

**Brown v Deck**

2016 NY Slip Op 30337(U)

February 26, 2016

Supreme Court, New York County

Docket Number: 152769/2015

Judge: Cynthia S. Kern

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: Part 55

-----X  
ROBERT BROWN and BARBARA CAREY.

Plaintiffs.

Index No. 152769/2015

-against-

**DECISION/ORDER**

HAMPTON DECK and DAVID R. SALERNO.  
D.B.A. HAMPTON DECK.  
Defendants.

-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavit.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced this action to recover damages for personal injuries Robert Brown allegedly sustained when he fell from a deck designed and constructed by defendants and to recover damages for loss of consortium Barbara Carey allegedly sustained as a result of this accident. The court previously issued a decision denying defendants' motion to dismiss plaintiffs' personal injury cause of action based on negligent design and construction on the ground that it was barred by the statute of limitations. Defendants now seek leave to reargue that portion of this court's decision. For the reasons set forth below, defendants' motion for reargument is granted, and upon reargument, the court adheres to its original decision.

The relevant facts are as follows. Plaintiff Robert Brown contracted with defendants to design and build a deck at plaintiffs' residence. In 2005, defendants completed construction of the deck. On or about July 10, 2012, when Mr. Brown leaned against a portion of the deck rail, the rail collapsed and he fell approximately fifteen feet to the ground, sustaining injuries. Plaintiffs allege that the deck rail was improperly attached to the deck by an insufficient number of screws which were of inadequate length. On or about March 5, 2015, within three years of when plaintiff Brown was allegedly injured, plaintiffs commenced the instant action, alleging, *inter alia*, a personal injury cause of action for negligent and defective design and construction.

Defendants moved to dismiss plaintiff Robert Brown's personal injury cause of action for negligent design and construction solely on the ground that it was barred by the three year statute of limitations for non-medical malpractice claims pursuant to CPLR § 214(6). Pursuant to CPLR § 214(6), the statute of limitations for non-medical, dental, or podiatric malpractice is three years, whether the action is based in contract or tort. The court denied the motion to dismiss on this ground based on the court's finding that defendants had failed to make a prima facie showing that they were an architect or other professional to whom CPLR § 214(6) would apply.

Defendants now argue that this court erred in its determination because defendants are entitled to dismissal of plaintiffs' cause of action for negligent design and construction pursuant to CPLR § 214(6) because the accrual date for statute of limitations purposes is completion of performance, the statute of limitations for negligent design and construction claims is three years after completion of performance and plaintiffs did not commence this action within three years after completion of performance. In making this argument, the defendants rely on two Court of Appeals decisions which were cited in their original papers. *See City School District of Newburgh v. Hugh Stubbins & Associates, Inc.*, 85 N.Y.2d 535 (1995); *Cabrini Medical Center*

v. *Desina*, 64 N.Y.2d 1059 (1985). However, these cases are completely inapplicable to the present case. Initially, neither of these cases hold, as defendants argue, that contractors are professionals for the purposes of determining the applicability of the statute of limitations contained in CPLR § 214(6). Moreover, these cases do not address what the statute of limitations is for a personal injury claim, which is what plaintiff is asserting in this action, and when a claim for personal injury accrues for statute of limitations purposes.

In both *City School District of Newburgh and Cabrini Medical Center*, the issue before the court was the proper accrual date for a cause of action against a contractor for defective construction where the plaintiff is asserting a claim for damage to real or personal property arising out of the contractual relationship. In *City School District of Newburgh*, which involved a claim for damage to personal property, the court held that in cases against contractors, the accrual date for statute of limitations purposes is completion of performance. *Id.* at 538. According to the court, “no matter how a claim is characterized in the complaint--negligence, malpractice, breach of contract, an owner’s claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties.” *Id.* As the court explicitly noted, however, “[i]n a different category, of course, is injury to the person--a circumstance not present here”. *Id.* at 539. Similarly, in *Cabrini Medical Center*, a case involving damage to property, the court similarly held that a cause of action against a contractor for defects in construction generally accrues upon completion of the actual physical work. More recently, the Court of Appeals once again addressed its determination in *Newburgh and Cabrini*. See *Town of Oyster Bay v. Lizza Industries, Inc.* 22 N.Y.3d 1024 (2013). The court held in that case as follows:

A breach of contract action must be commenced within six years from the accrual of the cause of action (see CPLR 203[a]; 213[2]). In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance. This rule applies “no matter how a claim is characterized in the complaint” because “all liability” for defective construction “has its genesis in the contractual relationship of the parties” (Newburgh, 85 N.Y.2d at 538, 626 N.Y.S.2d 741, 650 N.E.2d 399, citing *Sears, Roebuck & Co. v. Enco Assoc.*, 43 N.Y.2d 389, 396, 401 N.Y.S.2d 767, 372 N.E.2d 555 [1977]). Even if the plaintiff is not a party to the underlying construction contract, the claim may accrue upon completion of the construction where the plaintiff is not a “stranger to the contract,” and the relationship between the plaintiff and the defendant is the “functional equivalent of privity” (Newburgh, 85 N.Y.2d at 538–539, 626 N.Y.S.2d 741, 650 N.E.2d 399 [internal citations and quotation marks omitted]).

*Id.* at 1030. However, as the Court of Appeals explicitly noted in *Newburgh*, the rule that a cause of action for negligent design accrues upon completion of the construction is only applicable where the cause of action is for damages to property which has its genesis in the contractual relationship between the parties and it does not apply to actions for personal injury. It is well established that a cause of action for personal injury, which is what plaintiff is asserting in this action, has a three year statute of limitations which accrues when the plaintiff is injured. See CPLR § 214 (5) (action to recover damages for a personal injury is three years); *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429 (1993) (cause of action for personal injury accrues on date of injury). Moreover, defendants have still not made a showing that CPLR § 214(6) applies to this action as they have not made any showing that defendants are professionals.

Based on the foregoing, the motion for reargument is granted, and upon reargument, the court adheres to its original decision. The foregoing constitutes the decision and order of the court.

Dated: 2/26/16

Enter: \_\_\_\_\_

*CK*  
 CYNTHIA S. KERN  
 J.S.C. J.S.C.