[* 1]

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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

Handler, D

INDEX NO. 103281/06

MOTION DATE

- v -

MOTION SEQ. NO. 02

City

MOTION CAL. NO.

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1, 2 |
| Answering Affidavits — Exhibits | 4, 6 |
| Replying Affidavits | 5, 7 |
| Notice of Cross | 3 |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

Dated: 8/28/07

PHF

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X

DEBRA GANDLER,

Plaintiff,

- against -

THE CITY OF NEW YORK, THE DEPARTMENT OF BUILDINGS, PATRICIA A. LANCASTER As Commissioner of the New York City Department of Buildings, and HECTOR M. VALENTIN a/k/a VICTOR VALENTINE d/b/a ARTISAN CONTRACTING,

Defendants.
----------X

Index Number 103281/2006
Mot. Seq. No. 002

**DECISION AND ORDER**

**For the Plaintiff**:
Debra Anne Gandler, Esq. *pro se*
685 President Street
Brooklyn NY 11215
(718) 623-5979

**For City Defendants:**
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
By: Desiree A. Wise, ACC
100 Church Street
New York NY 10007
(212) 788-0819



Papers considered in review of the motion for summary judgment and cross-motion to amend:

| Papers | Numbered |
|---|---|
| Notice of Motion, Aff. In Support | 1,2 |
| Cross-Motion | 3 |
| Aff. in Reply and Opposition | 4 |
| Reply Affidavi & Exhibits | 5,5a |
| Plaintiff's Affidavit | 6 |
| Aff. in Reply/Opposition | 7 |

**PAUL G. FEINMAN, J.:**

The motion and cross motion are consolidated for purposes of decision.

The City of New York, the Department of Buildings (DOB), and Commissioner Patricia Lancaster move for summary judgment pursuant to CPLR 3212(b). Plaintiff cross-moves seeking leave to amend her complaint pursuant to CPLR 3025.[1] For the reasons which follow, the motion

[1]Co-defendant Valentin has never appeared or answered (Not. of Cross-Mot. Gandler Aff. ¶ 27).

and cross-motion are each granted in part and denied in part.

*Background*

Plaintiff, an attorney representing herself in this action, is an owner of the premises known as 685 President Street, Brooklyn, New York (City's Aff. in Supp. Ex. B, Verified Complaint [hereinafter Complaint] ¶ 20). According to her verified complaint, she hired co-defendant Valentin to perform "extensive renovations" of the premises (Complaint ¶ 24). She and Valentin, doing business as Artisan Contracting, signed a contract on October 9, 2004 (Cross-Mot. Ex. A). Plaintiff's engineer submitted plans to the DOB in September 2004; the plans were initially disapproved but, after the engineer made corrections, they were approved on October 15, 2004 (Not. of Mot. Wise Aff. ¶¶ 10-12; Ex. E). On October 22, 2004, an application for an alteration work permit was filed, signed by Valentin and notarized (Cross-Mot. Ex. B). The form indicated that Artisan Contracting was the "Applicant/Contractor." On page one it seems to indicate that Valentin is a General Contractor ("GC"), but on page two it shows him as a Home Improvements Contractor ("HIC"), with license number 103845. On December 14, 2004, a work permit was issued by the Department of Buildings (Complaint ¶ 24; Cross-Mot. Ex. C). It stated that Valentin was a licensed GC and that the work involved alterations and general construction.

On December 20, 2004, plaintiff fired Valentin for "gross negligence" and possible fraudulent behavior (Complaint ¶ 26; Def. Aff. in Supp. Ex. H [Gandler letter to Valentin 12/20/04]). In early January 2005, Valentin allegedly filed a false report with the DOB concerning plaintiff's property, and after investigation that found no action was needed by the DOB, the DOB issued a "stop work" violation on plaintiff's premises and allowed a change of contractor (Aff. in

Supp. of Mot. Ex. H [DOB "Special Report"]; Cross-Mot., Pl. Aff. in Opp. ¶ 14; Ex. D).[2] Plaintiff then reported Valentin to the Department of Consumer Affairs and at that time first learned that he was "never" a licensed Home Improvement Contractor (Cross-Mot. Pl. Aff. in Opp. ¶ 16).

