

**Wunderlich v Hampton Design and Construction  
Group, Inc.**

2002 NY Slip Op 30093(U)

November 20, 2002

Supreme Court, New York County

Docket Number: 603985/00

Judge: Walter C. Gage

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

PRESENT: HON. LOUISE GRUNER GANS

PART 61

Justice

Daniel V. Wunderlich

INDEX NO. 603985/00

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -  
Hampton Design

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion ~~and cross-motion~~  
determined per renewed decision per order

**SCANNED**  
DEC 05 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/20/02

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK; PART 61

..... X

Daniel Wunderlich,

Plaintiff,

-against-

Index # 603985/00

Hampton Design and Construction Group, Inc. Cedar Cove  
Construction, Inc., Theodore Foscolo III a/k/a Ted Foscolo,  
Individually and d/b/a Hampton Design and Construction Group,  
Inc., Laura Foscolo, Individually and d/b/a Hampton Design  
and Construction Group, Inc., and Steve Monaco, Individually  
and d/b/a Cedar Cove Construction, Inc.,

Defendants. ,

-----X

LOUISE GRUNER GANS, J.:

Motion sequences 003 and 004 are consolidated for purposes of disposition. In motion sequence 003 defendants Cedar Cove Construction, Inc. and Steve Monaco moved to dismiss the complaint as against them pursuant to CPLR 3211(a)(7), for failure to state a cause of action and plaintiff Wunderlich cross-moved to compel discovery. In motion sequence 004 defendants Hampton Design and Construction Group, Inc. and Theodore Foscolo and Laura Foscolo each individually and d/b/a as Hampton Design and Construction Group, Inc., have moved for summary judgment. The motion of Cedar Cove and Monaco is granted and plaintiffs cross-motion to compel discovery as to them is denied. The motion of Hampton Design and the Foscolo’s is granted in the form of partial summary judgment dismissing the complaint, with the exception only that plaintiff is entitled to litigate against Hampton Design the amount of damages to which he is entitled for Hampton Design’s failure to complete the basement portion

of the construction which is the subject of this litigation; plaintiff may have discovery as to damages, if needed.

On December 5, 1997, plaintiff entered into a contract with Hampton Design for renovations to be done at a cottage plaintiff's owned at 30 Stratton Square, East Hampton, New York. In turn, Hampton Design sub-contracted with Cedar Cove to do some of the work required to fulfill Hampton Design's contract with plaintiff. Ted Fuscolo is the vice-president of Hampton Design. Laura Fuscolo is the president of Hampton Design. Steve Monaco is the principal owner of Cedar Cove.

The contract between plaintiff and Hampton Design consisted of a Letter dated October 26, 1997 and a form AIA contract for Construction Projects of Limited Scope executed on December 5, 1997. Both documents were signed by a Foscolo for Hampton Design as its officers. There was no formal contract between Hampton Design and Cedar Cove or Monaco. Instead there were periodic work proposals and billing between the two corporate entities. **As** plaintiff concedes, he had no contract with Cedar Cove or Monaco and was not in privity with them. Moreover, Article 14.7 of the contract between plaintiff and Hampton Design states: "The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a Contract with the Contractor." Article 15.8 of the contract provided for arbitration of all claims and disputes arising out of the contract.

Hampton Design began work under its contract in December 1997 and continued until July 1998, when allegedly, dissatisfied with the rate of progress, the quality of the work, and added costs plaintiff told Hampton Design to stop work under the contract. On September 2,

1998, plaintiff filed a complaint against Hampton Design with the Town of East Hampton Home Improvement Contractors' Licensing Review Board ("Licencing Review Board"), alleging that Hampton Design had failed to complete work for which payment was made, failed properly to complete work that was performed, persistently failed to carry out the work in accordance with the contract terms and fraudulently overbilled for work and materials provided by others. The Licensing Review Board was created pursuant to the Town Code of East Hampton, Chapter 89, Section 89-30 with authority, inter alia, to receive, investigate, hear and determine complaints relating to home improvement contractor licensing and home improvement contract performance.

