

**Samuels v Fradkoff**

2005 NY Slip Op 30332(U)

July 6, 2005

Supreme Court, New York County

Docket Number: 112610/03

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN

PART 59

0112610/2003

Justice

SAMUELS, WILLIAM C.  
VS  
FRADKOFF, ALEX R.

SEQ 3

DISMISS ACTION

NO. \_\_\_\_\_

IN DATE \_\_\_\_\_

ON SEQ. NO. \_\_\_\_\_

ON CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits

2, 2A

Replying Affidavits

4

*Memo & Law*  
Cross-Motion:  Yes  No

M1, M2, M3, M4

Upon the foregoing papers, It is ordered that this motion is ~~granted~~ ~~dismissed~~ ~~denied~~

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

**JUL 22 2005**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Dated: 7/6/05



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 57

\_\_\_\_\_  
WILLIAM C. SAMUELS,  
*Plaintiff(s),*

Index No.: 112610/03

*against*

DECISION/ORDER

ALEX R. FRADKOFF, HOWARD R.  
GOLDIN ASSOCIATES, P.C., and  
HOWARD R. GOLDIN, individually, et al.,  
*Defendant(s).*

\_\_\_\_\_  
Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

In this action, plaintiff William C. Samuels (“Samuels”) sues to recover damages for defendants’ alleged negligence in the provision of architectural and construction services during the renovation of plaintiff’s Manhattan townhouse (“subject premises”). The amended complaint alleges causes of action against defendant Alex R. Fradkoff (“Fradkoff”) for breach of contract, negligence, misrepresentation, and unjust enrichment; a cause of action against defendant Howard R. Goldin Associates P.C. (“Goldin Assocs.”) for negligence; causes of action for fraudulent misrepresentation and negligent misrepresentation against Goldin Assocs. and Howard R. Goldin, individually (“Goldin”) (collectively, the “Goldin defendants”); and causes of action for negligence and breach of contract against defendant Leithlong Construction Corporation. The Goldin defendants make this pre-answer motion to dismiss all claims and cross-claims as against them.

It is well settled that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We 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 within any cognizable legal theory.” (Leon v

Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) When documentary evidence is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 [2001].) Further, the court may consider a plaintiff’s opposing affidavits to amplify the pleadings. (Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; Eastern Consol. Prop., Inc. v Lucas, 285 AD2d 421, 422 [1<sup>st</sup> Dept 2001].)

It is undisputed in this case that plaintiff William Samuels entered into a written agreement with defendant Alex Fradkoff for architectural and interior design services in connection with the renovation of plaintiff’s townhouse. It is also undisputed that Fradkoff retained Goldin Assocs. to perform architectural services in connection with the renovation. Plaintiff alleges, among other things, that he entered into the September 1999 agreement with Fradkoff based upon Fradkoff’s representations that he was a licensed architect (Complaint, ¶14), and that Fradkoff “knowingly or negligently made representations to plaintiff that he was an architect licensed to practice in the State of New York \* \* \* knowing these representations were false.” (Id., ¶ 36.) With respect to the Goldin defendants, the complaint alleges that the Goldin defendants knew or should have known that Fradkoff made representations to plaintiff that he was a licensed architect, and that the Goldin defendants “failed to inform plaintiff that Fradkoff was not in fact an architect licensed to practice architecture within the State of New York.” (Id., ¶¶ 66, 78.) The complaint also alleges that the Goldin defendants, “[b]y performing services under Fradkoff for the benefit of plaintiff \* \* \* participated in Fradkoff’s fraudulent

misrepresentation.” (*Id.*, ¶¶ 65, 89.) Plaintiff further alleges that Goldin Assocs. performed its services negligently. Defendant Fradkoff cross-claims against the Goldin defendants for indemnification or contribution.

The Court of Appeals “has long held that before a party may recover in tort for pecuniary loss sustained as a result of another’s negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity.” (*Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]; *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 [1989].) “Such a requirement is necessary in order to provide fair and manageable bounds to what otherwise could prove to be limitless liability.” (*Prudential Ins. Co.*, 80 NY2d at 382.)

Where, as here, there is no privity of contract, the Court of Appeals has identified three criteria to determine whether the underlying relationship approaches privity: “(1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant’s understanding of their reliance.” (*Ossining*, 73 NY2d at 425; *Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536, 551 [1985].)

Assuming the truth of the allegations in the complaint and in the affidavits submitted in opposition to the Goldin defendants’ motion, the court finds that plaintiff has sufficiently pleaded the existence of a relationship that approaches privity. The Goldin defendants do not dispute that they were aware that their work was being done on behalf of plaintiff and do not deny that they were hired by Fradkoff to prepare required architectural plans and filings for the project.

