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

PRESENT: Hon. BARBARA R. KAPNICK Justice PART 12

TRAVELERS INDEMNITY

- v -

ZEFF DESIGN

INDEX NO. 114169/05

MOTION DATE

MOTION SEQ. NO. 001

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the accompanying memorandum decision.

FILED
NOV 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: 11/21/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

BARBARA R. KAPNICK J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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TRAVELERS INDEMNITY COMPANY AS SUCCESSOR IN INTEREST BY MERGER TO GULF INSURANCE COMPANY AS SUBROGEE OF LEIBOVITZ STUDIO INC., ANNIE LEIBOVITZ AS MANAGING MEMBER OF 305-7 West 11th STREET, LLC and 305-7 West 11th STREET, LLC, and ANNIE LEIBOVITZ, individually

Plaintiff,

- against -

ZEFF DESIGN, Z ONE DESIGN, LLC, MARK ZEFF CONSULTING GROUP d/b/a ZEFF DESIGN-INTERIOR DESIGN AND ARCHITECTURAL, ALAN BARR, MARK ZEFF, HAGE ENGINEERING, MARK HAGE, P.E., D'AUGUSTINE CONTRACTING CO., INC., D'AUGUSTINE CONTRACTORS, INC., CONSTRUCTION DESIGN CONSULTANTS, JOHN ROWLAND, C.E. BOSS CO., INC., JACK W. MENDELSON, P.E., JOHN SIMS,

Defendants.

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DECISION/ORDER
Index No. 114169/05
Motion Seq. Nos. 001, 002 and 003

BARBARA R. KAPNICK, J.:

Motions sequence numbers 001, 002, and 003 are consolidated for disposition.

Background

Annie Leibovitz, the well-known photographer, purchased two adjoining multi-million dollar townhouses at 305 and 307 West 11th Street in Greenwich Village to combine into one property containing a residence, a studio and a rental apartment. The property shared a party wall with the adjacent property at 311 West 11th Street.

On March 27, 2002, Leibovitz and defendant Zeff Design[1] entered into a nine-page Architecture and Construction Management Contract and a three-page Rider in connection with the above-mentioned gut renovation project.

Defendants Zeff Design, Z One Design, LLC, Mark Zeff Consulting Group d/b/a Zeff Design-Interior Design and Architectural, Alan Barr and Mark Zeff (collectively, "the Zeff defendants") were the construction managers of the project. The Zeff defendants subcontracted (a) with defendant Hage Engineering and Mark Hage, P.E. ("Hage") to serve as the structural engineer of the project; (b) with defendants D'Augustine Contracting Co., Inc., D'Augustine Contractors, Inc., Construction Design Consultants, and John Rowland (collectively "D'Augustine") to do underpinning and other work; (c) with defendant C.E. Boss Co., Inc. ("Boss") to do soil samplings and related analysis; and (d) with defendant John Sims ("Sims") to act as site supervisor. Defendant Jack W. Mendelson ("Mendelson") rendered consulting/supervising engineering services as an employee of defendant Boss.

On or about October 11, 2002, during the construction work, a party wall settled, causing damage to Leibovitz' property. She was eventually paid the sum of $960,000 under a Commercial Lines Policy issued for the benefit of Leibovitz by her insurance company, Gulf

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[1] Zeff Design is merely a trade name for Z One Design, LLC and has no legal existence.

Insurance Company ("Gulf"), which was merged into and is now known as Travelers Indemnity Company ("Travelers"), the plaintiff in this action.

Travelers then commenced this subrogation action to recover the insurance monies that were paid to Leibovitz, setting forth causes of action against all the defendants sounding in negligence (first cause of action); breach of contract (second cause of action); professional malpractice (third cause of action); misrepresentation (fourth cause of action); and gross negligence and recklessness (fifth cause of action).

Motions

In motion sequence number 001, the Zeff defendants move for an order pursuant to CPLR § 3211(a)(1) dismissing the Complaint against them. Defendants Mendelson and the D'Augustine defendants both cross-move pursuant to CPLR § 3211(a)(7) for an order dismissing the Complaint against them. Defendant Sims cross-moves for an order: (i) pursuant to CPLR § 3025(b) granting him leave to amend his Answer to include a defense of waiver of subrogation; and (ii) pursuant to CPLR § 3212(a) granting summary judgment dismissing plaintiff's Complaint against him.

In motion sequence number 002, defendant Boss moves pursuant to CPLR § 3025(b) for leave to amend its answer to assert the defense of waiver of subrogation, and, upon such amendment, for an

order pursuant to CPLR § 3211(a)(7) dismissing the Complaint against it.

In motion sequence number 003, the Hage defendants move, pursuant to CPLR § 3212(a), for summary judgment dismissing the Complaint and all cross claims against them.

Discussion

Waiver of Subrogation

Defendants argue in the first instance that plaintiff's Complaint must be dismissed on the ground that the Contract and Rider contain a waiver of subrogation in favor of all the defendants.

Plaintiff, on the other hand, contends that Leibovitz did not waive her rights of subrogation.

Subrogation is an equitable doctrine, pursuant to which "an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss (citation omitted)." Winkelmann v. Excelsior Ins. Co., 85 N.Y.2d 577, 581 (1995); see also, Kaf-Kaf, Inc. v. Rodless Decorations, Inc., 90 N.Y.2d 654, 660 (1997).

However, an insurer may not recover as a subrogee if the insured has entered into an agreement waiving claims against third parties for losses covered by insurance as "[i]t is well-settled that waiver of subrogation clauses are valid in New York state" (St. Paul Fire and Marine Insur. Co. v. Universal Builders Supply, 317 F.Supp.2d 336, 340 [S.D.N.Y. 2004], aff'd as modified, 409 F.3d 73 [2nd Cir. 2005]), "provided the intention of the parties is clearly and unequivocally expressed" (Viacom International, Inc. v. Midtown Realty Co., 193 A.D.2d 45 [1st Dep't 1993])."[2]

In the instant case, the Contract and Rider do not contain an explicit waiver of subrogation provision. Defendants, however, argue that such a provision is incorporated into the Rider by reference to certain provisions of the American Institute of Architects ("AIA")'s Standard Form of Agreement Between Owner and Construction Manager, Document B801/CMa-1992 (O&C Form) and of its General Conditions of the Contract for Construction, Document A201/CMa-1992 (GCC Form).

Section 10.4 of Article 10 (Miscellaneous Provisions) of the O&C Form provides as follows:

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[2] Such waiver of subrogation clauses are "particularly common in large construction projects, because they avoid[ ] disruption and disputes among the parties to [the] project, and ... protect[ ] the contracting parties from loss by bringing all property damage under the all risks builder's property insurance." St. Paul Fire and Marine Ins. Co. v. Universal Builders Supply, supra at 340, quoting Tokio Marine & Fire Ins. Co. Ltd. v. Employers Ins. of Wausau, 786 F.2d 101, 104 (2nd Cir. 1986).

[* 7]

The Owner and Construction Manager waive all rights against each other and against the Contractors, Architect, consultants, agents and employees of any of them, for damages, but only to the extent covered by property insurance during construction, except such rights as they may have to the proceeds of such insurance as set forth in the edition of AIA Document A201/CMa, General Conditions of the Contract for Construction, Construction Manager-Adviser Edition, current as of the date of this Agreement. The Owner and Construction Manager each shall require similar waivers from their Contractors, Architect, consultants, agents, and persons or entities awarded separate contracts administered under the Owner's own forces.

Section 11.3.7 of Article 11 (Insurance and Bonds) of the GCC Form provides as follows:

The Owner and Contractor waive all rights against each other and against the Construction Manager, Architect, Owner's other Contractors and own forces described in Article 6, if any, and the subcontractors, sub-subcontractors, consultants, agents and employees of any of them, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as the Owner and Contractor may have to the proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Construction Manager, Construction Manager's consultants, Architect, Architect's consultants, Owner's separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

Although the Rider does not specifically mention either Article 10, Section 10.4 of the O&C Form, or Article 11, Section 11.3.7 of the GCC Form, defendants argue that these provisions are necessarily incorporated into the Rider because paragraph 3(d) of the Rider provides, in relevant part, that:

> As part of its basic services as Construction Managers, Zeff Design shall enter into written contracts with contractors for the project. ... Each such contractor [sic] shall where the context is appropriate, contain provisions that:
>
> ***
>
> (ii) waive all rights the contracting parties may have against one another, against Construction Manager or against Owner for damages caused by fire or other perils covered by the insurance described in the contract documents;

Defendants contend that since neither the Contract nor the Rider refer to insurance "for damages caused by fire or other perils," paragraph 3(d) of the Rider must relate to and incorporate Section 11.3.7 of the GCC Form which requires the owner to purchase such insurance.

However, the "contract documents" referred to in the phrase, "the insurance described in the contract documents", in paragraph 3(d)(ii) of the Rider are not the Contract and Rider. Rather, they

are the contracts that the Rider requires Zeff to enter into with its subcontractors.[3]

Thus, while the Policy is a first-party insurance policy, such as is called for by Section 11.3.7 of the GCC Form, and while paragraph 3(d)(ii) of the Rider imposes a requirement analogous to that required by Article 11.3.7 of the GCC Form, the insurance referred to in the Rider is insurance that is to be purchased by the subcontractors.

Inasmuch as Leibovitz did not clearly and unequivocally waive any claims for subrogation, plaintiff is not barred from suing as her subrogee.

"While amendment of a pleading should ordinarily be freely granted (CPLR § 3025[b]), it may be denied where the proposed [amendment] is plainly lacking in merit (citation omitted)." Sharon Ava & Co. v. Olympic Tower Assoc., 259 A.D.2d 315, 316 (1st Dep't 1999). Accordingly, that branch of the cross-motion by defendant Sims and the motion by defendant Boss which seek leave to amend their Answers to add the defense of waiver of subrogation are denied, as are those portions of the motions by the Zeff defendants

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[3] A review of the documents reveals that the word Contract with a capital "C" is consistently used in the document to denote the Contract and Rider, while contract with a lower-case "c" is used to denote the contracts that Zeff is to enter into with the as yet unspecified subcontractors.

and the Hage defendants to dismiss the Complaint based on the waiver of subrogation.

Plaintiff Paid Leibovitz as a "Volunteer"

Defendants next argue that this action should be dismissed because plaintiff is not entitled to subrogation for payments it "voluntarily made" instead of invoking applicable exclusions in the subject policy to disclaim coverage. Plaintiff argues in opposition that it should not be penalized to the benefit of the alleged tortfeasors for its "good faith" payment to its insured.

Although the doctrine of subrogation is "liberally applied for the protection of those who are its natural beneficiaries -- insurers that have been compelled by contract to pay the loss caused by the negligence of another" (Winkelmann v. Excelsior Ins. Co., supra at 581), subrogation is not available when the insurer's payment to the insured is "voluntary"; i.e., when an insurer "pays a loss for which it is not liable." (National Union Fire Ins. Co. v. Ranger Ins. Co., 190 A.D.2d 395, 397 [4th Dep't 1993]; see also, Employers Mut. Liab. Ins. Co. of Wis. v. Di Cesare & Monaco Concrete Constr. Corp., 9 A.D.2d 379, 382 [1st Dep't 1959]).

The defendants argue that Gulf paid Leibovitz as a "volunteer" because Gulf could have disclaimed coverage on the basis of the following exclusions:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or

damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

* * *

b. Earth Movement

* * *

(4) Earth sinking (other than sinkhole collapse), rising or shifting soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

* * *

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * *

d. (1) Wear and tear;

(2) Rust, corrosion, fungus, decay deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

* * *

(4) Settling, cracking, shrinking or expansion;

However, the listed examples of soil conditions demonstrate that the exclusion for "Earth Movement" is arguably limited to shifting caused by the gradual effect of natural causes, not by the sudden effect of construction activities. See, Holy Angels Academy v. Hartford Ins. Group, 127 Misc.2d 1024 (Sup. Ct., Erie Co. 1985); Barash v. Insurance Co. of North America, 114 Misc.2d 325 (Sup.

Ct., Nassau Co. 1982). Likewise, "settling", as used in the "Wear and tear" exclusion, appears to apply to the effect of a gradual process affecting the subject property.

Plaintiff's allegation in the Complaint that the party wall "settled, shifted, cracked and/or moved" in the course of the construction does not constitute an admission that the alleged settling comes within the exclusions described above.

Defendants alternatively argue that plaintiff could have disclaimed coverage based on the following exclusion:

> 3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by the Covered Cause of Loss.
>
> * * *
>
> c. Faulty, inadequate or defective:
>
> * * *
>
> (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

However, this provision, by its own terms, does not apply where the damage to the property was caused by a "Covered Cause of Loss", which is the case here.

Finally, the Zeff defendants argue that the Settlement Agreement between Gulf and Leibovitz confirms that plaintiff paid

despite its knowledge that there was no coverage. That agreement provides in paragraph 3 that

> [t]he Insured acknowledges that the payment being made in accordance with this Agreement is in compromise of disputed coverage demands for property damage and is not an admission by the Company of coverage, scope, or availability of the Policy, or that any obligations exist under the Policy or otherwise.

Plaintiff's witness, Beverly Miller, testified at her deposition that her understanding of the wording of this settlement agreement is that it is

> the equivalent of a release that we sent out to claimants after we rear-end them and knock them into the wall, and we say this is compromise liability. We didn't do anything wrong. We're not admitting we did anything wrong, but we're going to pay you a million dollars.

Ms. Miller also testified that the negotiations between plaintiff and Ms. Leibovitz concerned the magnitude of damages, rather than issues of coverage. Finally, nothing in plaintiff's predecessor's Manual Check Request, which notes that "CELEBRITY INVOLVED AND ADJUSTMENT HAS BEEN DIFFICULT AND MUST GET OUT PAYMENT TODAY," suggests that Gulf could have disclaimed coverage on the basis of an exclusion in the Policy.

Accordingly, those portions of the motions and cross-motions seeking to dismiss this action on the ground that Gulf paid Leibovitz as a "volunteer" are denied.

Claims for Professional Malpractice and Misrepresentation

The Zeff defendants argue that plaintiff's third and fourth causes of action alleging professional malpractice and misrepresentation, respectively, must be dismissed on the grounds that: (i) none of the principals of Zeff Design are licensed architects (see, Santiago v. 1370 Broadway Associates, L.P., 264 A.D.2d 624 [1st Dep't 1999], aff'd as modified on other grounds, 96 N.Y.2d 765 [2001]);[4] and (ii) a claim of fraud/misrepresentation will not arise when the alleged misrepresentation relates to a breach of contract. (See, Rosen v. Watermill Development Corp., 1 A.D.3d 424 [2nd Dep't 2003]).