In response to plaintiffs complaint, the Licensing Review Board reviewed the plans filed for the project with the Town Building Inspector, as well as subsequently revised plans, visited the construction site at plaintiffs home, conducted a hearing and received written submissions. On February 24, 1999, the Licensing Review Board, in a written decision, found that Hampton Design was not in breach of contract with respect to the quality or timing of the work, and, that there was no evidence that Hampton Design fraudulently padded the costs to the Plaintiff. The Licensing Review Board did find that there were deficiencies in the renovations relating to the concrete basement and ordered Hampton Design to return to the premises to finish work on the basement. The Board noted that it lacked the power to award damages, and that assessment of damages was reserved for the courts. In a March 1, 1999 letter to plaintiff, Hampton Design offered to complete the work on the basement as ordered by the Board. Plaintiff declined the offer by letter dated March 29, 1999.

On June 22, 1999, plaintiff filed a petition for Article 78 review of the decision of the Licensing Review Board in the Supreme Court for Suffolk County. The Petition was dismissed

on November 15, 2000, based on plaintiffs failure timely to join Ted Foscolo as a party to the proceeding.

While the decision of the Licensing Review Board was still pending undetermined, Hampton Design filed a Petition to Compel Arbitration in accordance with its contract with plaintiff, and pursuant to CPLR Article 75 in Supreme Court, Suffolk County (Index # 1419/99). On February 19, 1999, before the decision of the Licensing Review Board was rendered on the 24th, the Supreme Court (Hall, J.) granted the Petition to Compel Arbitration, but refused to stay the administrative proceedings before the Licensing Review Board. However, neither plaintiff or Hampton Design, actively pursued arbitration after this decision was rendered.

On March 29, 1999, Hampton Design was notified by the Licensing Review Board that plaintiff had filed another complaint, claiming that Hampton Design, by the Foscolos, had made false statements in its construction contractor's license application. **As** an initial response, on April 28, 1999, the Review Board suspended Hampton Design's license. Hampton Design then petitioned for Article 78 review of this action and on May 17, 1999 obtained a Temporary Restraining Order from the Supreme Court, Suffolk County (Index # 10921/99) restraining the suspension pending determination of the Article 78 proceeding. On May 20, 1999, the Licensing Review Board vacated the suspension of the license and ordered a hearing to be held on June 23, 1999. The parties have not informed the Court whether the hearing was held. However, on September 27, 1999, the Supreme Court, Suffolk County, dismissed th Article 78 proceeding addressed to the suspension as mooted by the revocation of the suspension by the Licensing Review Board

Finally, this action was filed in Supreme Court, New York County on September 19,

2000. Answers were filed and the parties have engaged in discovery. The complaint asserts five causes of action: the first, for negligent performance of contract is alleged against all defendants; the second, for breach of contract is alleged against all defendants; the third, appears to claim damages for breach of contract against all defendants; the fourth, seeks recovery of damages based on unjust enrichment against all defendants; the fifth, seeks recovery of attorney's fees and costs.

- Turning first to plaintiffs claims against defendants Cedar Cove Construction, Inc. and its principal Steve Monaco, the Court finds that plaintiff has failed to state any cognizable legal claims against these parties pursuant to **CPLR** 3211(a)(7), and, or, that these defendants have a defense founded on documentary evidence, pursuant to CPLR 3211(a)(1). Attached to these defendants moving papers, in addition to the pleadings, are copies of the contract between plaintiff and Hampton Design, plaintiffs Bill of Particulars, and Cedar Cove's proposals and billing to Hampton Design, with notations as to payment. The Court focuses on "whether the plaintiff has a cause of action rather than on whether he has properly stated one." *R.H. Sanbar Projects, Inc. v. Gruzen Partnership et al.*, 148 A.D.2d 316,318 (1<sup>st</sup> Dep't 1989).

