

**Sykes v RFD Third Ave. 1 Assoc., LLC**

2007 NY Slip Op 34431(U)

October 1, 2007

Supreme Court, New York County

Docket Number: 113486/04

Judge: Richard F. Braun

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

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JAMES SYKES and ELLEN SYKES,  
Plaintiffs,

Index No. 113486/04

- against -

RFD THIRD AVENUE 1 ASSOCIATES, LLC,  
TREVOR DAVIS, MICHAEL FUCHS, ABY ROSEN,  
THE MARKETING DIRECTORS, INC., SCHUMAN  
LICHTENSTEIN, CLAMAN & EFRON, PETER  
CLAMAN, and COSENTINI ASSOCIATES, LLP,

Defendants.  
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OPINION

**FILED**  
OCT 09 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**RICHARD F. BRAUN, J.:**

Plaintiffs denominate in their complaint causes of action against defendant Cosentini Associates, LLP (defendant) for damages for breach of contract, professional malpractice, and fraud and/or negligent misrepresentation. Defendant moves to dismiss the first two causes of action, pursuant to CPLR 3211 (a) (5), based on the three year statute of limitations under CPLR 214 (6); and the third cause of action, pursuant to CPLR 3211 (a) (1) and (7), and, "if deemed appropriate", to treat those branches of the motion as for summary judgment, pursuant to CPLR 3211 (c).

Defendant ended its work in the subject building on May 21, 2001. The October 15, 2001 calculations and report were incidental, and did not extend the statute of limitations (*see Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951 [1984]). Under the circumstances, plaintiff's first cause of action is in essence for professional malpractice, like the second one, not for breach of contract, and thus the applicable statute of limitations is three years, pursuant to CPLR 214 (6) (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 541-543 [2004]). Therefore, as this action was commenced on March 1, 2006 and the earlier one with defendant as a party defendant on September 21, 2004, which was more than three years after the statute of limitations began to run, this action was time-barred when commenced against

defendant. The ground was not waived by defendant, as breach of contract and professional malpractice were not asserted against defendant in the first action.

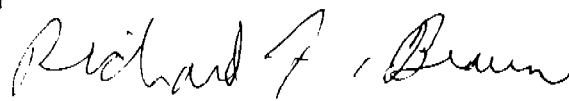
On a motion pursuant to CPLR 3211 (a) (1) and (7), a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the Court must decide only whether the facts alleged fall under any recognized legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1<sup>st</sup> Dept 1998]). To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the cause(s) of action of the opposing party (*Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1<sup>st</sup> Dept 1997]).

Contrary to the prior complaint against defendant, this one, which expressly incorporates all prior paragraphs (*see* CPLR 3014) in addition to paragraphs 81-98, does state a cause of action for negligent misrepresentation (*see Board of Managers of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488, 489-490 [1<sup>st</sup> Dept 1992]; *cf. Board of Managers of Alfred Condominium v Carol Mgt.*, 214 AD2d 380, 381 [1<sup>st</sup> Dept 1995] [the sponsor's promotional and sales material having highlighted the construction manager's participation in the project, the causes of action for negligence and breach of contract against that defendant should not have been dismissed]). Defendant has not definitively demonstrated through documents that the claim should be dismissed. However, as in the first complaint against defendant, the fraud claim is still pled in a conclusory manner, as there are no sufficiently detailed allegations to show intent to defraud.

Therefore, the first and second causes of action, and the fraud portion of the third cause of action have been dismissed by this court's September 28, 2007 decision and order. The remaining claims have been severed and shall continue.

Dated: New York, New York  
October 1, 2007

**FILED**  
OCT 09 2007  
NEW YORK  
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RICHARD F. BRAUN, J.S.C.