

**Meserole Hub LLC v Rosenzweig**

2023 NY Slip Op 34638(U)

January 19, 2023

Supreme Court, Kings County

Docket Number: Index No. 524299/2018

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York,  
held in and for the County of Kings, at the  
Courthouse, located at 360 Adams Street,  
Borough of Brooklyn, City and State of New  
York on the 19th day of January 2023

P R E S E N T:

Honorable Reginald A. Boddie  
Justice, Supreme Court

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MESEROLE HUB LLC,

Index No. 524299/2018

Plaintiffs,

Cal. No.20 MS 4

-against-

DECISION AND ORDER

SOLOMON ROSENZWIEIG AND SOLOMON  
ROSENZWIEIG, PE P.C., d/b/a SRPE,

Defendants.

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SOLOMON ROSENZWIEIG AND SOLOMON  
ROSENZWIEIG, PE P.C., d/b/a SRPE,

Third-Party Plaintiffs,

-against-

Y.N.H. CONSTRUCTION INC.,

Third-Party Defendant.

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

<u>Papers</u>	<u>Numbered</u>
MS 4	Docs. No. 67-76

Upon the foregoing cited papers, defendants Solomon Rosenzweig and Solomon Rosenzweig, PE, P.C. d/b/a SRPE’s motion seeking dismissal of plaintiff’s second cause of action, pursuant to CPLR 3211 (a)(4) or CPLR 3211 (a) (7), is decided as follows:

In the within action, plaintiff seeks damages including lost profits against the defendant engineer and his firm for alleged errors in building plans related to the alleged defective

installation of rebar at 152 Manhattan Avenue, Brooklyn, NY. The initial complaint included claims for breach of contract, negligence and unjust enrichment. In an order dated May 14, 2021, this Court granted SRPE's motion and dismissed all of plaintiff's claims except the first cause of action for breach of contract. The Court also determined that the contract limits defendants' liability to Fifty Thousand Dollars. Thereafter, on April 26, 2022, plaintiff moved to amend the complaint to reinstate the claim for unjust enrichment and add a claim for gross negligence. By order dated October 6, 2022, the court granted plaintiff's motion to amend the complaint to include a claim for gross negligence.

Defendants now move to dismiss the claim for gross negligence as untimely since it was brought more than three years after the action accrued on March 30, 2016. Defendants argue the claim was commenced at the earliest on April 26, 2022, the date plaintiff made the motion to amend. Defendants also allege the claim is duplicative of the contract claim, conclusory, fails to allege any property damages or personal injury, and fails to properly state a cause of action. Defendants also aver "The damages sought are entirely economic lost-based damages despite the Amended Complaint asserting that the public "might have been harmed if the building was completed without revisions to the design."

Plaintiff argues the claim is not duplicative of the contract claim and is timely since defendants received notice of the transactions and occurrences when the original complaint was interposed.

"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." (*Berger v. Stolzenberg*, 158 A.D.3d 738, 739, 71 N.Y.S.3d 558, 560 [2d Dept 2018]). "The 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.” (*Id.*) The statute of limitations for gross negligence, as here, is three years (CPLR 214 and 214 [c] ).


On a motion to dismiss the complaint pursuant to CPLR 3211[a] [7] for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Hyatt v Wilmington Sav. Fund Socy., FSB*, 186 AD3d 1621,1622 [2d Dept 2020] [citations omitted]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Doe v Ascend Charter Schs.*, 181 AD3d 648, 649 [2d Dept 2020] [citing to *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]]).

Defendants’ argument that the gross negligence claim is untimely since it was brought more than three years after the action was commenced in March 30, 2016 is unsupported. The law clearly provides, “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” CPLR § 203(f); *Marcotrigiano v Dental Specialty Associates*, 209 AD3d 850 [2d Dept 2023]; *Pendleton v. City of NY*, 44 AD3d 733, 736, [2d Dept 2007]. The relation-back doctrine enables a plaintiff to correct a pleading error by adding either a new claim

or a new party after the limitation period has expired (*Marcotrigiano v Dental Specialty Associates*, 209 AD3d 850 [2d Dept 2023]).

Here, defendant shifted the burden of proof to plaintiff on this issue. Plaintiff met this burden by establishing that the gross negligence claim was timely when the action was commenced and derives from the same transactions and occurrences in the original complaint. Nonetheless, the allegations asserted here are duplicative of the contract claim and fail to state a claim for gross negligence (*See Colnaghi, USA v Jewelers Protection Servs., Ltd*, 81 NY2d 821 [1993]). Therefore, the second cause of action is dismissed.

ENTER:

  
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Hon. Reginald A. Boddie  
Justice, Supreme Court

**HON. REGINALD A. BODDIE  
J.S.C.**