

**269 W. 87th St. Apt. Corp. v
Leeding Bldrs. Group LLC**

2024 NY Slip Op 32310(U)

July 5, 2024

Supreme Court, New York County

Docket Number: Index No. 161625/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 161625/2021

269 WEST 87TH STREET APARTMENT CORP., QSB 267
PROPERTY CO, LLC,

MOTION DATE 06/15/2024

Plaintiff,

MOTION SEQ. NO. 003

- v -

LEEDING BUILDERS GROUP LLC, DONATO,
INC., HIGHBURY CONCRETE, INC., KINGDOM
ASSOCIATES, INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for DISMISS

Upon the foregoing documents, Defendant Kingdom Associates, Inc.’s (“Kingdom” motion to dismiss Plaintiffs 269 West 87th Street Apartment Corp. (269 West) and QSB 267 Property Co, LLC’s (“QSB”) (collectively “Plaintiffs”) Complaint is denied without prejudice, with leave to renew upon completion of further discovery. Defendant Leeding Builders Group (“Leeding”) motion to dismiss on the same grounds is likewise denied.

269 West owns the premises located at 269 West 87th Street, New York, New York (the “Premises) (NYSCEF Doc. 1 at ¶ 7). Plaintiff QSB sponsored the Premises conversion into a co-operative corporation (*id.* at ¶ 8). On or about January 1, 2019, the conversion was completed (*id.* at ¶ 13). During the conversion, a Detention Tank was installed to capture rainwater that accumulated on the roof (*id.* at ¶ 12). The Detention Tank was meant to ensure rainwater would properly drain into the tank and then be discharged into the municipal sewer system. On or about July 8, 2021, the Premises were damaged due to water leaking from the Detention Tank. On

December 29, 2021, Plaintiffs sued the Defendants alleging negligence in constructing the Detention Tank.

On May 13, 2023, Defendant Kingdom moved to dismiss Plaintiff's Complaint pursuant to CPLR §3211(a)(1), (a)(5), and (a)(7) (NYSCEF Doc. 36). Kingdom argues Plaintiff's common law negligence claim is governed by a three-year statute of limitations since the claim for defective construction accrues from the date of completion of the contractor's work. Kingdom claims its work was completed on November 22, 2017. Kingdom argues the Complaint is untimely based on accrual of a three-year claim from November 22, 2017. Defendant Leeding cross-moves to dismiss on identical grounds. In opposition, Plaintiffs argue Kingdom failed to meet its burden on its statute of limitations defense. Leeding likewise opposes and argues if its motion is not granted then Kingdom's motion should be denied due to the lack of discovery exchanged to date.

II. Discussion

"A cause of action arising out of defective construction accrues upon completion of the contractual work" (*Omega Diagnostic Imaging PC v Attica Construction Corp.*, 190 AD3d 617 [1st Dept 2021] quoting *Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1029 [2013]). This rule applies to nonparties to a contract who are in a "functional equivalent of privity" with a defendant, and it applies even if the alleged defect is latent (*id.* citing *Rite Aid of N.Y., Inc. v R.A. Real Estate, Inc.*, 40 AD3d 474 [1st Dept 2007]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L.*

v SIC Holdings, LLC, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). While an affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence, affidavits and e-mails do not qualify as documentary evidence for purposes of a motion to dismiss (*U.S. Fire Ins. Co. v North Shore Risk Management*, 114 AD3d 408 [1st Dept 2014]). A defendant who moves to dismiss based on the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired (*Lebedev v Blavatnik*, 144 AD3d 24 [1st Dept 2022]).

The Court finds that the evidence submitted by Kingdom does not establish definitively the date upon which work was finished. Moreover, as this is a pre-answer motion to dismiss, as opposed to a motion for summary judgment on a more fully developed record, the Court is constrained to deny Kingdom's application. While Kingdom submits its own application for final payment, that application is missing the architect's signature that the work was indeed complete (*see* NYSCEF Doc. 44). Moreover, Kingdom failed to provide a complete set of the payroll records (*see* NYSCEF Doc. 45) On a pre-answer motion to dismiss the Court cannot dismiss Kingdom without an exchange of discovery related to payroll. Plaintiff has likewise produced evidence which raises an issue of fact as to when the work was completed. Correspondence from March of 2018 purportedly shows final payment was not issued due to work not being complete (NYSCEF Doc. 51). The Court makes no judgment on the merits of a future dispositive application based on the statute of limitations after these issues of fact have been flushed out. However, for purposes of a pre-answer motion to dismiss, the Court denies Kingdom's motion, without prejudice.

For the same reason, the Court denies Leeding's motion, without prejudice. Leeding produced a certificate of substantial completion dated April 4, 2019 (NYSCEF Doc. 67). However

that document states that there remained open a punch list which needed to be completed or corrected, and that list was not provided to the Court. There is likewise no further agreement or correspondence produced which indicates when the outstanding work referenced in the certificate of substantial completion was completed.

Given the incomplete record, and giving Plaintiff the benefit of all favorable inferences, as this Court must at this juncture, the Court can infer that Leeding and Kingdom did not complete their contractual work until some months after April 4, 2019.¹ This inference, combined with the operation of the Covid-19 tolling of the statute of limitations, may very well make Plaintiff's Complaint timely. However, the Court cannot make a dispositive determination as to timeliness given the current record and procedural posture. Thus, Kingdom's motion and Leeding's cross-motion are denied without prejudice, with leave to renew upon completion of further discovery and a more fully developed record.

Accordingly, it is hereby,

ORDERED that Kingdom's motion to dismiss and Leeding's cross-motion to dismiss is denied, without prejudice, with leave to renew upon completion of further discovery; and it is further

ORDERED that Defendant Kingdom shall file and serve an Answer to Plaintiff's Complaint within twenty (20) days of entry of this Decision and Order; and it is further

ORDERED that the parties are directed to appear for an in-person preliminary conference with the Court on August 14, 2024 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New

¹ The Covid-19 toll adds 228 days to the statute of limitations for claims that had not expired as of March 20, 2020. If work ceased on April 4, 2019, the statute of limitations, with the applicable Covid-19 toll, would have expired November 18, 2021. The Complaint was filed on December 29, 2021. Because the document executed on April 4, 2019 referenced outstanding work which still needed to be completed, there may be discovery which shows the remaining work continued for a month and a half, which could make the Complaint timely. This issue is to be litigated after further discovery.

York. Should the parties agree to a proposed preliminary conference order prior to the date of the preliminary conference, they may e-mail same to SFC-Part33-Clerk@nycourts.gov, which may obviate the need to appear for the preliminary conference; and it is further

ORDERED that within ten (10) days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>7/5/2024</u> DATE		<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE