprove an application and certify that the building substantially conforms to plans and codes (*see* Admin. Code § 28-118.4 *et seq*). Plaintiffs do not suggest that the DOB has a continuing duty after the C of O is issued. Thus, just like the removal of the tree stump, the occurrence of the event giving rise to plaintiffs' claim is the discrete act of issuing the final C of O, and not the duration of the C of O (*see Klein v City of Yonkers*, 53 NY2d 1011 [1981]). Accordingly, the fifth cause of action is dismissed because it is time barred.

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[1]The municipal defendants inform that plaintiffs filed a notice of claim on September 27, 2010, which was not resolved in plaintiffs' favor.

As to plaintiffs' alternative request to excuse the delay, they base the delay on their prior attorney's law office failure. However, there is nothing to substantiate this claim except for plaintiffs' conjecture. Considering that the prior attorneys' timely filed notice of claim met with disfavor, it cannot be said that the law office failure supposition carries much weight. In short, there is no good cause shown here to grant their request.

II. Fraud and Conspiracy to Commit Fraud

The second cause of action in the amended complaint is for fraud and conspiracy to commit fraud. To make out a prima facie case of fraud, the complaint must contain specific and detailed allegations of a misrepresentation of material fact, falsity, scienter, reliance and injury (*see* CPLR 3016[b]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). The basis of this claim is that the municipal defendants "engaged in unlawful policies and practices that resulted in fraudulent inspections" (Pltf's Opp. Exh. T, p 18 ¶ 112). The allegations recount Awan's promise that a C of O would be issued in weeks; Awan's lie to them that residents could not be present for the DOB inspection; Wolf's failure to identify obvious dangers and hazards; DOB's tactics of pressuring its inspectors such as Wolf to pass off violations; Wolf's participation and conspiracy to further Awan's fraudulent plans by bypassing violations; DOB's allowing Seung to circumvent laws related to building permits and obtaining waivers; their reliance on DOB's policies and mission statement, which reliance was corroborated by the issuance of a final C of O; Awan's representation that the air conditioning units were properly installed or DOB would not have issued the C of O; Awan's loud admonition to his worker to lie to plaintiffs about the installation of the air conditioner; Wolf's 'confession' to plaintiff Maheras that upon learning of the construction problems, apologized for "causing so much turmoil", taking responsibility for failing to properly inspect the premises, admitting to a personal relationship with Awan, and claiming Awan did good work; and disclosing the horrific policies of and understaffing at DOB that "encouraged unscrupulous contractors to flout the system" (*id.* at p 23 ¶ 141).

In reviewing the allegations, it appears that they fall under two categories: (1) Awan's misrepresentations, and (2) DOB's policies. Awan's alleged misrepresentations cannot be attributed to the municipal defendants. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2d Dept 2010]). The inferences that connect Awan and Seung to the DOB do not show that the DOB participated in or even knew about Awan or Seung's alleged misrepresentations.

As for DOB's policies, plaintiffs appear to argue that they do not correspond with its mission statement. Plaintiffs' attempt to associate Awan with Wolf as co-conspirators to defraud them is found in their allegation that Wolf had Awan's cell phone number in his cell phone, his apology for plaintiffs' turmoil and his admission of his initial improper inspection. Having a contractor's cell phone number, one whose site was to be inspected, or getting stock tips occasionally from him, and

expressing sympathy for plaintiffs' problems, do not point to a conspiratorial relationship between Awan andWolf. Wolf's admission to an improper inspection ties his work to the pressure he felt from his supervisors which speaks to DOB policies, not conspiracy. Nor does the mechanical waiver obtained by Seung from the DOB form a conspiratorial association. General allegations that the policies do not carry out its mission statement, or issuing unwarranted C of O, or granting waivers without required documents are insufficient to support a cause of action sounding in fraud (*see Introna,* 78 AD3d at 898). If plaintiffs intended its conspiracy to defraud claim to be an independent cause of action, then, it also fails because New York does not recognize a civil conspiracy to commit a tort as an independent cause of action (*see Hoeffner v Orrick, Herrington & Sutcliffe, LLP,* 85 AD3d 457, 458 [1st Dept 2011]). Accordingly, the second cause of action is dismissed.

III. Negligence and Respondeat Superior

Turning to plaintiffs' negligence claims, defendants argue that they are absolutely immune from liability because the issuance of a C of O is an exercise of discretion, and cite more than a few cases that speak to this axiom (*see e.g. Tango v Tulevach*, 61 NY2d 34, 40 [1983]; *Mon v City of New York*, 78 NY2d 309, 313 [1991]; *Haddock v City of New York*, 75 NY2d 478. 484 [1990]; *Rothkamp v Young* 21 AD2d 373, 375 [2d Dept 1965], *aff'd* 15 NY2d 831 [1965]; *Russo Demolition Inc. v City of New York*, 2012 NY Slip Op 04237 [2d Dept, May 31, 2012]; *see also California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 155 [1st Dept 2012]). Plaintiffs' memorandum of law cites none. They rely solely on their complaint to show that they have sufficiently made out their argument that the issuance of a C of O was not an exercise of discretion because Wolf colluded with Awan and Seung in his inspection of the premises. And since Wolf is an employee of the DOB, the DOB is liable under the theory of *respondeat superior.* Even if assuming the hearsay statements forming plaintiffs' allegations are true, there is still no showing of a conspiracy as discussed *supra.* Because the municipal defendants have absolute immunity from liability for the tort claims, the fifth cause of action, which was time barred in any event, and sixth cause of action are dismissed.

IV. CPLR Article 78

Finally, the municipal defendants argue that the proceeding should be dismissed because the claims against them challenges the issuance of a C of O, which should be properly brought under an Article 78 proceeding. Plaintiffs respond that as monetary relief is the objective of their suit, an Article 78 proceeding is inappropriate and futile.

Typically, a claim against a governmental agency or agent is brought under CPLR Article 78 (*see California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 153, *quoting New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 201 [1994]). Allegations that the governmental agency failed to follow proper procedures should be addressed in a special proceeding under CPLR Article 78 (*see California Suites, Inc.* at 154). Here, taking the fraud and conspiracy to commit fraud

allegations aside, which as previously discussed were found lacking, the crux of plaintiffs' complaint against the municipal defendants was that they did not abide by their mission statement in carrying out their policies or execution of their procedures. The allegations ranged from the DOB being understaffed; retaining untrained inspectors; its supervisors coercing and encouraging improper inspections; improper issuance of C of O's; and issuance of a mechanical waiver without drawings all speak to a departure from policy, procedure, guideline or mission statement. These allegations were raised to challenge the DOB's determination in issuing a final C of O. A challenge such as this requires an administrative review of the DOB's alleged "global failure and systemic breakdown of the DOB policies and procedures" (Maheras Aff, p11 ¶30). The proper vehicle by which to address that challenge is brought under CPLR Article 78, which is subject to a four-month statute of limitations (CPLR § 217; *see California Suites, Inc.* at 154). As such, plaintiffs' claims against the municipal defendants are time-barred.

Accordingly, the municipal defendants' motion is granted in its entirety. The complaint against New York City Department of Buildings and Chris Wolf is dismissed as a matter of law. As this action no longer involves municipal defendants it must be transferred out of this City Part to an appropriate IAS Part.

This constitutes the decision and order of the court.

Dated: March 28, 2013

Margaret A. Chan , *J.S.C.*