Plaintiff reported the incident to the DOB (Cross-Mot. Pl. Aff. in Opp. ¶¶ 18, 21). She informed the DOB representative that the building permit was deceptive as it indicated that Valentin was licensed, and stated her belief that the issuance of a permit to an unlicensed contractor and was "aiding and abetting in consumer fraud" (Cross-Mot. Pl. Aff. in Opp. ¶ 23; Complaint ¶ 28). The DOB representative's response was that any legal irregularities would result in violations on plaintiff's property (Cross-Mot. Pl. Aff. in Opp. ¶ 23; Complaint ¶ 29). She was also told that it was "too hard to change the building permit forms" (Cross-Mot. Pl. Aff. in Opp. ¶ 23; Complaint ¶ 31).

On March 17, 2005, she served upon the City of New York a notice of claim alleging that employees of the City's Department of Buildings had improperly issued a home improvement renovation permit on December 14, 2004 to co-defendant Valentin who had fraudulently represented himself to be licensed (Not. of Cross-Mot. Ex. G, Notice of Claim [hereinafter Not. of Claim] ¶¶ 2-3). The notice of claim also states that home improvement contractors are required to be licensed by the Department of Consumer Affairs, but that the Department of Consumer Affairs did nothing to stop the DOB from issuing a permit to Valentin, and that the issuance of the permit "facilitates said fraud and gives [Valentin] the city's [imprimatur]." (Not. of Claim ¶¶ 2, 3). Plaintiff seeks damages for monies paid under a fraudulent contract, and seeks payment of all fines, fees, and penalties, and monies to correct "negligent construction of fraudulent contractor" (Not. of

[2]On about January 12, 2005, a second violation was issued, returnable before the Environmental Control Board (ECB) (Ver. Answer ¶ 30).

[* 5 ]

# SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. PAUL GEORGE FEINMAN PART 52
Justice

Decision Order & Judgment

Rafael M. Cruz
Petitioner

INDEX NO. 109020/07

MOTION DATE 8/29/07

- v -

MOTION SEQ. NO. 001

THE CITY OF NEW YORK, NYC Dept. of Social Services/HRA and Sergeant Albert Zelaya
Respondent

MOTION CAL. NO. 3

The following papers, numbered 1 to _____ were read on this motion for permission to file a late Notice of Claim.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1,2 |
| Answering Affidavits — Exhibits (Memo) | 3 |
| Replying Affidavits (Reply Memo) | 4 |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this petition is granted (~~without opposition~~) (~~upon the default of~~) (for reasons set forth on the record in open court on 8/29/07 [Court Reporter: Margaret Guimond]). It is therefore

ORDERED that the notice of claim in the proposed form annexed to the moving papers as Exhibit A shall be deemed timely served upon service of a copy of this decision, order and judgment with notice of entry thereof upon the respondent(s) City of New York ~~and~~

Petitioner is reminded that this constitutes a final disposition of this petition and index number and that any subsequently-filed complaint requires the purchase of a separate index number.

This constitutes the Decision, Order and Judgment of the Court.

HON. PAUL G. FEINMAN

Dated: 8/29/07

ENTER:

J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Claim ¶ 4).

In May 2005, she learned that a "new directive" from the DOB had been issued, dated April 29, 2005, stating that DOB requires contractors to obtain a Home Improvement Contractor license in order to apply for work permits for 1-4 family homes, apartments in multiple dwellings, and for certain particular types of work (Cross-Mot. Pl. Aff. in Opp. ¶ 26; Ex. H). On November 5, 2005, the DOB issued "Operations Policy and Procedure Notice #3/05," concerning the procedure by which DOB plan examiners would review submissions to verify if a Home Improvement Contractor license was required and if so, to confirm its existence (Pl. Aff. Ex. B, esp. p. 2). The Notice explicitly superseded an earlier policy and notice from 1990, and a Departmental Memorandum from 1968.[3]

