

All Craft Fabricators, Inc. v Syska Hennessy Group, Inc.
2015 NY Slip Op 32239(U)
November 23, 2015
Supreme Court, New York County
Docket Number: 155408/2015
Judge: Manuel J. Mendez
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
Justice

PART 13

ALL CRAFT FABRICATORS, INC. and  
DONALDSON INTERIORS, INC.,

INDEX NO.  
MOTION DATE  
MOTION SEQ. NO  
MOTION CAL. NO

155408/2015  
11-18-2015  
001

Plaintiffs,

-against-

SYSKA HENNESSY GROUP, INC.,

Defendant.

The following papers, numbered 1 to 8 were read on this motion to dismiss.PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1 - 4

Answering Affidavits — Exhibits \_\_\_\_\_

5 - 6

Replying Affidavits \_\_\_\_\_

7 - 8Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered, that defendant SYSKA HENNESSY GROUP., INC.'s (herein "Defendant") motion to dismiss the Complaint is denied.

Plaintiff All Craft Fabricators, Inc. (herein "All Craft") was hired by the construction manager - Skanska USA Buildings, Inc. (herein "Skanska") - to do mill work for the refurbishment (herein "Project") of the United Nations Headquarters (herein "UNH"), which included work on salvaged wood panels and doors within the offices of the UNH. All Craft shares offices with its affiliate, Donaldson Interiors, Inc. (herein "Donaldson" - collectively known herein as "Plaintiffs"). Plaintiffs claim the doors and panels contained toxic substances, specifically, asbestos, and that no notice of the defective condition was given to them. Plaintiffs allege that during the refurbishment of the doors and panels, due to the asbestos, they were forced to shut down their manufacturing facilities resulting in property damage, business interruption, loss of production, costs to remedy its facility, and costs to dispose of the asbestos.

Plaintiffs commenced this action against Syska Hennessy Group, Inc. (herein "Defendant") by summons and complaint dated May 29, 2015. Plaintiffs allege that Defendant was hired to perform design, architectural, and engineering, consulting and other services as part of the Project, and that Syska performed inspection, surveying, remediation and abatement of asbestos at the Project (see Complaint, PP. 10-11). Defendant hired ATC Associates, Inc. (herein ""ATC) to perform asbestos related services.

Plaintiffs claim that Defendant sent crates containing salvaged wood panels and doors from the UNH to perform millwork. The wood panels and doors contained asbestos. Plaintiffs contend that they were not given notice of the defective condition,

were forced to shut down their manufacturing facility, and incurred damages as a result (see Complaint, PP 12-21). The Complaint asserts a cause of action for negligence. Specifically, that Defendant "did not perform its work as a reasonably prudent company would under the circumstances;" did not "comply with applicable laws and regulations;" and that Defendant was "negligent" (see Complaint, PP. 29-31).

Defendant now moves to dismiss the Complaint based on a defense founded upon documentary evidence; that this action is time-barred; and that the Complaint fails to state a cause of action for negligence.

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law ( Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1<sup>st</sup>. Dept., 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2<sup>nd</sup>. Dept., 2012]).

"To state a claim for negligence, a plaintiff must sufficiently allege (1) a duty; (2) a breach of that duty; (3) causation; and (4) actual injury" (Aetna Life Ins. Co. v. Appalachian Asset Management Corp., 110 A.D.3d 32, 42-43, 970 N.Y.S.2d 750, 757-758 [1<sup>st</sup> Dept., 2013]).

The complaint sufficiently states a cause of action for negligence. The complaint alleges that Defendants were hired to perform asbestos-related abatement work, contracted with ATC for help in performing that work, then negligently delivered the asbestos-containing crates to Plaintiffs. As a result of Defendants' negligence in performing its job duties, Plaintiffs closed their manufacturing plant, performed the asbestos abatement at their own expense, and suffered loss of materials and business.

To dismiss a complaint as time-barred pursuant to CPLR § 3211(a)(5), the statute of limitations must have expired. CPLR § 214 imposes a three-year statute of limitations period for a cause of action for negligence. CPLR § 214-c(2) states that "[n]otwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

Defendant claims that this action is time-barred because the crates containing the toxic substance were delivered to Plaintiffs on January 23, 2013, and that Plaintiffs' claim is for professional negligence and not simple negligence. Defendant argues that the statute of limitations on Plaintiffs' professional negligence claim accrued on the date of delivery of the crates containing toxic substances and that the three-year statute of limitations period had expired four months prior to Plaintiffs commencing this action.

"[M]alpractice in the statutory sense describes the negligence of a professional toward the person for whom he rendered a service, and that an action for malpractice springs from the correlative rights and duties assumed by the parties through the relationship. On the other hand, the wrongful conduct of the professional in rendering services to his client resulting in injury to a party outside the relationship is simple negligence" (Cubito v. Kreisberg, 69 A.D.2d 738, 742, 419 N.Y.S.2d 578, 580 [2<sup>nd</sup> Dept., 1979]). "A latent injury occurs at the time of exposure: the reason that the injury is latent is that the injury is concealed, and not visible or otherwise apparent (see Giordano v. Market Am., Inc., 15 N.Y.3d 590, 598, 915 N.Y.S.2d 884, 941 N.E.2d 727 [2010]), and the property damage results from the seepage or infiltration of a toxic foreign substance over time" (Suffolk County Water Authority v. Dow Chemical Co., 121 A.D.3d 509, 91 N.Y.S.2d 613, 620 [2<sup>nd</sup> Dept., 2014]).

Plaintiffs were not in privity with Defendant. This action is based on simple negligence and CPLR 214-c applies here because the toxic condition of the doors and wood panels were a latent defect. The statute of limitations on Plaintiffs' simple negligence accrued on June 7, 2012 when the Plaintiffs' employees first opened the crates and sustained injuries. This action is timely.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858[2002]; 511 West 232<sup>nd</sup> Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]; Fortis Financial Services v. Fimat Futures USA, 290 A.D.2d 383, 737 N.Y.S.2d 40 [1<sup>st</sup>. Dept. 2002]).

Defendant annexes the contract between itself and the United Nations for the Project. The contract references the Scope of Professional Services and the Scope of Services. The Defendant fails to annex the documents defining the Scope of Professional Services and Scope of Services. Defendant also fails to annex the contract between itself and ATC showing what ATC's scope of services included. Defendant's self-serving affidavit without further proof in the form of the contracts between the parties at issue fails to conclusively establish a defense as a matter of law. Dismissal of the Complaint based on a defense founded upon documentary evidence is denied.

Accordingly, it is ORDERED, that defendant SYSKA HENNESSY GROUP, INC.'s motion to dismiss the Complaint is denied, and it is further,

ORDERED, that the parties appear for a Preliminary Conference in IAS Part 13 located at 71 Thomas St., Room 210, NY, N.Y. on February 10, 2016 at 9:30 a.m.

Enter: **MANUEL J. MENDEZ**  
**J.S.C.**

Dated: November 23, 2015

  
**MANUEL J. MENDEZ**  
**J.S.C.**

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST       REFERENCE