SHORT FORM ORDER

INDEX NO.: 30096-05

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 8-7-08; 9-18-08
SUBMITTED: 11-6-08
MOTION NO.: 001-MOT D
002-MOT D

LINWEN INDUSTRIES, INC.,

Plaintiff,

-against-

HANK ROSS, THOM GRAY d/b/a THOM GRAY BUILDER and BRIAN BARABAN,

Defendants.

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Upon the following papers numbered 1 41 read on this motion and cross-motion for summary judgment; Notice of Motion and supporting papers 1-20; Notice of Cross Motion and supporting papers 24-34; Answering Affidavits and supporting papers 21-23; 35-38; 39-41; Replying Affidavits and supporting papers ___; it is,

ORDERED that the motion by the defendant Thom Gray and cross motion by the plaintiff and the defendant Brian Baraban for summary judgment are determined as follows:

The plaintiff, Linwen Industries, Inc. (Hereinafter "Linwen"), is the owner of a commercial building located in Selden, New York (hereinafter "the premises"), and the defendant Brian Baraban is the sole shareholder and president of Linwen. In November 2004, Dr. Baraban entered into a written contract with the defendant Thom Gray to renovate the

basement of the premises for $53,435. The contract provided that the work to be performed by Gray did not include permits or plans. In December 2004, Dr. Baraban and Gray entered into a second written contract for the demolition and reconstruction of the roof and second floor of the premises for $321,000. That contract, like the first one, provided that the work to be performed by Gray did not include permits or drawings. Both contracts were in letter form, on Gray's letterhead, and addressed to Dr. Baraban individually. Dr. Baraban signed each contract in his individual capacity and not as the president of Linwen. Dr. Baraban acknowledges that he was to procure the building permit for the project.

Gray commenced preliminary work on the project before Dr. Baraban obtained the building permit. On January 6, 2005, the fire prevention permit that had been issued for the project was revoked and a stop-work order issued. The building permit had not been obtained at that time. On March 31, 2005, Gray advised Dr. Baraban that he would be unable to complete the project because he was retiring in June 2005 and that Dr. Baraban would be unable to obtain a building permit before he retired. By a letter dated April 4, 2005 to Dr. Baraban, Gray confirmed that he was retiring in June 2005 and recommended two other contractors to complete the project. Gray was paid a total of $122,000 for the work he performed.

Dr. Baraban hired the defendant Hank Ross (or his corporation, ECI Consultants, Inc.) to perform consulting and design services in connection with the project. Their agreement was not reduced to writing. Ross prepared and delivered to Dr. Baraban plans for a sprinkler system and a fire alarm for the project. The fire prevention permit that was revoked on January 6, 2005, was based on Ross's plans, which contained an invalid engineer's stamp bearing the name "D.H. Ross." Ross subsequently pleaded guilty to forgery in the third degree for his use of an invalid engineer's stamp on the plans that he had prepared for the project.

Linwen commenced this action against Ross and Gray on December 23, 2005. In his answer, Gray asserted two counterclaims against Linwen and several cross claims against Ross and Dr. Baraban, whom Gray brought into the action as an additional defendant. Gray now moves for summary judgment dismissing the complaint insofar as asserted against him, for summary judgment on the counterclaims and most of the cross claims, and for sanctions against Linwen. Linwen and Dr. Baraban cross move for summary judgment in their favor against Ross and Gray. They also seek an order deeming Dr. Baraban's answer to be an answer interposed by Linwen to Gray's counterclaims.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see*, **Hartford Accident & Indemnity Co. v Wesolowski**, 33 NY2d 169, 172; **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851; **Zuckerman v City of New York**, 49 NY2d 557; **Sillman v Twentieth Century Fox Film Corp.**, *supra*). To defeat

the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see*, **Freedman v Chemical Constr. Co.,** 43 NY2d 260).

The complaint contains three causes of action against Gray: the sixth for breach of contract, the seventh for unjust enrichment, and the eighth for negligence. In order for someone to be liable for a breach of contract, that person must be a party to the contract. Privity or its equivalent remains the predicate for imposing liability for nonperformance of contractual obligations (*see*, **Danica Plumbing & Heating v Amoco Constr. Co.**, 18 Misc 3d 1137[A], at *3 [and cases cited therein]). The documentary evidence establishes as a matter of law that there is no privity of contract between Linwen and Gray. Accordingly, the sixth cause of action for breach of contract is dismissed.

