

Maikish v Guy Pratt, Inc.
2016 NY Slip Op 31698(U)
August 2, 2016
Supreme Court, New York County
Docket Number: 162763/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Charles Maikish,

Plaintiff,

- v -

Index No.
162763/2015

**DECISION
and ORDER**

Mot. Seq. 1

Guy Pratt, Inc., and Gibbons Esposito & Boyce
Engineers, P.C., and Gibbons Esposito & Boyle
Engineers, P.C.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Charles Maikish (“Plaintiff”) brings this action to recover for personal injuries he allegedly sustained on December 28, 2013 while Plaintiff was riding his bicycle over and along Route 27A, Montauk Highway between Parkwood Road and the northbound entrance ramp of Route 23. Plaintiff alleges that he fell from his bicycle because “of the excessive gap existing, between the drainage grate and its frame located in the roadway,” which was not in compliance of a 1999 construction contract concerning reconstruction of the roadway. The work performed pursuant to the contract was completed in or about 2000.

The Complaint alleges that on February 4, 1999, defendant Guy Pratt, Inc., a contractor, entered into a contract with the State of New York, Department of Transportation, designated as Contract D257942, for the reconstruction of Montauk Highway (NY 27A) from NY 231 to Robert Moses Causeway in the City of West Islip. Guy Pratt “was to furnish all materials, appliances, tools and labor of every kind to construct and complete, in a most skillful manner, 9 miles of asphalt concrete milling and resurfacing and install sidewalk curb ramps on various routes in the Town of Babylon, Oyster Bay, Islip, Hempstead and North Hempstead and villages of Babylon, Lindenhurst & East Hills.” As part of the work, Guy Pratt “installed, changed, exchanged or replaced a drainage grate and frame located on the roadway/shoulder on the north side of Montauk Highway, Route 27A,

approximately 76 feet westerly of the centerline of Parkwood Road, between Parkwood Road and the northbound on-ramp of Route 231 in West Islip, New York, designated upon information and belief between mile markers 6.1 and 6.4.” The Complaint alleges that in its installation and replacement of the drainage grate, Guy Pratt, “left a gap greater than that called for by the contract plans and specifications between the drainage grate and frame and failed to replace, change, exchange or adjust the grate or frame so that a hazardous dangerous defective trap like gap for bicyclists did not exist in the aforementioned grate and frame.” The Complaint further alleges, “In allowing a gap in excess of the contract specifications to exist, as aforementioned, defendant caused and created a dangerous defective trap like condition in the roadway to exist.”

Defendant Guy Pratt, Inc. (“Pratt”), moves to dismiss Plaintiff’s Complaint as against Pratt pursuant to CPLR §3211(a)(1), (3), (5), (7), and (10).¹ As against Pratt, the Complaint alleges two causes of action – breach of contract and negligence. Plaintiff opposes. Plaintiff cross moves for costs and sanctions.

CPLR § 3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence;
 - or
 - *
 - (3) the party asserting the cause of action has not legal capacity to sue; or
 - *
 - (5) the cause of action may be not be kmart maintained because of ... statute of limitations ...
 - (7) the pleading fails to state a cause of action.

¹ Guy Pratt also moves to dismiss the cross claims for indemnification and contribution interposed by co-defendant Gibbons Esposito & Boyle, Engineers, P.C. (“Gibbons”), as against Guy Pratt. Gibbons does not oppose.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory.” (*Leon v. Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]).

On a motion to dismiss pursuant to CPLR §3211(a)(5), the court may grant dismissal of a cause of action which is time-barred by the statute of limitations.

Turning to Defendant’s second cause of action for negligence against Guy Pratt, to establish negligence, the plaintiff must demonstrate (1) that a duty of care was owed by the defendant to the plaintiff; (2) breach of the duty; (3) proximate cause; and (4) damages. (*Alvino v. Lin*, 751 N.Y.2d 585 [2002]). In the absence of a duty, there can be no breach and no liability. (*Ruiz v. Griffin*, 898 N.Y.2d 599 [2010]). “Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party.” (*See Espinal v. Melville Snow Constrs.*, 98 N.Y. 2d 136, 138 [2002]).

“[A] contractual obligation, standing alone, will not give rise to tort liability in favor of a third party.” (*See Espinal*, 98 N.Y.2d at 139). “A duty of care to non-

contracting third parties, however, may arise out of a contractual obligation or the performance thereof in three sets of excepted circumstances, in which case the promisor is subject to tort liability for failing to exercise due care in the execution of the contract.” (*Timmins v Tishman Const. Corp.*, 9 A.D.3d 62, 66 [1st Dept 2004]). The first situation is where the contracting party, in failing to exercise reasonable care, “launches a force or instrument of harm” or, in other words, “creates an unreasonable risk of harm to others or increases that risk. (*Espinal*, 98 N.Y.2d at 138; *H.R. Moch Co. v. Rensselaer Water Co.*, 247 NY 160 [1928]). The second is where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties. (*Eaves Brooks Costume Co., Inc., v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 [1990]). The third is where the contracting party has entirely displaced the other party’s duty to safely maintain the premises. (*Palka v. Servicemaster Management Services Corp.*, 83 N.Y.2d 579 [1994]).

Claims for personal injury are governed by the three year statute of limitations contained in CPLR 214. As a general rule, a cause of action for personal injury accrues when the injury occurs. (*Barrell v. Glen Oaks Vil. Owners, Inc.*, 29 A.D.3d 612, 613 [2d Dep’t 2006]).

