SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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INDEX NO. 152020/2021

MOTION DATE 06/14/2021, 09/30/2021

MOTION SEQ. NO. 001 002

ALLIED WORLD NATIONAL ASSURANCE COMPANY AS SUBROGEE OF SOHO HOUSE, LLC,WESTCHESTER SURPLUS LINES INSURANCE COMPANY AS SUBROGEE SOHO HOUSE, LLC,EVANSTON INSURANCE COMPANY AS SUBROGEE OF SOHO HOUSE, LLC,HDI GLOBAL INSURANCE COMPANY AS SUBROGEE OF SOHO HOUSE, LLC,

Plaintiffs,

- v -

MASTER FIRE PREVENTION SYSTEMS, INC.,AIR FORCE MECHANICAL CORP., WTC PLUMBING & HEATING CORP., WILLIAM DEE INSTALLATIONS, BURO HAPPOLD CONSULTING ENGINEERS,

Defendants.

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DECISION + ORDER ON MOTION

AIR FORCE MECHANICAL CORP.

Plaintiff,

-against-

SOHO-LUDLOW HOUSE, LLC D/B/A LUDLOW HOUSE

Defendant.

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Third-Party
Index No. 596049/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 85, 87, 88, 89, 90, 91

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant Buro Happold Consulting Engineers moves pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (5) to dismiss the complaint and all cross-

claims (motion sequence no. 1). Defendant Master Fire Prevention Systems moves pursuant to CPLR 3211 (a) (2), CPLR 3211 (a) (5), and CPLR 3211 (a) (7), to also dismiss the complaint and all cross-claims (motion sequence no. 2).

BACKGROUND

This subrogation matter arises out of a fire that occurred on March 24, 2018, at the Soho House located at 139 Ludlow Street, New York, New York. It is alleged that plaintiffs Allied World National Assurance, Westchester Surplus Insurance, Evanston Insurance, and HDI Global Insurance (collectively referred to as "plaintiffs") insured the Soho House (subject premises) and personal property located within. It is further alleged that prior to March 24, 2018, Soho House contracted with defendants, Master Fire Prevention Systems, Air Force Mechanical Corp., WTC Plumbing and Heating Corp., William Dee Installations, and Buro Happold Consulting Engineers to perform a variety of services. Such services included, e.g., cleaning, servicing, testing, maintaining, designing, installing and or repairing hoods, ducts, grease filters, exhaust fans and/or fire suppression systems. Plaintiffs initiated this matter to recover from defendants the amount paid to Soho House in accordance with the governing insurance policies.

In its motion to dismiss, defendant Buro Happold Consulting Engineers (hereinafter "Buro") alleges that plaintiffs' causes of action against it are time-barred, that co-defendants' cross-claims for contractual indemnification should be dismissed because Buro's indemnification clause does not require Buro to indemnify any party to this action, and that co-defendants' cross-claims for contribution and common law indemnification fail to state a cause of action. Defendant Master Fire Prevention Systems (hereinafter "Master") moves to dismiss the complaint and all cross-claims arguing that it is not bound by any writing to plaintiff and that incontrovertible facts entitle it to dismissal. The Court will address the motions in sequential order.

DISCUSSION

When deciding a motion to dismiss, the Court is to liberally construe the factual allegations in the complaint and deem them to be true, while giving the nonmoving party the benefit of all favorable inferences (see Magee-Boyle v Reliastar Life Ins. Co. of New York, 173 AD3d 1157, 1158–59 [2d Dept 2019]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY 3d 11, 19 [2005]).

Buro's Motion to Dismiss

Dismiss Complaint as Time Barred

> "A defendant who moves to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired…[t]he burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period" (Plaza Invs. v Cap. One Fin. Corp., 165 AD3d 853, 854 [2d Dept 2018]).