Plaintiff argues in opposition that Z One Design "held itself out" to Leibovitz as "qualified" to perform architectural services (see, Brown v. Shyne, 242 N.Y. 176 [1926]) since the Contract between Zeff and Leibovitz provided in "Phase I - Architectural Design and Documentation Services" that Z One Design would "develop a comprehensive architectural/Interior design identity and layout for the townhouses" ... and "produce a complete set of drawings and specifications". In addition, defendant Mark Hage, the Structural Engineer for the project, testified that he was under the

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[4] In Santiago v. 1370 Broadway Associates, L.P., supra at 624-625, the Court noted that

> [m]alpractice is the negligence of a professional [emphasis supplied] toward a person for whom a service is rendered (1 Weinstein-Korn-Miller, NY Civ Prac § 214.24). A "profession" is an occupation generally associated with long-term educational requirements leading to an advanced degree, licensure evidencing qualifications met prior to engaging in the occupation, and control of the occupation by adherence to standards of conduct, ethics and malpractice liability (citation omitted).

impression that defendant Alan Barr was at least representing "[w]hoever in his firm was the architect."

However, the Rider specifically states in paragraph 5 that "Zeff Design has informed Owner that none of the principals of Zeff Design is a licensed architect under the laws of the State of New York," and that Zeff Design would be required to retain a licensed architect in connection with the project. The Rider also provides that the terms of the Rider govern if there is any inconsistency between the Rider and the Contract. Accordingly, it cannot be said that Z One Design "held itself out" to Leibovitz as qualified to perform architectural services. The cause of action alleging professional malpractice is, therefore, dismissed as against the Zeff defendants.

Plaintiff's claim of misrepresentation alleges that defendants misrepresented the extent of their professional experience and their ability to carry out the services they represented they could competently perform, and that these misrepresentations were misleading and detrimentally relied upon by Leibovitz, as a result of which she was damaged. These claims are sufficiently pled so as to survive the motion to dismiss by the Zeff defendants.

Moreover, the allegations of fraud are sufficiently collateral to the breach of contract claim to support a claim of fraud in the inducement. See, Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112 (1995); Zuccarini v. Ziff-Davis Media, Inc., 306 A.D.2d 404 (2nd Dep't 2003).

However, while the Complaint alleges that the non-Zeff defendants held themselves out "to the public and to plaintiff's subrogors" as qualified professionals, the Complaint clearly alleges that none of those defendants was hired by Leibovitz, and alleges not a single meeting or communication between Leibovitz and those defendants as a result of which she could have relied upon representations made by them. Accordingly, the fourth cause of action is dismissed as against the non-Zeff defendants.

Those portions of the cross-motions seeking to dismiss plaintiff's claim for breach of contract against the non-Zeff defendants on the ground that they never entered into an agreement directly with Leibovitz is, however, denied, as this Court finds that Leibovitz was the intended beneficiary of all the subcontractor's contracts. See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38 (1985); 243-249 Holding Co., LLC v. Infante, 4 A.D.3d 184 (1st Dep't 2004).

Motion to dismiss against certain defendants

The Zeff defendants argue that (i) plaintiff may not hold Barr and Mark Zeff personally liable because they did not perform any services, or have any involvement with the project in their individual capacities; and (ii) Barr, as a member of Z One Design, LLC, a limited liability company may not be held to be personally liable "solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of

the business of the limited liability Company" (Limited Liability Law § 609[a]); and (iii) the entity that contracted with Leibovitz was Z One Design and, thus, all other Zeff defendants were improperly and unnecessarily named as defendants.

Those portions of the Zeff defendants' motion are granted, and the Complaint is dismissed as against defendants Zeff Design, Mark Zeff Consulting Group d/b/a Zeff Design-Interior Design and Architectural, Alan Barr and Mark Zeff.

Claims for negligence and breach of contract against the Hage defendants

The Hage defendants argue that there has been no showing that they breached any duty to Leibovitz with respect to the excavation, shoring, bracing, underpinning or other protection of the party wall. In additon, the Hage defendants argue that there is no evidence that they conducted controlled inspections or directed the contractors on the means and methods of construction.

According to Mark Hage, a licensed professional engineer and the sole principal of Hage Engineering,

> Hage's structural drawings did not provide for, and Hage never recommended, the underpinning, shoring, bracing or other protection of the subject party wall. In fact, Hage's drawings provided that the soil and support located beneath the party wall were not to be disturbed. The excavation underneath, and underpinning of, the party wall were performed in contradiction to Hage's structural drawings (as well as the notes which accompanied the

structural drawings) and without Hage's consent (or knowledge).

It is undisputed that D'Augustine did not pour the concrete ledge called for in Hage's drawings, but instead commenced to excavate the soil beneath the wall, apparently pursuant to a conversation with Alan Barr. It is also undisputed that the wall began to settle only after that excavation work had begun.

When Hage was notified of the excavation under the south wall, it prepared a revised sketch which provided a tighter spacing of the rebars in the ledge, in order to further strengthen and stabilize the south party wall. Two days later, with no ledge having been poured, the wall gave way. A timeline prepared by Zeff notes that during a site visit on September 30, 2002, Zeff "observed D'Augustine underpinning wall that was not supposed to be underpinned."

Zeff then met with Hage on October 9, 2002, and the next day received the revised sketch from Hage.

Plaintiff argues, through its counsel's affidavit, that:

> As Structural Engineer for the project with direct emphasis on the lowering of the sub-basement floor of the sub-cellar, it is Hage's design, first and foremost that failed. Undoubtedly, the collapse of the south party wall was a structural failure. The design of the lowering of the floor without proper bracing, shoring and/or appropriate supervision but instead, with a creation of a concrete ledge ... was brutally wrong, ill conceived and disastrous.

Plaintiff, however, has not submitted an expert's affidavit in support of this contention, nor has plaintiff shown that Hage's design and instructions were followed.

The Zeff defendants argue, in partial opposition to Hage's motion, that Hage filed a Technical Report: Statement of Responsibility, commonly referred to as a TR-1, with the New York City Department of Buildings, which indicated that Hage would conduct controlled inspections of the shoring, structural stability and concrete work on the project.

However, Hage's contract with Zeff Design dated April 29, 2002 specifically provided that Hage's services would not include:

> any controlled inspections, meetings with building department officials, expediting, architectural code review, environmental assessments, waterproofing issues, fireproofing, toxicity issues, geotechnical work or analysis, underpinning or sheet piling work, work relating to means and methods of construction such as safety measures, shoring, bracing, and any other temporary stability measures.

Hage also explained in an April 23, 2002 e-mail to Barr that:

> means and methods of construction should never be a part of our scope, to protect us and to protect you. The reason is simple ... there is no way we can watch the contractor continuously, and therefore it is his responsibility to maintain temporary stability.

In addition, by letter dated July 15, 2002, Hage advised Barr that Hage was signing the TR-1 "in order to expedite the filing

process", but that Hage "should be superseded just before construction commences, and the inspections should be performed by a controlled inspection company engaged by someone other than us."

Therefore, the first, second and fifth causes of action alleging negligence, breach of contract and gross negligence and recklessness, respectively, as against defendant Hage are dismissed.

The third cause of action against defendant Hage for professional malpractice and the fourth cause of action for alleged misrepresentation of its qualifications are also dismissed, as plaintiff cannot demonstrate that any damage resulted from the implementation of Hage's drawings. Likewise, the cross-claims against the Hage defendants for contribution and common-law indemnification must be dismissed.

Accordingly, the Clerk may enter judgment dismissing plaintiff's Complaint in its entirety against defendants Zeff Design, Mark Zeff Consulting Group d/b/a Zeff Design-Interior Design and Architectural, Alan Barr, Mark Zeff, Hage Engineering and Mark Hage, P.E. only, and plaintiff's fourth cause of action against the non-Zeff defendants, with prejudice and without costs or disbursements. Plaintiff's remaining claims are severed and continued.

All remaining defendants who have not answered shall serve answers in accordance with the rulings made in this Decision within 30 days of entry of this order. All parties shall appear for a preliminary conference in IA Part 12, 60 Centre Street, Room 341 on January 16, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: November 21, 2007

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.