

Village of Greeport v Manning Plumbing & Heating Corp.

2011 NY Slip Op 30385(U)

February 8, 2011

Supreme Court, Suffolk County

Docket Number: 26981-09

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

INDEX
NO.: 26981-09

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

_____ x
VILLAGE OF GREENPORT,

Plaintiff,

-against-

MANNING PLUMBING & HEATING CORP.,
BRIAN MANNING, ARA PLUMBING CORP.,
BJLA ARCHITECTURE & PLANNING, PLLC,
BRUCE J. LEVY, THE HASTINGS DESIGN
GROUP, CENTENNIAL INSURANCE
COMPANY, ATLANTIC MUTUAL
INSURANCE COMPANY, FEDERATED
MUTUAL INSURANCE COMPANY,
FEDERATED SERVICE INSURANCE
COMPANY, QBE INSURANCE
CORPORATION, FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, EXCELSIOR
INSURANCE COMPANY, SHOP/SHARPLES
HOLDEN PASQUARELLI, SHARPLES
HOLDEN PASQUARELLI, CASHIN; AND
MARK OURS,

Defendants.

_____ x

MOTION DATE: 1-15-10; 1-29-10; 8-18-10
SUBMITTED: 11-18-10
MOTION NO.: 001-MOT D
002-MG
003-MG
004-MG
006-MOT D
007-MD
008-XMD

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Upon the following papers numbered 1-77 read on these motions for a more definite statement, dismissal, summary judgment and cross-motion for leave to amend ; Notice of Motion and supporting papers 1-4; 5-17; 18-23; 24-38; 39-49; 50-56 ; Notice of Cross Motion and supporting papers 57-64 ; Answering Affidavits and supporting papers 65 ; Replying Affidavits and supporting papers 66; 67-68; 69; 70; 71-74; 75; 76-77 ; it is,

ORDERED that the motion by the defendant ARA Plumbing Corp. for a more definite statement of the complaint is granted as to the third and fourth causes of action, and the motion is otherwise denied; and it is further

ORDERED that the motion by the defendants Bruce J. Levy; BJLA Architecture & Planning, PLLC; and the Hastings Design Group for an order dismissing the the seventh and eighth causes of action insofar as asserted against them is granted; and it is further

ORDERED that the motion by the defendant Fidelity and Deposit Company of Maryland for an order dismissing the complaint insofar as asserted against it is granted; and it is further

ORDERED that the motion by the defendants Centennial Insurance Company and Atlantic Mutual Insurance Company for summary judgment dismissing the complaint insofar as asserted against them is granted; and it is further

ORDERED that the branch of the motion by the defendants Federated Mutual Insurance Company and Federated Service Insurance Company which is for an order dismissing the complaint and any cross claims insofar as asserted against them is granted, and the motion is otherwise denied; and it is further

ORDERED that the motion by the defendants Shop/Sharples Holden Pasquarelli and Sharples Holden Pasquarelli to dismiss the seventh and eighth causes of action and all cross

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claims insofar as asserted against them is denied; and it is further

ORDERED that the cross motion by the plaintiff for leave to amend the complaint is denied; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference, which shall be held on February 10, 2011, at 10:30 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

This action arises out of the alleged negligent design and construction of the East and West Piers at the Mitchell Marina in the Village of Greenport (the "Village"). The Village commenced this action on July 24, 2009, against the various contractors, architects, engineers, and sureties involved in the project. The defendant ARA Plumbing Corp. moves for a more definite statement of the complaint. Several of the other defendants move to dismiss the complaint on the ground that the plaintiff's claims against them are time barred. The defendants Centennial Insurance Company, Atlantic Mutual Insurance Company, Federated Mutual Insurance Company, and Federated Service Insurance Company seek dismissal of the complaint for failure to state a cause of action against them. The Village cross moves for leave to serve and file an amended complaint.

The court agrees with the defendant ARA Plumbing Corp. ("ARA") that the third and fourth causes of action fail to distinguish between the purported liability of ARA and that of the defendants Brian Manning and Manning Plumbing & Heating Corp. ("the Manning defendants"). The record reveals that, in July 2003, the Manning defendants entered into a contract with the Village for the construction and installation of a standpipe for fire suppression and plumbing at the piers. When the Manning defendants failed to complete the work, the Village entered into a separate agreement with ARA in April 2005 for the work that was not done by the Manning defendants. While the complaint contains separate causes of action against ARA and the Manning defendants for breach of contract, the third and fourth causes of action merely allege in conclusory terms that ARA and the Manning defendants were negligent in the performance of the work they were required to perform and that they were paid for work that was not properly completed. The court finds that these allegations are not sufficiently specific to permit ARA to frame a reasonable response thereto (*see*, CPLR 3024 [a]; **Della Villa v Constantino**, 246 AD2d 867). Moreover, the proposed amended complaint does not cure the deficiency. Accordingly, ARA's motion is granted as to the third and fourth causes of action, and the motion is otherwise denied.¹

¹ARA also seeks a more definite statement of the fifth and sixth causes of action. The fifth cause of action is dismissed (*infra*). The sixth cause of action was discontinued against the defendants Excelsior Insurance Company and QBE Insurance Corporation, and the remainder of the sixth cause of action is dismissed (*infra*). Accordingly, the branch of ARA's motion which is for a more definite statement of the fifth and sixth causes of action is denied as academic.

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The defendants Bruce J. Levy; BJLA Architecture & Planning, PLLC; and the Hastings Design Group (the BJLA defendants) provided architectural and construction management services for the project. The seventh and eighth causes of action are asserted against the BJLA defendants, among others, to recover damages for breach of contract and negligence, respectively. The BJLA defendants move to dismiss the seventh and eighth causes of action on the ground that the Village's claims against them are time-barred.

The Village's claims against the BJLA defendants sound in malpractice. Nonmedical malpractice claims are governed by the three-year statute of limitations, whether the complaint is cast in contract or in tort (CPLR 214 [6]; **Matter of R.M. Kliment & Frances Halsband, Architects** [McKinsey & Co., Inc.], 3 NY3d 538, 539). A cause of action to recover damages for professional malpractice against an architect for defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship (**Frank v Maza Group, LLC**, 30 AD3d 369, 369-370), not when the injury occurred or the defective condition was discovered (**Heritage Hills Society, Ltc. v Heritage Development Group, Inc.**, 56 AD3d 426, 427).

The BJLA defendants have established that they completed their contractual obligations and ceased working on the project on May 10, 2004, more than five years before this action was commenced. In opposition, the Village contends that the operative date for statute-of-limitations purposes is August 2006, when the fire suppression system was pressurized with water for the first time and rendered inoperable due to burst pipes and connections. As previously noted, a cause of action to recover damages for architectural malpractice accrues upon completion of the work to be performed and not when the defective condition is discovered (**Id.**). Accordingly, the seventh and eighth causes of action are dismissed insofar as they are asserted against the BJLA defendants.

The defendant Fidelity and Deposit Company of Maryland ("Fidelity") moves to dismiss the sixth cause of action on the ground that the Village's claim is time-barred. Fidelity issued a performance bond guaranteeing ARA's performance of its contract with the Village. The performance bond provides, in pertinent part:

No suit or action shall be commenced by a Claimant under this Bond...after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1 or Clause 4.2.3 or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs.

The "Construction Contract" is defined as ARA's contract with the Village. The Village has stipulated that its final payment to ARA was on or about October 31, 2006, and that ARA

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stopped performing under the contract on or about December 31, 2006. This action was commenced approximately two and one-half years later on July 24, 2009. Accordingly, the sixth cause of action is dismissed insofar as it is asserted against Fidelity.

The defendants Centennial Insurance Company (“Centennial”) and Atlantic Mutual Insurance Company (“Atlantic Mutual”) move for summary judgment dismissing the fifth cause of action, inter alia, for failure to state a cause of action against them. The record reveals that Centennial and Atlantic Mutual are insolvent and in rehabilitation pursuant to Insurance Law article 74. Pursuant to orders of rehabilitation issued by the Supreme Court, New York County (Rakower, J.), filed on September 16, 2010, all persons are permanently enjoined and restrained from commencing or prosecuting any actions or proceedings against Centennial and Atlantic Mutual. Moreover, the record reveals that Atlantic Mutual did not issue a performance bond in connection with the project and that the Village’s claim against Centennial is time-barred. Accordingly, the fifth cause of action is dismissed insofar as it is asserted against Centennial and Atlantic Mutual.

The defendants Federated Mutual Insurance Company and Federated Service Insurance Company (the “Federated defendants”) move for an order dismissing the complaint and any cross claims asserted against them and for a declaration that they are not obligated to defend or indemnify the Village. The record reveals that the Federated defendants did not issue a performance bond in connection with the project and that the Village cannot recover under the commercial-package insurance policy issued by the Federated defendants to Manning Plumbing & Heating Corp. The Federated defendants, however, are not entitled to declaratory relief. A declaratory judgment may not be obtained by motion (*see generally*, CPLR 3001; Siegel, NY Prac § 438 at 742-743 [4th ed]). Accordingly, the fifth cause of action and any cross claims are dismissed insofar as they are asserted against the Federated defendants, and the motion is otherwise denied.

The defendants Shop/Sharples Holden Pasquarelli and Sharples Holden Pasquarelli (the “Shop defendants”) move to dismiss the seventh and eighth causes of action and all cross claims asserted against them on the ground that the Village’s claims against them are time-barred. Although this motion is denominated as a motion to dismiss pursuant to CPLR 3211(a) (5), it is actually a motion for summary judgment on CPLR 3211(a) (5) grounds since service of an answer cut off the Shop defendants’ right to make a CPLR 3211 motion (*see generally*, CPLR 3211[e]; Siegel, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:52). However, any of the grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by way of a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (*see*, CPLR 3211[e]; Siegel, McKinney’s Cons Laws of NY, Book 7B, CPLR C3212:20). The Shop defendants’ answer includes the statute of limitations as an affirmative defense. Moreover, a review of the record indicates that the parties have laid bare their proof (*see*, **Kavoukain v**

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Kaletta, 294 AD2d 646, 646-647). Accordingly, the court will treat the motion as one for summary judgment on CPLR 3211 (a) (5) grounds (*see*, CPLR 3211[c]); **Hertz Corp. v Luken**, 126 AD2d 446, 449).

Like the BJLA defendants, the Shop defendants provided architectural and construction management services for the project, and the seventh and eighth causes of action are asserted against the Shop defendants to recover damages for breach of contract and negligence, respectively.

The Village's claims against the Shop defendants sound in malpractice. Nonmedical malpractice claims are governed by the three-year statute of limitations, whether the complaint is cast in contract or in tort (CPLR 214 [6]; **Matter of R.M. Kliment & Frances Halsband, Architects** [McKinsey & Co., Inc.], 3 NY3d 538, 539). A cause of action to recover damages for professional malpractice against an architect for defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship (**Frank v Maza Group, LLC**, 30 AD3d 369, 369-370).

The Shop defendants have produced documentary evidence in support of the motion that their professional relationship with the Village ended on April 14, 2006. In opposition, the Village has produced documentary evidence that the Shop defendants may have continued to provide services pursuant to their agreement with the Village until January 17, 2007. It, therefore, cannot be determined as a matter of law when the Shop defendants' professional relationship with the Village was terminated. Accordingly, and the Shop defendants' motion is denied.

The court finds that the proposed amended complaint does not cure any of the deficiencies found in the original complaint or revive any of the dismissed causes of action. It is, therefore, palpably insufficient (*see*, **Lucido v Mancuso**, 49 AD3d 220, 229). Moreover, the Village has failed to demonstrate that the proposed additional defendant, Shop Architects P.C., was united in interest with the Shop defendants (*see*, **Hilliard v Roc-Newark Assocs.**, 287 AD2d 691, 692). Accordingly, the cross motion is denied.

Dated: February 8, 2011

HON. ELIZABETH HAZLITT EMERSON

J.S.C.