

<b>Nunez v B07 Constr. Corp.</b>
2020 NY Slip Op 33102(U)
September 22, 2020
Supreme Court, New York County
Docket Number: 159323/2019
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 159323/2019

IRIS NUNEZ,

MOTION SEQ. NO. 001

Plaintiff,

- v -

BO7 CONSTRUCTION CORP., C&T PLUMBING & HEATING, INC., DUANE D. POLADIAN, MD ASHRAF ALI and ASHRAF ALI. P.E., P.C.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISSAL.

In this personal injury action, defendants C&T Plumbing & Heating, Inc. a/k/a C&T Plumbing & HTG, Inc. and Duane D. Poladian ("C&T Plumbing and Poladian") move, pursuant to CPLR 3211(a)(5), for dismissal of the summons and complaint on the ground that, inter alia, plaintiff Iris Nunez ("plaintiff") failed to commence this action within the applicable statute of limitations (Docs. 10-21, 53). Defendant BO7 Construction Corp. ("BO7") cross-moves against plaintiff for identical relief (Docs. 23-29). Plaintiff only opposes BO7's cross motion (Docs. 33-50, 54-61). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On May 5, 2014, plaintiff was allegedly injured by a ceiling that collapsed in her apartment at 608 West 189<sup>th</sup> Street in Manhattan ("the premises") (Doc. 1). In September 2014, plaintiff commenced a related action as against 608-614 West 189<sup>th</sup> Street LLC ("608-614 West"), the owner of the premises, based on negligence (*see Nunez v 608-614 West 189<sup>th</sup> Street, LLC*, Supreme Court, NY County, Index No. 158901/2014, James, J.) ("the related action") (Doc. 13). In February 2016, after issue was joined, 608-614 West filed a third-party complaint in the related action for indemnification as against BO7, a general contractor that was performing construction and/or renovation work in the apartment directly above plaintiff's apartment ("the project") and which, 608-614 West claimed, caused the ceiling in plaintiff's apartment to collapse (Doc. 15). In May 2019, BO7 filed a second third-party complaint in the related action against several defendants, including C&T Plumbing and Poladian, alleging that C&T Plumbing and Poladian were liable for, *inter alia*, contribution and indemnification because they were contractors and/or subcontractors involved in the project (Doc. 18).

In June 2020, plaintiff moved to consolidate the related action with the above-captioned action and for permission to amend her complaint to add BO7 as a direct defendant (Doc. 50).

In September 2019, plaintiff commenced this action as against C&T Plumbing and Poladian, as well as BO7, based on the same incident referenced in the related matter (Doc. 1). C&T Plumbing and Poladian now move to dismiss the summons and complaint against them, arguing that this action is barred by the statute of limitations; that there is no basis for tolling the statute of limitations pursuant to Article 2 of the CPLR; and that the relation back doctrine set forth in CPLR 1024 does not apply (Doc. 11 ¶ 12-29). This motion is unopposed.

BO7 interposed an answer in this action on May 20, 2020, raising several affirmative defenses and cross claims against its co-defendants (Doc. 22). The next day, BO7 cross-moved against plaintiff for dismissal of the summons and complaint based on similar arguments raised by C&T Plumbing and Poladian (Doc. 24). Plaintiff opposes the cross motion arguing, *inter alia*, that it is procedurally defective and that, for purposes of the statute of limitations, the complaint as against BO7 relates back to the February 2016 third-party complaint served in the related action (Doc. 33 ¶ 16-52).

### LEGAL CONCLUSIONS:

"Pursuant to CPLR 3211 (a) (5), the Court may dismiss a cause of action as time barred under the applicable statute of limitations. The initial burden is on the defendant to show that the claims against him [or her] are time barred by the applicable statute of limitations. Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been stopped from asserting a statute of limitations defense" (*Stanger v Shoprite of Monroe, NY*, 2019 NY Slip Op 30383[U], 2019 NY Misc LEXIS 653, \*9 [Sup Ct, NY County 2019] [internal citations omitted]). Moreover, it is well-settled that an action for personal injury must be commenced within three years (*see* CPLR 214 [5]; *Wolf v Walgreens Boots Alliance, Inc.*, 2019 NY Slip Op 30685[U], 2019 NY Misc LEXIS 1208, \*4 [Sup Ct, NY County 2019]).

Here, the negligence claim asserted by plaintiff as against C&T Plumbing and Poladian relates to an incident that occurred in May 2014 and is therefore barred by the three-year statute of limitations (*see* CPLR 214 [5]; *Schlapa v Consol. Edison Co. of NY, Inc.*, 174 AD3d 934, 935-936 [2d Dept 2019]; *Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 678-679 [2d Dept 2007]; *Goldstein*

*v Massachusetts. Mut. Life Ins. Co.*, 32 AD3d 821, 821 [2d Dept 2006]; *Meighan v City of N.Y.*, 2020 NYLJ LEXIS 1261, \*3 [Sup Ct, NY County 2020]. Further, failing to oppose the motion, plaintiff has not demonstrated that the statute of limitations should be tolled as against C&T Plumbing and Poladian, or that they should be precluded from asserting a statute of limitations defense.<sup>1</sup>

However, BO7's cross motion is denied as defective. It is well-settled that "a cross motion is an improper vehicle for seeking affirmative relief from . . . a nonmoving party" (*Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016], quoting *Mango v Long Island Jewish-Hillside Medical Center*, 123 AD2d 843, 844 [2d Dept 1986]; see CPLR 2215). Since BO7 is seeking affirmative relief from plaintiff, a non-movant, the cross motion is improper. Further, although a Court may, in the exercise of its discretion, disregard this procedural defect (see generally *Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Shtulberg v Metro. Transp. Auth.*, 2020 NY Slip Op 31720[U], 2020 NY Misc LEXIS 2503, \*6 n 2 [Sup Ct, NY County 2020]), no such exercise of discretion is warranted here, especially in light of the pending motion in the related action seeking consolidation and leave to amend the complaint to add BO7 as a direct defendant, which concern the same legal arguments raised here (Doc. 54 ¶ 3, 12).

All remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the foregoing, it is hereby:

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<sup>1</sup> C&T Plumbing and Poladian remain in this action only for the purposes of the cross claims asserted against them by BO7.

**ORDERED** that the unopposed motion by defendants C&T Plumbing & Heating, Inc. a/k/a C&T Plumbing & HTG, Inc. and Duane D. Poladian seeking dismissal of plaintiff's negligence claim, pursuant to CPLR 3211(a)(5), is granted and the Clerk is directed to enter judgment accordingly; and it is further


**ORDERED** that defendant BO7 Construction Corp.'s cross motion, pursuant to CPLR 3211(a)(5), seeking to dismiss the summons and complaint is denied as improper; and it is further

**ORDERED** that, within 20 days after this order is uploaded to NYSCEF, counsel for defendants C&T Plumbing & Heating, Inc. a/k/a C&T Plumbing & HTG, Inc. and Duane D. Poladian shall serve a copy of this order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre Street, Room 141 B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark their records accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties are to participate in a preliminary conference by telephone on December 10, 2020 at 10:30 am (the parties are to provide a dial-in number and access code for the call or are to have all parties on the line and then patch in the Court at 646-386-3895); and it is further

ORDERED that this constitutes the decision and order of this Court.

  
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9/22/2020  
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE