SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

MARK SCHNEIDER and HUGHENA SCHNEIDER,

Plaintiffs,

-against-

ROBERT L. CAMPAGNA, ARCHITECT, P.C., HARVEY P. STARK, P.E., P.C., THOMAS MURPHY & ASSOCIATES, ISLAND STRUCTURES ENGINEERING, P.C. and VIPA RESTORATION,

Defendants.

ORIGINAL RETURN DATES: 08/17/07 (#5)
10/26/07 (#7)
SUBMISSION DATES: 10/18/07 (#5)
10/26/07 (#7)
INDEX No.: 4460/07

MOTION SEQUENCE #5,7

The following papers read on this motion:

Notice of Motion.....	A, G
Answering Papers.....	C
Reply.....	E
Plaintiffs' Brief.....	D
Defendant's Brief.....	B, F

Motion [sequence #5] pursuant to CPLR 32111[a][7], [c] by defendant Island Structures Engineering, P.C. for an order dismissing the complaint and all cross claims insofar as asserted against it is granted.

Motion [sequence #7] pursuant to CPLR 3215[a] by plaintiffs Mark Schneider and Hughena Schneider motion for, *inter alia*, a default judgment as against co-defendant VIPA Restoration, Inc. is granted to the extent provided.

In 2003, plaintiffs Mark and Hughena Schneider entered into a construction contract with general contractor, Thomas Murphy & Associates ["TMA"] for the construction of a new home to be located adjacent to Manhasset Bay, in Manhasset, New York (Cmplt., ¶ 28).

Defendant TMA later retained subcontractor Island Structures, Engineering, P.C . ["Island"] to design a waterproofing system for the new home, which was apparently necessitated by the home's proximity to the water and the existing soil conditions at the site (Cmplt., ¶ 33).

Plaintiffs claim, *inter alia*, that they personally located and referred Island to TMA (Schneider Aff., ¶¶ 3-4, 6-7, 14); that they met with Island's principal – William Schlumpf – before Island was retained in order to discuss the waterproofing job (Schneider Aff., ¶¶ 8-10); that at TMA's request, plaintiffs forwarded certain pre-construction information relating to the project to Island (Schneider Aff., ¶¶ 9-10); that after referring Island to TMA, plaintiffs sent an e-mail to TMA stressing the importance and significance of the waterproofing portion of the job (Schneider Aff., ¶¶15-16); and that during the project, plaintiff made several inquiries of TMA concerning the progress of the waterproofing work (Schneider Aff., ¶¶1 18-21).

The project was ultimately completed 2005, but in October of that year, after a heavy rain, the cellar floor cracked and/or ruptured and the house flooded (Cmplt., ¶¶ 41-42).

After the rupture occurred, Island's principal met personally with Schneider and others to discuss the remediation options available (Schneider Aff., ¶¶ 26-27). Schlumpf later e-mailed his plans both to Schneider and a third-party engineer whom Schneider had retained to further investigate the problem (Schneider Aff., ¶¶ 27-28).

Thereafter plaintiffs commenced the within negligence and professional malpractice action against, *inter alia*, TMA and Island.

Island now moves to dismiss the action pursuant to CPLR 3211[a][7], arguing that: (1) it never entered into a direct contractual relationship with plaintiffs; and (2) that plaintiffs have alternatively failed to establish that a relationship "functionally equivalent" to privity existed within the meaning of governing case law (*see, Ossining Union Free School Dist. v. Anderson LaRocca Anderson,* 73 NY2d 417 [1989] *see also*, *Parrott v. Coopers & Lybrand, L.L.P.*, 95 NY2d 479 [2000]). The Court agrees.

Since it is undisputed that no contract existed between Island and plaintiffs, "the burden was on the plaintiffs to establish that the functional equivalent of privity of contract arose between themselves and * * * [Island] as a result of * * *[Island's] actions" (*Melnick v. Parlato*, 296 AD2d 443)

Accordingly, and "before liability may attach, the evidence must demonstrate '(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance'" (*Parrott v. Coopers & Lybrand, L.L.P.*; *supra*, at 483 *quoting from*, *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382, 384 [1992]; *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, *supra; see*, *J.A.O. Acquisition Corp. v. Stavitsky*,

8 NY3d 144, 148 [2007]; *Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536 [1985]; *Melnick v. Parlato*, *supra*).

"As a shorthand rule encapsulating those requirements, it has been noted that, for defendants to be liable, reliance by plaintiff upon the representation must be 'the end and aim of the transaction', rather than an 'indirect or collateral' consequence of it" (*Kidd v. Havens*, 171 AD2d 336, 339; *see, Credit Alliance Corp. v Andersen & Co., supra*).

New York has defined the duty of care in such a case "narrowly, more narrowly than other jurisdictions" (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, *supra,* at 424).

With respect to the so-called "linkage" requirement, a plaintiff must generally demonstrate the existence of some affirmative conduct by Island "linking it to the plaintiff's reliance"(*LaSalle Nat. Bank v. Ernst & Young LLP*, 285 AD2d 101,107 *see also*, *Securities Investor Protection Corp. v. BDO Seidman, L.L.P.*, 95 NY2d 702, 711 [2001]).

"Notwithstanding some degree of overlap among these requirements, they are distinct * * * [and] must be distinctly pleaded * * *" (*LaSalle Nat. Bank v. Ernst & Young LLP*, 285 AD2d 101,105). "[T]he pleadings still must establish a basis of liability arising from 'either actual privity of contract between the parties or a relationship so close as to approach that of privity' requiring 'a clearly defined set of circumstances which bespeak a close relationship premised on knowing reliance'" (*Id., quoting from*, *Parrott v. Coopers & Lybrand, L.L.P.*, *supra*, at 383-4).

Upon applying these principles to the facts presented, and according plaintiffs the benefit of every possible favorable inference (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *LaSalle Nat. Bank v. Ernst & Young LLP*, *supra*, at 105), the Court finds that plaintiffs have failed to establish the existence of "a relationship so close as to approach that of privity" (*Parrott v. Coopers & Lybrand, L.L.P.*, *supra*, at 383-4; *Melnick v. Parlato*, *supra*).

Preliminarily, the Court notes that neither the complaint's prefatory factual allegations, nor the cause of action later interposed expressly against Island (Cmplt.,¶¶ 81-86), contains averments or allegations which actually address the foregoing tripartite test (*see*, *LaSalle Nat. Bank v. Ernst & Young LLP, supra*, at 105).

To the extent that plaintiffs have amplified their claim through the submission of plaintiff Mark Schneider's affidavit and certain documentary materials (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]), the allegations made still fall short of establishing a viable cause of action establishing the functional equivalent of privity.

Specifically, while plaintiffs may have located Island and referred it to the project's general contractor – and although the waterproofing component of the job may well have been significant – there is nothing in the record demonstrating that Island performed its contract function with knowledge that it would be doing so for a "particular" or unique purpose *vis a vis* plaintiffs (*cf.*,

Ossining Union Free School Dist. v Anderson LaRocca Anderson, supra, at 425). To the contrary, the pleaded averments, when read together with plaintiffs' amplified factual assertions, establish no more than that the waterproofing work was to comprise one component of an on-going construction project.

Correspondingly, it cannot be concluded that Island was aware that its work was to be relied upon by plaintiffs for any "particular purpose" – as opposed to merely comprising a discrete portion of the overall construction project.

The fact that plaintiffs may have regularly corresponded with the general contractor concerning the progress of the waterproofing process (Schneider Aff.,¶¶ 18-21) or expressed concern about its overall importance, does not show the existence of functional privity. Indeed, these factual claims merely establish that plaintiffs made inquiries similar to those raised by virtually all property owners during the pendency of a construction project, *i.e.*, that the work, or portions thereof, is being performed in an expeditious, competent and complete fashion.

Further, to the extent that there were direct interactions between plaintiffs and Island, these contacts were, at best, inconclusive, since they primarily entailed: (1) a telephone call and meeting prior to Island's retention (Schneider Aff., ¶¶ 4, 7); (2) a pre-retention occasion during which plaintiffs e-mailed "certain additional information" concerning the project to Island at TMA's request (Schneider Aff., ¶¶ 9-10); and (3) an on-site meeting after the rupture occurred with Island (and others) at which remediation options were discussed, and after which Island forwarded its plans a third party contractor and to plaintiffs (Schneider Aff., ¶¶ 26-28)(*Carter v. Carlis*, 22 AD3d 296).

