At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 28th day of December 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

----------X

MICHELLE DUTTON,

Plaintiff,

-against-

FLATBUSH PARTNERS LLC, LMW ENGINEERING GROUP, LLC, and BOLT CONSTRUCTION CORP.,

Defendants.

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FLATBUSH PARTNERS LLC and BOLT CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

MALIBU MASONRY II, LLC

Third-Party Defendant.

----------X

FLATBUSH PARTNERS LLC and BOLT CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

LMW ENGINEERING GROUP, LLC

Third-Party Defendant.

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Index No.: 511594/2018

DECISION & ORDER

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

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	62 - 70
Opposing Affidavits (Affirmations)	72
Reply Affidavits (Affirmations)	75 - 76

Introduction

Third-party defendant, LMW Engineering Group, LLC, moves by notice of motion, sequence number four, pursuant to CPLR §§ 3211(a)(5) and 201 to dismiss Flatbush Partners LLC's third party complaint as against it and pursuant to CPLR § 3211(a)(7) to dismiss Bolt Construction Corp's third party complaint against it. Second third-party plaintiffs Flatbush Partners LLC and Bolt Construction Corp. oppose this application.

Background & Procedural History

Plaintiff commenced the instant action by e-filing a summons with notice on June 6, 2018, based on alleged property damage. Plaintiff owns the premises located at 25 East 31st Street, Brooklyn, New York. Flatbush Partners LLC (Flatbush) owns the adjacent property, 19 East 31st Street, Brooklyn, New York.

In 2014, Flatbush began a construction project at its premises. Flatbush retained Bolt Construction Corp (Bolt) as general contractor on the project. In December 2014, Flatbush hired LMW Engineering Group, LLC (LMW) to "[d]esign criteria for the project based on 2008 NYC Building Code and material; review the geotechnical report along with the soil boring information and its recommendation for excavation; review the

foundation plan for the new building and property survey for site conditions; drawings and specifications for NYC DOB filings; and signing all SOE design related for the filing at NYC Building Department" (Memorandum of Law in Support at p 6-7). Flatbush and LMW entered into an agreement on December 10, 2014 (*see* NYSCEF Doc. # 65). Paragraph 6 of the agreement's "General Conditions", entitled "Limitations of Liability" provides that "[n]o action, regardless of form, arising out of the service under this agreement, may be brought by the Client more than one(1) year after the act or omission giving rise to a cause of action has occurred" (*see id.*).

In December 2014, Flatbush was issued a demolition permit by the City of New York. Plaintiff contends that the demolition project caused structural damage to her garages, which abut the property line with the premises owned by Flatbush. LMW moved to dismiss the main action as against it, pursuant to CPLR § 3012(b). This motion was granted by the Hon. Dawn Jimenez-Salta on May 29, 2019.

On August 23, 2019, Flatbush and Bolt impleaded LMW by filing a second third-party summons and complaint wherein both Flatbush and Bolt allege the following causes of action: (1) contractual indemnification; (2) common law indemnification and contribution; and (3) breach of contract (*see* NYSCEF Doc. # 69). LMW joined issue by filing an answer to the second third-party complaint on September 13, 2019. On November 4, 2019, LMW filed the instant motion to dismiss the second third-party action.

Discussion

Flatbush- Statute of Limitations

LMW moves LMW moves pursuant to CPLR § 3211(a)(5) to dismiss Flatbush's second third-party complaint. "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of ... statute of limitations" (CPLR § 3211[a][5]).

CPLR § 201 provides that "[a]n action...must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action". "[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable" (*D & S Restoration, Inc. v. Wenger Constr. Co.*, 160 A.D.3d 924, 75 N.Y.S.3d 505 [2 Dept., 2018], quoting *John J. Kassner & Co. v. City of New York,* 46 N.Y.2d 544, 415 N.Y.S.2d 785 [1979]; *see also* CPLR § 201). "[T]he period of time within which an action must be brought ... should be fair and reasonable, in view of the circumstances of each particular case ... The circumstances, not the time, must be the determining factor" (*D & S Restoration, Inc. v. Wenger Constr. Co.*, 160 A.D.3d 924, *supra,* quoting *Executive Plaza, LLC v. Peerless Ins. Co.,* 22 N.Y.3d 511, 982 N.Y.S.2d 826 [2014]; *see also Continental Leather Co. v. Liverpool, Brazil & Riv. Plate Steam Nav. Co.,* 259 N.Y. 621, 182 N.E. 207 [1932] [Crane, J., dissenting]).

As an initial matter, Flatbush is mistaken in its contention that LMW waived this cause of action by failing to raise statute of limitations as an affirmative defense (*see*

NYSCEF Doc. # 70, Answer to Second Third-Party Complaint at ¶ 19). In the instant case, the parties' agreement dated December 10, 2014, provides for a one-year statute of limitations from the act or omission giving rise to the cause of action. Dutton's property was allegedly damaged as a result of the construction in early 2016. This action was commenced by filing a summons and complaint on February 13, 2019. The third-party action was commenced by filing a summons and complaint on August 23, 2019. Here, the act or omission occurred which gave rise to plaintiff's action occurred in 2016. Therefore, LMW's alleged breach of contract would have occurred in 2016 and therefore was not commenced within the agreed upon one-year statute of limitations.

However, with respect to Flatbush's remaining third-party causes of action, this is not the case. The remaining causes of action herein are for indemnification and contribution. The Court of Appeals has ruled that "[t]he statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim" (*Tedesco v. A.P. Green Indus., Inc.,* 8 N.Y.3d 243, 864 N.E.2d 65 [2007]; *see also Vidal v. Claremont 99 Wall, LLC,* 124 A.D.3d 767, 2 N.Y.S.3d 186 [2 Dept., 2015]). Further, where, as here, the causes of action for indemnification and contribution, directly stem from plaintiff's main action, those causes of action cannot accrue prior to plaintiff's original claim. Flatbush correctly contends that "to do so would nullify the claim, rather than simply curtailing the statute of limitations period" (NYSCEF Doc. # 72, Opposition at ¶ 13). Accordingly, LMW's motion to dismiss Flatbush's second third-party complaint based on statute of limitations

is granted as to the breach of contract cause of action but denied as to the remaining claims.

Bolt- Failure to State a Cause of Action

LMW further moves pursuant to CPLR § 3211(a)(7) to dismiss Bolt's third-party complaint as against it based on Bolt's alleged failure to state a cause of action. "When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Bennett v. State Farm Fire & Cas. Co.*, 161 A.D.3d 926, 78 N.Y.S.3d 169 [2 Dept., 2018], quoting *Sokol v Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 [2 Dept., 2010]). "[T]he pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, 78 N.Y.S.3d 129 [2 Dept., 2018], citing *Leon v Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 [1994]; *see also Mirro v. City of New York,* 159 A.D.3d 964, 74 N.Y.S.3d 356 [2 Dept., 2018]). "[T]he sole criterion is whether factual allegations are discerned from the four corners of the complaint which, taken together, manifest any cause of action cognizable at law" (*Law Offices of Thomas F. Liotti v. Felix,* 129 A.D.3d 783, 9 N.Y.S.3d 888 [2 Dept., 2015], citing *Cohen v. Kings Point Tenant Corporation,* 126 A.D.3d 843, 6 N.Y.S.3d 93 [2 Dept., 2015]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, *supra,* quoting *EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 799 N.Y.S.2d 170 [2005]).

"In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v. Polsky, Shouldice & Rosen, P.C.,* 161 A.D.3d 828, 77 N.Y.S.3d 424 [2 Dept., 2018], quoting *Cron v. Hargro Fabrics,* 91 N.Y.2d 362, 670 N.Y.S.2d 973 [1998]; *see also Rad & D'Aprile, Inc. v. Arnell Constr. Corp.*, 159 A.D.3d 971, 74 N.Y.S.3d 266 [2 Dept., 2018]). "A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action" (*Kaplan v. New York City Dep't of Health & Mental Hygiene*, 142 A.D.3d 1050, 38 N.Y.S.3d 563 [2 Dept., 2016]).

Here, LMW's motion to dismiss for failure to state a cause of action is denied. Affording the pleading with liberal construction and giving Bolt the benefit of every favorable inference, Bolt sufficiently stated it's causes of action. With respect to the cause of action for indemnification, while Bolt admits that it is not a third-party beneficiary to the agreement between Flatbush and LMW (*see* NYSCEF Doc. # 72, Opposition at ¶ 20)[1], Bolt alleges that privity exists. Motions to dismiss are not meant to address the substantive merits of the party's cause of action. Whether Bolt can ultimately establish privity, or the functional equivalent of privity is not relevant here.

[1] This Court notes that Bolt's opposition is silent as to the cause of action for breach of contract.

Conclusion

Accordingly, LMW's motion to dismiss the second third-party complaint is granted only to the extent that Flatbush and Bolt's causes of action for breach of contract are dismissed. The remainder of the motion is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

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J.S.C.

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