Buro argues that it is entitled to dismissal of the complaint and all cross-claims because plaintiffs' claims are untimely since this action was commenced more than three years after Buro concluded its professional services on the project. According to Buro, the statute of limitations for a malpractice claim against a design professional is three years, regardless of whether the action is based in contract or tort. Buro argues that it completed its work on the project on March 10, 2017. Plaintiffs filed the complaint on February 26, 2021, thus, plaintiffs' failure to commence the action within the three-year period renders it untimely. In opposition, plaintiff argues that the causes of action are not time barred because Buro did not complete its services on March 10, 2017. Plaintiff argues the professional relationship continued with Buro and the insured, Soho House, past the

March 10, 2017 date, because on March 29, 2018, representatives for Soho House contacted Buro representatives to assist with code complaint issues within the subject building. Additionally, plaintiff argues that professional relationships in New York are subject to the "continuous representation" rule which tolls or extends the beginning of the suit period to the last date on which the professional stopped rendering services. In response Buro argues that despite contemplating additional engineering services with Soho House after the March 10, 2017 date, Buro did not proceed with this work, therefore, the continuous representation rule is inapplicable.

The continuous representation rule "applies when a plaintiff shows that he or she relied upon an uninterrupted course of services related to the particular duty breached" (Sendar Dev. Co., LLC v CMA Design Studio P.C., 68 AD3d 500, 503 [1st Dept 2009]). "However, '[t]he mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services'" (id. quoting Hall & Co. v Steiner & Mondore, 147 AD2d 225, 228 [3d Dept 1989]). In other words, for the continuous representation rule to apply, the continued services must be in the same manner and for the same purpose (see Hall & Co., 147 AD2d at 229). Examining the material presented, it is unclear when Buro completed their work for the subject premises and whether the completion date surpassed March 10, 2017. Furthermore, it is unclear what kind of work Buro performed, and if it engaged in additional work past March 10, 2017, whether that was related to the original work or not. Buro asserts it did not perform any additional work. However, plaintiffs assert that Buro continued a professional relationship with the Soho House as late as March 29, 2018.

For the continuous representation rule to apply it is clear that "the continuous relationship be in connection with the particular matter from which the malpractice claim arose" (In re Clark Patterson Engineers, Surveyor, & Architects, P.C. (City of Gloversville Bd. of Water Comm'rs),

25 A.D.3d 984, 986 [3d Dept 2006]). Plaintiffs have brought suit against Buro for the alleged negligence and breach of contract that occurred in connection with the work Buro performed at the subject premises, for the insured Soho House. In order for the continuous representation rule to apply, there must be a connection with the work performed and the malpractice that arises therefrom. Accordingly, the Court holds that the continuous representation rule might apply, rendering plaintiffs' claims timely because it is unclear whether Buro engaged in work past the March 10, 2017 date, and whether this work was related to the previous work it performed. Therefore, that branch of Buro's motion to dismiss pursuant to CPLR 3211 (a) (5) is denied.

Dismiss Cross-Claims for Contractual Indemnification, Contribution, and Common Law Indemnification

Buro further moves to dismiss co-defendants' cross-claims for contractual indemnification because the indemnification clauses in Buro's contracts do not require Buro to indemnify any party to this action. Buro further argues that the economic loss doctrine precludes the defendants' cross-claims for contribution, because plaintiffs seek to recover the benefit of a contractual bargain, which precludes the defendants recovery on a theory of contribution. In opposition, defendants Air Force Mechanical (hereinafter "Air Force") and WTC Plumbing and Heating Corp. (hereinafter "WTC"), along with plaintiffs, argue that the economic loss doctrine does not apply in this matter. Specifically, Air Force argues that Buro's motion to dismiss is premature, and that plaintiffs seek to recover damages on the basis of breach of contract and negligence, a tort and separate cause of action for negligence which the economic loss doctrine cannot prohibit. WTC adopts and supports the arguments made by Air Force, while also claiming that Buro's motion is premature as there are questions to liability. Plaintiffs argue the economic loss rule does not apply where the defective workmanship causes physical damage to property that was not the subject matter of the contract.

Plaintiffs' complaint alleges that Buro is liable for negligence and breach of contract. "Pursuant to [the economic loss] doctrine, a plaintiff may not recover in tort against a manufacturer for economic loss that is contractually based, 'whether due to injury to the product itself or consequential losses flowing therefrom'" (Elec. Waste Recycling Grp., Ltd. v Andela Tool & Mach., Inc., 107 AD3d 1627, 1629 [4th Dept 2013] quoting Bocre Leasing Corp. v Gen. Motors Corp. (Allison Gas Turbine Div.), 84 NY2d 685, 693 [1995]). "Where, however, there is harm to persons or property other than the property that is the subject of the contract, a plaintiff is entitled to recover in tort" (Elec. Waste Recycling Grp., 107 AD3d at 1629). Buro argues that the economic loss doctrine bars the co-defendants' cross-claims because the alleged damages were contemplated by the contract. Plaintiffs argue that the fire damage spread throughout the subject premises, and that the insured's real and personal property sustained severe and substantial damage that was outside the scope and subject matter of the contract. Considering that discovery has not been held and liberally construing the factual allegations in the complaint and deeming them to be true, while also giving plaintiffs the benefit of all favorable inferences, Buro's motion to dismiss defendants' cross-claims for contractual indemnification, contribution, and common law indemnification is denied, as issues of fact exist as to whether the damages were contemplated by the contract and if Buro had a duty to indemnify.