While acknowledging that he had no contract with either Cedar Cove or with Steve Monaco, individually, and that he is not in privity with them, plaintiff insists that they may be held liable to him on the theory of "negligent performance of contract" between plaintiff and defendant Hampton Design. Plaintiff also claims that he is a third-party beneficiary of the contract between Hampton Design and Cedar Cove/Monaco, which contract he is entitled to enforce. The claim that plaintiff is a third party beneficiary of the contract between Hampton Design and Cedar Cove ignores the long settled requirement that to qualify for third party

beneficiary status, a party must show that the contracting parties, here Hampton Design and Cedar Cove, intended that their contract run to the benefit of plaintiff. *Port Chester Electrical Const. Corp. v. Atlas*, 40 N.Y.2d 652, 655-656 (1976). Here the proposals and billing exchanged between Hampton Design and Cedar Cove disclose no such intention. At the same time, Article 14.7 of the contract between plaintiff and Hampton Design reveals a clear intention that plaintiff is to look to Hampton Design when seeking to enforce claims based on the acts and omissions of Hampton Design's subcontractors, such as Cedar Cove. This provision provides a clear basis for dismissal. *Bronxville Knolls, Inc., v. Webster Town Center Partnership, et al*, 221 A.D.2d 248 (1<sup>st</sup> Dep't 1995).

The case of *R.H. Sanbar Projects, Inc., v. Gruzen Partnership et al.*, 148 A.D.2d 316 (1<sup>st</sup> Dep't 1989) is of no assistance to plaintiff. In *Sanbar*, plaintiffs were the owner and the developer of a parcel of real property, who sued the architect and engineer hired by the developer in connection with a project to develop the property. The architect and engineer were each under direct contract only with the developer.

Nevertheless, plaintiff owner was permitted to proceed against the architect and engineer as a third-party beneficiary because a separate contract between the plaintiffs had created an agency relationship between them, plaintiff owner expressly consented to the performance by both architect and engineer, the architect expressly acknowledged that its work on the project was on behalf of the owner, and an issue of fact had been raised as to whether this was also true in the case of the architect. By contrast here, the documentary evidence is inconsistent with the existence of an agency relationship between plaintiff and Hampton, or any role by plaintiff in Hampton's hiring of Cedar Cove, or of a direct contractual relationship between plaintiff and

Cedar Cove, or between plaintiff and Monaco. Sanbar was an exceptional case and the Sanbar opinion does not express an intention by the Appellate Division, First Department, routinely to recognize a third-party beneficiary relationship in construction cases such as this, where there a contract between owner and general contractor for construction, and authority by the general contractor to enter into subcontracts without the owner's involvement.

With respect to its cause of action for "negligent performance of a contract" plaintiff again misconstrues legal precedent. Without third-party beneficiary status there is no contract as to which plaintiff can claim negligent performance against Cedar Cove. In any event, the general rule is that "claims based on negligent or grossly negligent performance of a contract are not cognizable." *City of New York v. 611 West 152<sup>nd</sup> Street, Inc.*, 273 A.D.2d 125, 126 (1<sup>st</sup> Dep't 2000). Moreover, plaintiff has not alleged against Cedar Cove the violation of an independent tort obligation, even though such an obligation independent of a contract, might in some circumstances be cognizable. See *Sommer v. Federal Signal Corporation*, 79 N.Y. 2d 540, 550-552 (1992); *Clark-Fitzpatrick, Inc., v. Long Island R.R. Co.*, 70 N.Y. 2d 382 (1987).

Neither does plaintiff state or show that he has a claim for unjust enrichment against Cedar Cove and Monaco in its fourth cause of action. This cause of action seems to repeat the previously discussed claims for breach of contract and negligent performance of contract, but adds an allegation that defendants, which includes Cedar Cove and Monaco overcharged him for certain work and materials. However, plaintiff does not allege that he ever made payments to Cedar Cove or Monaco and the billing and payments records submitted by Cedar Cove, show only that Cedar Cove billed and was paid by Hampton Design.

"A cause of action for unjust enrichment is stated where 'plaintiffs have properly

asserted that a benefit was bestowed...by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor.” *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 119(1<sup>st</sup> Dep’t 1998). The fourth cause of action does not make such an assertion. Plaintiffs fifth cause of action, which seeks reimbursement of fees and expenses incurred by plaintiff in the administrative proceedings before the Licensing Review Board cannot state a claim against Cedar Cove and Monaco, since these defendants were not parties to the administrative proceedings. The Court is not persuaded that plaintiff requires further discovery to address this motion. The complaint against Cedar Cove Construction, Inc. and Monaco is dismissed.

Addressing next the Hampton Design defendants’ motion for summary judgment, in order to prevail on the motion, they “must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (citations omitted)” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). The Hampton Design defendants have made such a showing in part.