Plaintiffs have not alleged the existence of personal interactions or a pattern of contacts between themselves and Island which approximate the existence of contractual privity

Lastly, the Court agrees that there is no "linking" conduct which will suffice to satisfy the final prong of the tripartite inquiry, *i.e.*, that there is "some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance (*Parrott v. Coopers & Lybrand, L.L.P., supra,* at 484) – other than the performance of the * * * [work] itself"(*LaSalle Nat. Bank v. Ernst & Young LLP, supra,* at 107).

Here, the pleaded allegations and supporting materials establish that Island possessed a general knowledge and awareness that its work was to constitute a component of a home construction project – knowledge no different from that possessed by any subcontractor retained to perform work at a job site (*Melnick v. Parlato, supra*).

Nor is this a situation where Island's performance as subcontractor was the "end and aim" of the transaction within the meaning of the relevant case law (*cf., Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood, supra,* at 385; *Glazer v. Shepard,* 233 NY 236, 238-239 [1922]; *Ossining Union Free School Dist. v Anderson LaRocca Anderson, supra,* at 426).

Rather, the "end and aim" of Island's involvement in the project was to provide waterproofing services to TMA in accord with its subcontract – whereas the "end and aim" of the transaction insofar as plaintiffs were concerned, was the construction of their new home (*see*, *Melnick v. Parlato*, *supra*; *Simon v. Ernst & Young* , 223 AD2d 506, 507). Accordingly, and "[a]t most, plaintiffs' allegations show only that their reliance * * * was * * *'indirect or collateral' * *" (*Simon v. Ernst & Young*, 223 AD2d 506, 507; *Kidd v. Havens*, *supra*).

Lastly, plaintiffs' alternative reliance upon its alleged status as a third party beneficiary to the TMA-Island Agreement is lacking in merit. There is nothing in the complaint itself which relies upon – much less mentions or alleges – facts which would implicate a third-party beneficiary theory of liability as against Island (*see generally*, *State of California Public Employees' Retirement,* 95 NY2d 427, 434-435 [2000]; *Kings Choice Neckwear, Inc. v. DHL Airways, Inc.*, 41 AD3d 117).

Plaintiffs' speculatively framed assertions that facts might conceivably exist which would support such an unpleaded theory of recovery, are insufficient to defeat Island's motion to dismiss (CPLR 3211[d]; *see*, *Mandel v. Busch Entertainment Corp.*, 215 AD2d 455; *Oates v. Marino*, 106 AD2d 289, 291 *see also, Lewis v. Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325; *Rosenheck v. Calcam Associates Inc.*, 233 AD2d 553 *cf.*, *Mainline Elec. Corp. v. Pav-Lak Industries, Inc.*, 40 AD3d 939, 940).

In light of the Court's holding dismissing the complaint as to Island, the branch of Island's motion which is for dismissal of all cross claims interposed against it, is also granted (*see*, Stark Aff., in Opp., ¶ 4).

The Court has considered plaintiffs' remaining contentions and concludes that they are lacking in merit.

Consistent with the foregoing, the title of this action is amended to read as follows:

"MARK SCHNEIDER and HUGHENA SCHNEIDER,

Plaintiffs,

-against-

ROBERT L. CAMPAGNA, ARCHITECT, P.C., HARVEY P. STARK, P.E., P.C., THOMAS MURPHY & ASSOCIATES, and VIPA RESTORATION,

Defendants."

Lastly, plaintiffs' unopposed motion for a default judgment pursuant to CPLR 3215[a] as against co-defendant VIPA Restoration, Inc. [VIPA], is granted.

Assessment of damages shall be held during the trial of the action against the answering defendants (Vierya v. Briggs & Stratton Corp., 184 AD2d 766) and defendant VIPA may participate in the damages phase only (see, Rokina Optical, Inc. v. Camera King, Inc., 63 NY2d 728). If, however, all answering defendants settle with plaintiff or these defendants successfully defend against the liability phase of plaintiffs' claim, an inquest shall be held against defendant VIPA before the trial Justice assigned to this action; if none, an inquest shall be scheduled through the Calendar Control Part following the filing of a Note of Issue.

Plaintiff shall serve a copy of this order upon defendant VIPA by certified mail, return receipt requested, forthwith upon receipt of a copy from any source.

All parties are reminded that this action is scheduled for a compliance conference to be held in the courtroom of the undersigned on February 7, 2008 at 9:30 A.M.

This decision constitutes the order of the court.

Dated: 12-03-07

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J.S.C.

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