Master's Motion to Dismiss

Defendant, Master moves pursuant to CPLR 3211 (a) (2), CPLR 3211 (a) (5), and CPLR 3211 (a) (7), to dismiss the complaint and all cross-claims, for the lack of subject matter jurisdiction, Statute of Frauds, and the failure to state a cause of action. Master argues that it is not bound by any writing to plaintiff and that the facts of the case entitle it to dismissal. In support of the motion, Master submits the affidavit of a professional engineer and what appear to be FDNY

records that have not been authenticated, testified to, or exchanged with opposing counsel. Within the motion, Master relies heavily on unauthenticated FDNY records to assert that it did not cause the fire at the subject premises, and that plaintiffs' incorrect safety habits and failures caused the fire for which Master should not be held responsible. In opposition, WTC argues that Master's motion is premature as discovery between the parties has not been exchanged and depositions have not been held. WTC also argues that triable issues of fact are present which should prevent Master from being dismissed from the case, as discovery is warranted to effectively determine its liability. Plaintiff argues that the contract with Master is not governed by the statute of frauds, and that Master's arguments regarding comparative negligence are irrelevant and premature.

At the outset, the Court denies Masters' motion to dismiss because discovery imperative to this matter has not occurred. Master's reliance on FDNY records, that have not been exchanged or authenticated, to argue its lack of liability supports the need for discovery. Moreover, the Court finds that subject matter jurisdiction is proper as plaintiffs allege in the complaint that Master is and was at all times a corporation duly organized and existing under the laws of the State of New York, and that Master contracted to perform work at the subject location which is located in New York. "Subject matter jurisdiction 'refers to objections that are fundamental to the power of adjudication of a court' that the matter before the court was not the kind of matter on which the court had power to rule" (Garcia v Gov't Emps. Ins. Co., 130 AD3d 870, 871 [2d Dept 2015] quoting Manhattan Telecommunications Corp. v H & A Locksmith, Inc., 21 NY3d 200, 203 [2013]). Subject matter jurisdiction is proper in this matter and rightfully before this Court because it concerns a matter this Court is vested with power to hear (see Tendler v Bais Knesses of New Hempstead, Inc., 52 AD3d 500, 501–02 [2d Dept 2008]). Master argues that it is not bound to plaintiff because plaintiff is unable to produce a binding contact between the two parties and that

the statute of frauds warrants dismissal, however, the Court finds otherwise. Giving plaintiffs the benefit of all favorable inferences, the statute of frauds does not warrant dismissal in this matter because plaintiffs assert that several documents were created that contain the material terms of the agreement, which further suggests the need for discovery. "On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true, and according the plaintiff the benefit of every possible inference" (Gallagher v Kucker & Bruh, LLP, 34 AD3d 419, 420 [2d Dept 2006]). Master is not entitled to dismissal in accordance with CPLR 3211 (a)(7) because plaintiffs clearly state a cause of action for negligence and breach of contract in the pleadings.

It is hereby ORDERED that defendant Buro Happold Consulting Engineers' motion to dismiss the complaint and all cross-claims is denied; and it is further

ORDERED that defendant Master Fire Prevention Systems' motion to dismiss the complaint and all cross-claims is denied; and it is further

ORDERED that all parties are directed to appear for a preliminary conference virtually via Microsoft Teams on **November 9, 2022**, subject to availability in Part 33 as this matter was reassigned to the Hon. Mary V. Rosado.[1]

This constitutes the decision and order of the Court.

10/14/2022
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[1] Parties should follow up with the Part 33 Clerk to confirm (SFC-Part33-Clerk@nycourts.gov or 646-386-3894).