Plaintiff’s negligence cause of action against Guy Pratt is predicated on first *Espinal* exception: that Guy Pratt owes Plaintiff a duty of care because Guy Pratt launched a force or instrument of harm in his installation of the drainage gate. Guy Pratt argues that “Plaintiff’s allegations as to Guy Pratt’s contractual ‘failure’ in ‘letting’ the gap exist do not describe any affirmative action as required to give rise to the first exception.” Plaintiff argues that the Complaint sufficiently alleges that Plaintiff launched a force or instrument of harm. Plaintiff does not allege that Guy Pratt owes a duty pursuant to the latter two *Espinal* exceptions.

Here, taking the allegations of the Complaint as true and affording Plaintiff with the benefit of every possible inference, Plaintiff has sufficiently plead that Guy Pratt’s installation of the drainage gate with an excessive gap between the drainage and frame in violation of the specifications of the applicable contract, created an unreasonable risk to others and launched a force or instrument of harm, and that Plaintiff sustained personal injuries caused by the gap left by Guy Part. While Guy Pratt owed no contractual duty to Plaintiff regarding the performance of its work, it may nevertheless be liable to them in tort to the extent that its negligent performance of the duties that it performed, pursuant to its contract with NJDOT, created a dangerous condition that injured Plaintiff. See *Belmar v. HHM Associates, Inc. v. HHM Associates, Inc.*, 101 A.D.3d 526, 529 [1st Dept

2012](jury entitled to find that contractor created dangerous condition by leaving hole in road it contracted to improve). Accordingly, Plaintiff has stated a claim for negligence against Guy Pratt.

Turning to the breach of contract against Guy Pratt, “[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep’t 2009]). “Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties.” (*Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 104 [2d Dept. 2009]).

A plaintiff seeking status as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for plaintiff’s benefit and (3) that the benefit to plaintiff is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate plaintiff if the benefit is lost. (*Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 [2006]).

Guy Pratt argues that dismissal of Plaintiff’s breach of contract claim is warranted pursuant to CPLR 3211(a)(7) because Plaintiff’s breach of contract claim fails to identify the provisions of the contract upon which his claim. Guy Pratt also argues that dismissal is warranted because Plaintiff’s breach of contract is barred by the six year statute of limitations since the work on the contract was completed in 2000.²

² Guy Pratt also moves for dismissal under CPLR 3211(a)(1), and argues that the document provided by Plaintiff, as the 1991 agreement between Guy Pratt and NYSDOT, designated Contract D2579412, flatly contradicts certain allegations of Plaintiff. Guy Pratt contends that Contract D2579412 contracts Plaintiff’s allegations concerning the work encompassed (specifically, stating that the work encompassed “1.8 miles of Asphalt Concrete Reconstruction,” and not the “9 miles alleged in ¶7 of Plaintiff’s Complaint”). Plaintiff also contends that Contract D2579412 “is silent as to any drainage grate work” and contradicts Plaintiff’s allegations that he is an intended beneficiary of the contract. However, as Plaintiff points out in his opposition, Guy Pratt refers to contract D2579412, which is not the contract alleged to have been breached in the Complaint. The contract at issue here is designated as Contract D257942.

Here, the Complaint alleges that there was a 1999 contract between Guy Pratt and NJDOT, that Guy Pratt had certain obligations under that contract, that Guy Pratt breached those obligations “[i]n allowing a gap in excess of the contract specifications to exist,” and that Plaintiff sustained injuries as a result of the dangerous condition caused by Guy Pratt. Plaintiff alleges that he is an intended beneficiary of the 1999 Guy Pratt/NJDOT contract. Plaintiff does not plead any factual allegations to support his conclusory statement that he is an intended beneficiary of the 1999 Guy Pratt/NJDOT contract. Plaintiff does not plead how the 1999 contract between Guy Pratt and NJDOT conferred a direct benefit upon him that “clearly appears” in the contract or how the benefit to plaintiff is sufficiently immediate, rather than incidental. However, for purposes of this motion, accepting the allegations of the Complaint as true as the Court, Plaintiff’s breach of contract claim as an intended beneficiary of the 1999 Guy Pratt/NJDOT contract is governed by the six year statute of limitations contained in CPLR 213(2). Such claims begin to accrue upon the completion of the project. (*City School Dist. of City of Newburgh v Hugh Stubbins & Assoc., Inc.*, 85 NY2d 535, 538 [1995]). Thus, if the subject contract was completed in 2000 as Plaintiff alleges, any breach would have occurred prior to then, Plaintiff’s contractual claim brought 15 years after any alleged breach, is barred by the 6-year statute of limitations. CPLR §213. (*Kronos, Inc. v. AVX Corp.*, 81 N.Y. 2d 90 [N.Y. 1993]).

Guy Pratt also seeks dismissal on the grounds that the State of New York is a necessary party. CPLR § 1001(a) provides that “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” Actions for money damages in tort claims against the State can only be brought in the Court of Claims. The Court of Claims has exclusive subject matter jurisdiction over such claims. Accordingly, Guy Pratt’s argument that the State is a necessary party to this Supreme Court action lacks merit. Furthermore, the State’s duty is separate from Guy Pratt’s as contractor.

Wherefore, it is hereby,

ORDERED that Defendant’s motion to dismiss Plaintiff’s first cause of action for breach of contract is granted; and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's second cause of action for negligence is denied; and it is further

ORDERED that Defendant's motion to dismiss the cross claims for indemnification and contribution interposed by co-defendant Gibbons Esposito & Boyle, Engineers, P.C., as against Defendant is granted without opposition, and said cross claims are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof; and it is further

ORDERED that Plaintiff's cross motion for costs and sanctions is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 2, 2016

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EILEEN A. RAKOWER, J.S.C.