(Schoenberg Aff. In Support of Motion, ¶ 8.) Plaintiff alleges that the Goldin defendants knew that their drawings, plans, filings, advice and recommendations were essential to the completion of the renovation project; that the Goldin defendants knew that plaintiff was relying on their services as the architect for the renovation project; and that Goldin Assocs. provided architectural services on behalf of plaintiff, including appearances on his behalf in front of the Landmarks Commission, on which Goldin Assocs. was aware that plaintiff was intended to rely. Viewing the allegations of the complaint, as amplified by plaintiff's affidavit, in the light most favorable to plaintiff, the court finds that plaintiff has sufficiently alleged causes of action for negligence and negligent misrepresentation against the Goldin defendants. (See Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, supra [school district entitled to maintain action against engineering consultants with which it had not contracted where the engineers "could not possibly have failed to be aware \* \* \* that [their work] was for the school district alone, and that their findings would be reported to and relied on by the school district in ongoing project"].)

Turning to the claim for fraudulent misrepresentation, in order to prevail, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996].) Generally, where the alleged fraud consists of the omission of a material fact, the plaintiff must also prove that the defendant had a duty to disclose such fact. (Swersky v Dreyer & Traub, 219 AD2d 321 [1<sup>st</sup> Dept 1996], rearg denied 232 AD2d 968.)

However, “privity or a relationship which is the functional equivalent of privity is not an element of intentional fraud. Rather, a party who commits intentional fraud is liable to any person who is intended to rely upon the misrepresentation or omission and who does in fact so rely to his detriment.” (Blair Communications, Inc. v Reliance Capital Group, L.P., 157 AD2d 490, 492 [1<sup>st</sup> Dept 1990][internal citation omitted].) Thus, courts have recognized that “[t]here is a duty to disclose, which is not limited to parties in privity of contract, when nondisclosure would ‘le[a]d the person to whom it was or should have been made to forego action that might otherwise have been taken for the protection of that person’.” (Strasser v Prudential Sec., Inc., 218 AD2d 526, 527 [1<sup>st</sup> Dept 1995][internal citation omitted].)

The instant complaint, as pleaded, alleges that the Goldin defendants knew or should have known that Fradkoff was not a licensed architect and held himself out as an architect; that the Goldin defendants knew that plaintiff had entered into a contract with Fradkoff based on Fradkoff’s representations that he was an architect; and that the Goldin defendants failed to inform plaintiff that Fradkoff was not an architect. Even assuming arguendo that the Goldin defendants had an obligation to tell plaintiff that Fradkoff was not an architect, plaintiff did not enter into the contract with Fradkoff based on the Goldin defendants’ omission. By his own admission, plaintiff entered into a contract with Fradkoff prior to Fradkoff’s retention of Goldin Assocs. and therefore cannot claim that he contracted with Fradkoff based on the Goldin defendants’ nondisclosure. (Complaint, ¶¶ 14, 49.) Thus, plaintiff’s fraudulent misrepresentation claim against the Goldin defendants cannot be maintained based on their purported failure to inform plaintiff that Fradkoff was not an architect.

However, in supplemental papers submitted in opposition to the motion, plaintiff also

alleges that the Goldin defendants prepared architectural plans for the renovation project and supervised construction at the subject premises, work on which plaintiff would rely, as Fradkoff was not a licensed architect. Moreover, Goldin Assocs. was the only architect employed on the project during the time that the Goldin defendants were retained. Plaintiff also alleges that Goldin Assocs. knowingly allowed construction to proceed without a permit and allowed construction to proceed that was not in conformity with its filed drawings or was undertaken without proper inspections, resulting in serious deficiencies in the construction of the basement, boiler flue and heating system, and spiral staircase. (Id., ¶¶ 59-61, 66.) Plaintiff claims that the Goldin defendants knew or should have known of these violations and failed to disclose them to plaintiff. (Id., ¶¶ 5-7.) Plaintiff also alleges that the Goldin defendants, as the architect of record on the project, assumed the obligation to address and correct Landmark violations and appeared on behalf of plaintiff before the Landmarks Commission, all of which are acts that the Goldin defendants allegedly had a duty to disclose and on which plaintiff was intended to rely. (Samuels Aff. In Opp., ¶¶ 22, 26, 28-30, 42-43.) These allegations therefore are sufficient to state a cause of action against the Goldin defendants based on purported concealment of material facts.

While courts have held that in the absence of a special relationship, “mere silence” does not constitute a concealment that is actionable as fraud (see Mobil Oil Corp. v Joshi, 202 AD2d 318 [1<sup>st</sup> Dept 1994]), as found above, plaintiff has sufficiently alleged a special relationship between plaintiff and the Goldin defendants. Further, as the courts have recognized, the duty to disclose does not arise only when there is privity of contract, but may arise under circumstances where nondisclosure would lead to harm. (See Blair Communications, Inc. v Reliance Capital Group, L.P., 157 AD2d 490, supra.) In the instant case, the pleaded allegations of concealment

are sufficient to withstand a CPLR 3211 motion, particularly given the need for discovery pertaining to the extent of the alleged concealment by the Goldin defendants.

The Goldin defendants also move to dismiss defendant Fradkoff's cross-claims against them. In his answer, Fradkoff pleads two cross-claims against Goldin Assocs. The first alleges that Fradkoff is entitled to judgment from Goldin Assocs. for any judgment entered against Fradkoff under the first cause of action of the complaint. The first cause of action of plaintiff's complaint seeks damages against Fradkoff for breach of contract. Fradkoff's second cross-claim alleges that Fradkoff is entitled to judgment from Goldin Assocs. for any judgment entered against Fradkoff under the second cause of action of plaintiff's complaint. The second cause of action seeks damages against Fradkoff for negligence – "specifically, the defective, unworkmanlike, unprofessional and incomplete manner in which Fradkoff performed his work and services." (Complaint, ¶ 32.) Fradkoff pleads the identical cross-claims against Goldin individually. While Fradkoff's cross-claims do not expressly state the theory under which Fradkoff seeks damages, Fradkoff claims, in his memorandum of law in opposition to the Goldin defendants' motion to dismiss, that he is entitled under these cross-claims to both common-law indemnification and contribution from the Goldin defendants.

"The conceptual distinction between contribution and common-law indemnification claims has often been discussed and is by now familiar to most practitioners. In the 'classic indemnification case,' the one seeking indemnity 'had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party.' In other words, 'where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire

liability to the one who was negligent.’ Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy.” (Glaser v Fortunoff of Westbury Corp., 71 NY2d 643, 646 [1988])[internal citations omitted]

As a general rule, “a right of implied indemnification will arise in favor of one who is compelled to pay for another’s wrong.” (Margolin v New York Life Ins. Co., 32 NY2d 149, 152 [1973].) “Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.” (Trustees of Columbia Univ. v Mitchell/Giurgola Assocs., 109 AD2d 449, 453 [1<sup>st</sup> Dept 1985].)

Here, Fradkoff’s cross-claims allege that he hired the Goldin defendants “to perform work and services relating to the Project required of a licensed architect” and that in the event Fradkoff is found liable, such liability is due to the Goldin defendants’ actions or inactions. Fradkoff’s first cross-claim against the Goldin defendants, seeking indemnification and contribution based solely on any liability of Fradkoff to plaintiff for breach of contract, must be dismissed. New York law does not permit contribution between two parties whose potential liability to a third party is for economic loss resulting solely from a breach of contract. (Board of Educ. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21 [1987].) Nor is Fradkoff entitled to indemnification with respect to the cause of action based on breach of contract. (Board of Educ. v Mars Assocs., 172 AD2d 214 [1<sup>st</sup> Dept 1991], lv denied 78 NY2d 861; Suffolk County Water Auth. v J.D. Posillico, Inc., 191 AD2d 422 [2d Dept 1993].)

In contrast, Fradkoff’s second cross-claim is based on allegations sufficient to withstand

the motion to dismiss. This cross-claim seeks damages only in the event that Fradkoff is held liable to plaintiff for negligence or malpractice. It further alleges that Fradkoff hired the Goldin defendants to perform the services of a licensed architect for plaintiff's project. According to the cross-claimant the benefit of every favorable inference, the cross-claim effectively pleads that Fradkoff delegated to the Goldin defendants the responsibility for the duties giving rise to plaintiff's alleged loss. These allegations support a claim for indemnification. (See 17 Vista Fee Assocs. v Teachers Ins. and Annuity Assn. of Am., 259 AD2d 75 [1<sup>st</sup> Dept 1999].) That this cross-claim arises out of Fradkoff's contract with the Goldin defendants does not defeat the indemnity claim. (See id. at 81.) This cross-claim also alleges tort liability on the Goldin defendants' part based on their negligent performance of architectural services. Therefore, to the extent that the cross-claim seeks contribution, it is maintainable. (See id.)

Finally, the branch of the motion which seeks dismissal of the claims and cross-claims as against Goldin individually must also be denied. Goldin's wholly conclusory assertion that he is not a proper party is unsupported by any legal authority and fails to address whether "as a principal of the defendant professional corporation, he can be held liable for any wrongful act he committed while rendering professional services on behalf of such corporation (see, Business Corporation Law § 1505[b])." (See Pile Found. Constr. Co. v Berger, Lehman Assocs. P.C., 2005 AD2d 484, 486 [2d Dept 1998].)

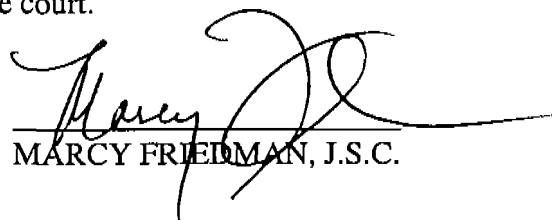
It is accordingly ORDERED that the Goldin defendants' motion is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
July 6, 2005

NEW YORK  
COUNTY CLERK'S OFFICE

JUL 22 2005

  
MARCY FRIEDMAN, J.S.C.