Plaintiff filed a notice of claim and subsequently commenced the within action. She argues that she, and all New York City homeowners, are members of a class which was meant to be protected by the legislature but that the DOB failed to protect her and other homeowners when it failed to determine that Valentin was not, in fact, licensed. She argues that only after she served her notice of claim did the City create a policy, first promulgated in the April 29, 2005 statement, to require contractors to have HIC licenses (Pl. Aff. in Reply ¶ 30).[4] As against the City defendants, the original complaint asserts six causes of action: breach of implied covenant and warranty; aiding and abetting unfair business practices; aiding and abetting of fraud; negligence in issuing a permit to

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[3]Similar information became available on the DOB website; plaintiff includes two pages downloaded in February 2007, entitled "Applications and Permits" (Pl. Aff. Ex. C). The municipal defendants' argument that plaintiff should have consulted the DOB website sooner, while perhaps true, is of little persuasive value.

[4]Not articulated is the proof a contractor must provide to the DOB at the time of applying for the work permit to establish the ownership of a valid license.

an unlicensed contractor; gross negligence, and negligence per se. The City's verified answer includes, as five affirmative defenses, failure to state a cause of action; that the matter should have been commenced as an Article 78 proceeding; failure to exhaust administrative remedies; statute of limitations based on Article 78 review; and immunity for discretionary actions.

The City seeks summary judgment and dismissal of the complaint as against the municipal defendants on several grounds. It argues that the municipal defendants have absolute immunity for damages claims because of the discretionary nature of their actions in issuing the permit, and that they do not have a special duty to plaintiff which would dissolve the immunity. It also argues that plaintiff has not and cannot establish the necessary elements for a cause of action of aiding and abetting fraud.

Plaintiff's cross-motion seeks leave to amend her complaint to further allege particulars that establish the municipal defendants' actions that aided and abetted fraud. She attaches a Proposed First Amended Verified Complaint to her Cross-Motion and has attached a Proposed Second Amended Verified Complaint to her Affidavit in Reply. In the newest proposed amended complaint, she adds one claim of detrimental reliance and two claims of strict liability, as well as now seeking treble damages against co-defendant Valentin. She also seeks to enjoin the municipal defendants from engaging in deceptive acts and practices that affect consumers.

Statutory Framework

1. Department of Buildings

The DOB is authorized under section 643 of the New York City Charter to enforce the provisions of the Building Code of the City of New York, codified at Title 27, chapter 1, in the New York City Administrative Code ([hereinafter "Building Code"). The Building Code is designed to

"provide reasonable minimum requirements and standards. . . for the regulation of building construction in the city of New York in the interest of public safety, health and welfare." (Building Code § 27-102). The Building Code applies to alterations of existing buildings (Building Code § 27-103). The Building Code is enforced by the Commissioner of Buildings except as where the Fire Commissioner or the Commissioner of Small Business Services has jurisdiction (Building Code § 27-106). Applications and plans that comply with the provisions of the Building Code and other pertinent laws and regulations "shall be approved by the commissioner," and those that do not comply "shall be rejected in writing, and may later be approved if revised so as to address the reasons for the rejection (Building Code § 27-144).

Pursuant to Building Code § 27-147, a permit must be issued by the Commissioner of Buildings before commencement of alteration work may begin. An application for a permit normally lasts for a 12-month period unless an extension is granted (Building Code § 27-155). The permit can be applied for by the owner of the property or a person acting on behalf of the owner (Building Code § 27-151). The application is submitted on forms issued by the Department, accompanied by the proper fee, and contains a general description of the work and location (Building Code § 27-150). No permit will be issued unless the proper fees have been paid (Building Code § 27-199). Applications for permits may also require specifics pertaining to the type of work to be done (Building Code § 27-152). An application for a building alteration permit, for instance, must be accompanied by the plans so as to indicate the nature and extent of the proposed alteration work and that it complies with the provisions of the Building Code and other applicable laws and regulations (Building Code § 27-162). Before issuing a work permit, the Commissioner "may cause" an inspection of the site (Building Code § 27-208).