The Court finds that the doctrine of collateral estoppel applies to the claims brought by Plaintiff against Hampton Design, except as they relate to its failure to complete work on the concrete basement, for which plaintiff is entitled to an assessment of damages. The Court does not understand plaintiff to be claiming otherwise.

The doctrine of collateral estoppel or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party. *Parker v. Blauvelt Volunteer Fire Company*, 93 N.Y.2d 343 (1999). Administrative proceedings are included in the range of prior actions or proceedings to which the

doctrine of collateral estoppel may be applied. *Ryan v. New York Telephone Company, et al.*, 62 N.Y. 2d 494 (1984); *Metro-North Commuter Railroad Co., v. New York State Executive Department*, 271 A.D.2d 256 (1<sup>st</sup> Dep't 2000). The doctrine applies to bar relitigation of an issue, if the issue in **an** action is identical to an issue which was raised in a prior administrative proceeding and the plaintiff had a full and fair opportunity to litigate the issue in the earlier proceeding. *Id.*

The Town of East Hampton Home Improvement Contractors Licensing Review Board  
■  
found that Hampton Design was not in breach of its contract, with respect to the quality, timing and cost of the work, except to the extent it failed to complete the basement part of the construction. As to the failure to complete the basement part of the construction the Licensing Review Board found that Hampton Design was in breach. The issues determined by the Licensing Review Board are the same issues plaintiff seeks to have determined in this action.. Plaintiff does not dispute that the Town of East Hampton Home Improvement Contractors' Licensing Review Board adjudicated the controversy between plaintiff and Hampton Design in a manner substantially similar to that of a court of law . Thus, under principles of collateral estoppel plaintiff is estopped from litigating against Hampton Design whether the latter breached their contract with respect for the quality, timing and cost of work performed, with the exception that Hampton Design is collaterally estopped from denying that it breached the contract by failing to complete the basement part of the construction. The Article 78 proceeding did not set aside the Licensing Review Board's findings and conclusions, but did not address them on the merits. However, since the Licensing Review Board lacked authority to assess damages, reserved that issue for the court, and since property damages for failure to complete the basement

could not have been assessed in the Article 78 proceeding in any event, plaintiff is not precluded from litigating his claim for damages for failure to complete the basement in this Court. *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343,348-350 (1999); *Vega v. State University of New York*, 67 F.Supp.2d 324 (S.D.N.Y. 1999). Accordingly Hampton Design's motion for summary judgment is granted in part and denied in part. In his opposition to the motion for summary judgment, plaintiff makes not reference to his claim against the Foscolos, individually. He has offered no basis for holding them personally liable and the complaint is dismissed in toto as against them. Plaintiff may have discovery as to damages, limited to the basement, if needed.

However, the limited issue of damages must be determined in this Court and not in arbitration. After having its right to arbitration recognized by the Suffolk County Supreme Court, by its February 17, 1999 Judgment Hampton Design waived its right to arbitration by not pursuing arbitration for two years, by attempting to compel discovery from the Plaintiff in this action, and by the breadth of its motion for summary judgment in this action *Sherrill v. Grayco Builders, Inc.*, 64 N.Y. 2d 261 (1985).

Accordingly, it is hereby

ORDERED, that the motion of defendants Cedar Cove Construction, Inc. and Steve Monaco to dismiss the complaint as to them is granted; and it is further

ORDERED, that the motion of Theodore Foscolo and Laura Foscolo to for summary judgment dismissal of the claims against each of them is granted and the complaint as to each of them is dismissed; and it is further

ORDERED that the motion of defendant Hampton Design & Construction Group, Inc., for summary judgment dismissal of the complaint is granted except with respect to plaintiffs


claim for damages for Hampton's failure to complete the construction of a concrete basement, as to which summary judgment is denied; and it is further

ORDERED that plaintiff shall be entitled to litigate the issue of the amount of damages he is entitled to for Hampton's failure to complete the construction of the basement; and it is further

ORDERED, that plaintiffs cross-motion for discovery is granted to the extent that plaintiff may conduct discovery limited to such damages, and is otherwise denied.

Dated: 11/20/02

ENTER:



A handwritten signature in black ink, consisting of stylized, overlapping loops, is written over a horizontal line.

HON. LOUISE GRUNER GANS