The applications and accompanying papers and plans are examined "promptly" for compliance with the Building Code provisions and other applicable laws and regulations, and when complying, "shall be" approved and the permit issued; if rejected, written notice with the reasons are provided. (Building Code § 27-191). Resubmitted applications shall be approved if the problems are corrected (Building Code § 27-191). Approved permits bear the signature of the Commissioner or authorized signer (Building Code § 27-193). A permit may, on notice, be revoked by the DOB for failure to comply with the Building Code provisions or any other laws and regulations, or "whenever there has been any false statement or any misrepresentation as to a material fact in the application or accompanying plans and papers upon the basis of which the permit was issued; or whenever any permit has been issued in error and conditions are such that a permit should not have been issued" (Building Code § 27-197). A permit may be suspended immediately where the Commissioner determined that there is imminent peril to life or property, but must notify the applicant of the revocation and schedule a hearing on the matter (Building Code § 27-197).

The permit is "deemed to incorporate the proviso that the applicant, his or her agent, employees, and contractors shall carry out the permitted work . . . in accordance with the provisions of this code and other applicable laws and regulations" (Building Code § 27-200). The work must also conform to the approved application and plans (Building Code § 27-201).

2. Department of Consumer Affairs

The City Council of the City of New York determined that "for the protection and relief of the public from deceptive, unfair and unconscionable practices, for the maintenance of standards of integrity, honesty and fair dealing," and for "protection of the health and safety of the people of New York city," it is necessary to require certain trades to be licensed (NYC Admin. Code, Title 20, ch.

1, 2 [hereinafter Consumer Affairs] § 20-101).[5] The Commissioner may promulgate regulations that will, among other things, "prevent and remedy fraud, misrepresentation, [and] deceit," by " requir[ing] adequate disclosure by those engaging in licensed activities of both the terms and conditions under which they perform licensed activities," so as to "protect the health, safety, convenience and welfare of the general public" (Consumer Affairs § 20-104[b][2],[3], [6]). It is unlawful for any person or business required to be licensed to work without a license in a business requiring one by statute (Consumer Affairs § 20-105[a]). Licenses are not assignable or transferable (Consumer Affairs § 20-109).

The Commissioner of Consumer Affairs may make rules and regulations as necessary, with respect to the form and content of applications for licenses, investigation, examination of applicants, and other matters (Consumer Affairs § 20-391). The Commissioner prescribes the form for filling out of a license application, and requires applications to be in writing, and signed and under oath (Consumer Affairs § 20-390[1],[3]). The Commissioner of Consumer Affairs has the power to appoint adequate personnel to "examine the qualifications and fitness of applicants for licenses," and "to keep record of all licenses issued, suspended or revoked" (Consumer Affairs § 20-389[e][1-3]). The Commissioner is given the power to grant, deny, revoke, or cancel licenses (Consumer Affairs, § 20-104). The Commissioner is authorized to conduct investigations, issue subpoena, and to hear complaints regarding activities for which a license may be required, to take testimony, and promulgate, amend, and modify procedures governing such proceedings (Consumer Affairs § 20-104[d]). The Commissioner may suspend, revoke, or cancel any license issued by the Department,

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[5]The provisions of the Consumer Affairs code are to be "liberally construed" (Consumer Affairs § 20-103).

upon due notice and hearing, and may impose fines or civil penalties (Consumer Affairs § 20-104[e]). Additional remedies may be applied under other provisions of the law (Consumer Affairs § 20-104[e][5]). Sections 20-105 and 20-106 of the Consumer Affairs Code set forth various penalties and sanctions, including monetary and imprisonment, which the Commissioner can impose after a hearing on notice. The Commissioner's action in revoking or suspending, or refusing to issue or renew a license is reviewable by the Supreme Court in an Article 78 proceeding (Consumer Affairs § 20-400).

As concerns the home improvement business, the consumer protection statutes were enacted specifically to "safeguard and protect the homeowner against abuses and fraudulent practices by licensing persons engaged in the home improvement, remodeling and repair business" (Consumer Affairs § 20-385).[6] Applicants for home improvement businesses are required to be fingerprinted so that their criminal history records can be accessed, however if the records are not available, the applicant need not be fingerprinted (Consumer Affairs §20-390[6]). The Commissioner can investigate when it is believed that a licensee or "any other person has violated any of the provisions of the" home improvement business subchapter (Consumer Affairs §20-398). Section 20-392 sets forth the various fines, and powers to issue, renew, suspend or revoke a license pertinent to home improvement business, including where the contractor is found to have engaged in "fraud, misrepresentation, or bribery in securing a license," made a "false statement as to a material matter in any application for a license," or is "untrustworthy or not of good character" (Consumer Affairs §

[6] "Home improvement" means "construction, repair, replacement, remodeling, alteration, conversion, . . renovation, modernization, improvement. ... to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place." (Consumer Affairs § 20-386[2]).

20-392[a][1-3]; see also § 20-393 [prohibited acts, including making substantial misrepresentations in the procurement of a home improvement contract, and failing to perform in a skillful and competent manner]; §§ 20-396, 20-401 and 20-401.1 [violations and penalties for unlicensed operations]).

*Legal Analysis*

1. Municipal Defendants' Motion for Summary Judgment

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

A party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial (*W.W. Norton & Co. v Roslyn Targ Literary Agency, Inc.*, 81 AD2d 798 [1st Dept. 1981]). Where pertinent facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge or control of the moving party, and may be revealed through pretrial discovery, summary judgment

should be denied (*Baldasano v Bank of New York*, 199 AD2d 184 [1st Dept 1993]).

CPLR 3212(b) provides that a motion for summary judgment must be supported by an affidavit from someone with actual knowledge of the facts (*Stainless, Inc. v Employers' Fire Ins. Co.*,, 69 AD2d 27 [1st Dept 1979], *aff'd*, 49 NY2d 924 [1980]). An attorney's affirmation, absent more, is not enough. *Stainless, Inc.* However, an attorney's affirmation may serve as the "vehicle for the submission of acceptable attachments" which do provide evidentiary proof in admissible form (*Adams v Cutner & Rathkopf*, 238 AD2d 234, 240 [1st Dept 1997] [quoting *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980)]). Thus, an attorney's affirmation accompanied by documentary evidence and deposition testimony can sufficiently establish the merits of the motion (*Ismael Olan v Farrell Lines Inc.*, 64 NY2d 1092, 1093 [1985]).

The municipal defendants, who offer their attorney's affirmations along with documentary evidence, argue that summary judgment and dismissal of the complaint as against them is proper based on three grounds. The first is that they are immune from tort suits that arise out of the performance of discretionary governmental functions. The second is that they are immune from this suit because there is no special relationship between the municipality and plaintiff. The third is that, as concerns the claim that the City defendants aided and abetted in a fraud, plaintiff has not and cannot make a prima facie case.

A. Immunity Based on Discretionary Acts

The City argues that its agencies have absolute immunity for damages stemming from discretionary actions including issuing a permit. To determine whether an action of a governmental employee or official is cloaked with any governmental immunity, the functions and duties of the employee are scrutinized to determine whether they inherently entail the exercise of some discretion

and judgment (*Mon v City of New York*, 78 NY2d 309, 313 [1991] citing *Arteaga v State of New York*, 72 NY2d 212, 216 [1988]; *Tarter v State of New York*, 68 NY2d 511, 518-519 [1986]). Where the official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant will generally not be found liable for the injurious consequences of that action even if it results in negligence or was done in malice (*Tango v Tulevech*, 61 NY2d 34, 40 [1983]; *see also, Mon v City*, at 313; *Haddock v City of New York*, 75 NY2d 478, 484 [1990]; *Arteaga v State*, at 216; *Weiss v Fote*, 7 NY2d 579 [1960]). Where the functions and duties are essentially clerical or routine, no immunity will attach (*Mon,* citing *Tango v Tulevech*, 61 NY2d, at 40-42). Even where there is ministerial negligence, such is not necessarily tortious. As stated in *Tango v Tulevech*, 61 NY2d, at 40, recovery for a tortious act is only available if the ministerial action was otherwise tortious and not justifiable pursuant to statutory command.

A ministerial act envisions direct adherence to a governing rule with a compulsory result, while discretionary actions involve an exercise of reasoned judgment which could produce different acceptable results (*Tango v Tulevech*, at 41). Courts have produced an "array of decisions with results that are difficult to harmonize" concerning whether various acts are ministerial or discretionary (*Tulevech*, at 40). Thus, as compiled by the Court of Appeals in *Tulevech,* the issuance of burning permits has been held to be discretionary (*Charles O. Desch, Inc. v State of New York*, 60 AD2d 678 [3d Dept. 1977], *affd* 45 NY2d 882 [1978]), as is the issuance of concert permits (*Burgundy Basin Inn, Ltd. v State of New York*, 47 AD2d 692 [3d Dept.], *lv denied* 37 NY2d 706 [1975]), and the filing of certificates of incorporation by the Secretary of State's employees (*Gross v State of New York*, 33 AD2d 868 [3d Dept. 1969]). Conversely, the issuance of a marriage license has been held to be ministerial (*Puffer v City of Binghamton*, 59 Misc 2d 856

[Sup. Ct., Broome County1969]), as has the duty of a judge to certify the record (*Luckie v Goddard*, 171 Misc 774 [Sup. Ct., Monroe County 1939]).

Here, the City argues that the DOB approval process involves the exercise of professional judgment (Def. Aff. in Reply ¶ 6). The City's attorney states that a plan examiner reviews the plans and uses professional judgment and training to determine if the application is complete and whether the plans comply with the Building Code requirements (Def. Aff. in Reply ¶ 7). The City analogizes to the facts and holding in *Rottkamp v Young*, 21 AD2d 373, 376 (2d Dept. 1964), *aff'd* 15 NY2d 831 (1965), where a town and building inspector wrongly denied a building permit, but was held immune from suit because his decision was based on his understanding of the zoning ordinances and a consideration of the facts before him, and was an act he was required to perform as part of his responsibilities. At least two decisions more recent than *Tulevich*, have held similarly. In *City of New York v 17 Vista Assocs.*, the Court of Appeals stated that the "decision whether to issue a permit is a *discretionary determination* and the actions of the government in such instances are immune from lawsuits based on such decisions" (84 NY2d 299, 307 [1994] emphasis added). In *Neville v Koch*, the Court noted, "[o]f course, requests for variances and special permits for uses not permitted as of right, as well as other *discretionary actions*, would not be 'ministerial acts' and would call for further review" (79 NY2d 416, 426 n. 6 [1992], emphasis added).

Plaintiff argues that, at least until April 29, 2005 and possibly as recent as November 25, 2005 when the new DOB Policy and Procedure Notice was issued, the decision to issue a work permit was a ministerial, clerical function. She points out that the one-and-a-half-page form was completed and notarized *by the applicant*, i.e., Valentin. There is nothing to indicate that the DOB employee handling the application had any responsibility with regard to the form other than to make

sure it was fully complete. Certainly, the employee did not check for accuracy as concerns the license (Pl. Aff. in Reply ¶ 19).

In *Puffer*, cited by *Tulevich* above, the court distinguished between the discretionary nature of the city clerk's job to ascertain if the parties before her were entitled to marry, and the ministerial act of issuing of the license (59 Misc. 2d, at 860). In *Luckie*, also cited by, *Tulevich*, the court held that where a justice of the peace incorrectly certified in a reckless driving incident that property damage had occurred, thus causing the driver's license to be suspended, the justice was not shielded from suit, and the rendering of a certificate to the commissioner was a ministerial rather than a judicial function (171 Misc., at 777). Here, the municipal defendants do not establish that, at least prior to the institution of new procedures in 2005, the approval of the application form for a DOB work permit differed in any significant way from the ministerial acts of issuing a marriage license or certifying a record. They have not established, as a matter of law, that the issuing of the DOB work permits was, at the time plaintiff sought to renovate her property, anything other than a ministerial function. Even that plaintiff's engineer's initial plan was denied by the DOB based on an analysis of the plans, does not establish that the approval of the *work permit* was made after any sort of discretionary analysis of the facts contained in the application. The City has not submitted an affidavit from a DOB employee or official with knowledge of its procedures in 2004 concerning the processing of work permit applications. From the face of the document itself and the lack of contrary evidence from the City, there remains a question of fact as to whether approval of work permits involved any real discretionary decision making or was a ministerial function at the time plaintiff undertook the renovation of her property.

B. Special Relationship

The City argues that the DOB has no special duty to plaintiff and that therefore, even were there a tortious act, the municipal defendants cannot be found liable (Def. Aff. in Reply ¶ 10, citing Consumer Affairs § 20-385, et seq.). They contend that the DOB did not voluntarily assume a duty on which the plaintiff could rely upon They also argue that plaintiff does not allege that the DOB assumed "positive direction and control over a dangerous safety condition that took place during construction," but only seeks monetary damages for what she deems inadequate work (Def. Aff. in Reply ¶ 10).

Courts have consistently refused to impose liability for a municipality in performing a public function absent "a duty to use due care for the benefit of particular persons or classes of persons" (*Lauer v City of New York*, 95 NY2d 95, 102 [2000] [citing *Motyka v City of Amsterdam,* 15 NY2d 134, 139 (1965)]). To sustain liability against a municipality, the duty breached must be more than the general duty owed the public (*Lauer,* 95 NY2d, 100, citations omitted). Violation of a statute resulting in injury gives rise to a tort action only if the intent of the statute is to protect an individual against an invasion of a property or personal interest (*Lauer*, at 101, citing *Steitz v City of Beacon,* 295 NY 51, 56 [1945]; *O'Connor v City of New York,* 58 NY2d 184, 189-190 [1983]; *Motyka v City of Amsterdam,* 5 NY2d, 139).

To establish a special relationship based on a municipality's assumption of a duty requires the plaintiff to sufficiently allege that there has been "an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party," that there is "knowledge on the part of a municipality's agents that inaction could lead to harm," some "direct contact between the municipality's agents and the injured party," and "justifiable reliance" by the party on the municipality's affirmative undertaking (*Kovit v Estate of Hallums*, 4 NY3d 499, 506-

507 [2005], citations omitted).

Here, contrary to what the municipal defendants argue, the Consumer Affairs statute, which were designed to protect consumers in general from fraudulent and misleading practices, impliedly requires the Department of Buildings to comply with the mandate to protect homeowners who hire contractors, from "abuses and fraudulent practices" (Consumer Affairs § 385). Given that home improvement contractors are required to be licensed (Consumer Affairs § 387), and that it is unlawful for anyone required to be licensed to work without a license in a business requiring one by statute (Consumer Affairs § 20-105[a]), the DOB's work permit application logically includes a section requesting the applicant to state the type of license, in acknowledgment of the need to protect home owners hiring contractors. Applying *Kovit*, it is clear that by statute, the DOB had an explicit affirmative duty to plaintiff and that the application form, which asked for the home improvement contractor license number, manifests the intent to undertake the duty. There is also little question that the DOB knew or should have known that the lack of a proper license by a contractor could lead to abuses and fraud in the making and carrying out of home improvement contracts. Plaintiff's engineer, as her agent, was in direct contact with DOB employees prior to the approval of her application. Finally, plaintiff alleges that she detrimentally relied on the DOB's approval of the work permit, which appeared to legitimate Valentin as a contractor. Although it is a fact that she hired Valentin prior to the work permit's approval, her papers contain the implicit conclusion that if the work permit had not been approved based on Valentin's lack of a proper license, she never would have allowed him to undertake the work, and would not have had the resulting problems with him. Accordingly, the motion to dismiss the complaint on the ground that the municipal defendants had no special duty toward plaintiff is denied.

C. Aiding and Abetting Fraud

The City argues that plaintiff fails to establish the necessary elements for claims of aiding and abetting fraud. As defendants note, a plaintiff alleging aiding and abetting fraud is required to assert factual allegations that the defendants "were aware of a fraud and intended to aid in the commission of the fraud" (*Agostini v Sobol*, 304 AD2d 395, 396 ]1st Dept. 2003]). Here, neither the original nor amended complaints allege facts to establish either that the municipal defendants were aware that Valentin was committing a fraud or that they intended to assist in the fraud's commission. It is clear that plaintiff cannot establish intentionality, and thus to the extent that the complaint alleges that the municipal defendants aided and abetted Valentin in the commission of a fraud, the First and Third causes of action contained in the second amended complaint must be dismissed for failure to state a cause of action (CPLR 3211[a][7]).

2. Plaintiff's Cross-Motion to Amend the Complaint

CPLR 3025(b) allows a party to amend or supplement its pleadings at any time by leave of court. Leave shall be given freely upon such terms as may be just, and will be denied when the other party is prejudiced.

The municipal defendants do not set forth any grounds to suggest that they would be prejudiced by allowing the complaint to be amended and re-served, even with the motion for summary judgment and dismissal under consideration. The City served its answer in July 2006, plaintiff served her first demand for discovery in late December 2006, and the instant motion was filed and served thereafter. There has been very little discovery exchanged, and what has now been provided goes to the weight of certain of plaintiff's claims and suggests that there may be information solely under defendants' control.

Although amendment is freely allowed, so as to conserve judicial resources the court will make a determination as to whether the proposed causes of action are warranted, denying amendment where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law (*Davis & Davis, P.C. v Morson*, 286 AD32d 584, 585 [1st Dept. 2001], citations omitted). Here, upon examination of the second amended complaint, in addition to dismissing the claims for aiding and abetting fraud, the court dismisses the sixth cause of action, alleging negligence per se as against the municipal defendants, because violations of municipal rules and regulations constitute evidence of negligence, not negligence per se (*Elliott v City of New York*, 95 NY2d 730, 734 [1920]). In addition, the second amended complaint does not establish that the DOB failed to use even the slightest bit of care or that its conduct was so careless that it showed a "complete disregard" for the rights and safety of others (*see,* 1A New York Pattern Jury Instructions [2007], sec. PJI 2:10A, p. 207 and cases cited therein). Therefore, the fifth cause of action for gross negligence is not tenable. Moreover, statutory causes of action predicated upon violations of administrative regulations do not give rise to claims of strict liability (*Bauer v Female Academy of the Sacred Heart*, 97 NY2d 445, 453 [2002]). Accordingly, the ninth and tenth causes of action cannot lie.

Therefore, based on all the above, plaintiff's cross-motion to amend her complaint is granted, and she may file and serve a third amended complaint, in conformance with the above rulings, within 30 days of the date of entry of this order.

It is

ORDERED that the motion for summary judgment is granted to the extent that the causes of action alleging the aiding and abetting of fraud are dismissed with prejudice, and is otherwise

denied; and it is further

ORDERED that the cross-motion to amend the complaint is granted to the extent that the plaintiff may file and serve on all parties a third amended complaint within 30 days of the date of entry of this order in accordance with the rulings set forth above, and if the complaint is not filed and served within that time, the matter shall be deemed dismissed with prejudice as against the municipal defendants upon application by the those defendants with five days notice to the plaintiff; and it is further

ORDERED that the parties shall serve and file their amended answers within 20 days of service of the amended complaint; and it is further

ORDERED that the parties are to appear for their previously scheduled compliance conference on October 24, 2007, in room 103 of Supreme Court, 80 Centre Street. It is further

ORDERED that all relief not specifically granted is denied.

This constitutes the decision and order of the court.

Dated: August 28, 2007
New York, New York

J.S.C.