The seventh cause of action for unjust enrichment alleges that Gray should not be permitted to retain the money Linwen paid him because he refused to complete the project, left the job site and refused to return, negligently performed the work, and knowingly performed work without a permit. Gray argues that he is entitled to summary judgment on this cause of action because Linwen has unclean hands. Specifically, Gray argues that Linwen and Dr. Baraban colluded with Ross to submit forged plans to the Town of Brookhaven. The court finds that Gray has failed to sustain this defense as a matter of law. The doctrine of unclean hands is only available when the conduct relied on is directly related to the subject matter of the litigation (**Goldberg v Goldberg**, 173 AD2d 679, 680). Whether or not Linwen was involved in the forgery that resulted in the stop-work order, the fact remains that a building permit was not issued for the project. Without a building permit, the work could not have continued in any event. Thus, the court finds that there is a question of fact regarding whether Linwen's alleged misconduct was directly related to Gray's failure to complete the project. Moreover, there are questions of fact regarding whether the work Gray performed required a building permit and whether Gray was required to be licensed. In view of these questions of fact, summary judgment is denied on the seventh cause of action for unjust enrichment.

The eighth cause of action for negligence is duplicative of the seventh cause of action for unjust enrichment. In any event, in the absence of contractual privity or a relationship that closely approximates privity, Gray did not owe Linwen a duty of care (*see generally*, **Ossining Union Free School Dist. v Anderson, LaRocca, Anderson**, 73 NY2d 417; *see also*, **Board of Mgrs. of Alfred Condominium v Carol Mgmt.**, 214 AD2d 380, 382-383; **49 East 21 LLC v AJS Project Mgmt.**, 2007 NY Slip Op 32028[U] [2007]). The court has already determined as a matter of law that there is no privity of contract between Linwen and Gray, and no relationship akin to privity has been established. Although the parties blur the distinction between Linwen and Dr. Baraban, Linwen's sole shareholder and president, they are, in fact, separate legal entities. Accordingly, the eighth cause of action for negligence is dismissed.

Gray contends that he is entitled to summary judgment on his counterclaims because Linwen failed to serve a response thereto. However, a motion for summary judgment

may not be made before issue is joined (CPLR 3212[a]), and this rule is strictly applied (*see*, **City of Rochester v Chiarella**, 65 NY2d 92, 101). Linwen contends that Dr. Baraban's answer responded to Gray's counterclaims, as well as Gray's cross claims against Dr. Baraban, and that it was intended to be an answer on behalf of both Dr. Baraban and Linwen. Thus, Linwen seeks an order deeming Dr. Baraban's answer to be an answer interposed by it to Gray's counterclaims. The court notes that the same attorney represents both Dr. Baraban and Linwen and that Dr. Baraban's answer does, in fact, respond to Gray's counterclaims against Linwen. Under these circumstances, the court will deem Dr. Baraban's answer to be an answer interposed by both Dr. Baraban and Linwen.

Gray's counterclaims are based on Linwen's failure to obtain a building permit for the project. However, there is no evidence in the record that Linwen was required to obtain the building permit. Linwen was not a party to the contract between Gray and Dr. Baraban, and there is no evidence in the record that Linwen assumed any obligation to obtain the building permit. The court finds that the evidence establishes as a matter of law that it was Dr. Baraban's obligation to procure the building permit. Accordingly, Gray's counterclaims are dismissed.

Gray moves for summary judgment on five of the seven cross claims he asserts against Dr. Baraban: the first for fraud, the fourth for negligence, the fifth for breach of contract, and the sixth and the seventh for failure to obtain a building permit. Dr. Baraban opposes the motion and cross moves for summary judgment dismissing Gray's cross claims.

A cause of action for fraud may be maintained when the plaintiff pleads a breach of a duty separate from or in addition to a breach of the contract (*see*, **First Bank of the Americas v Motor Car Funding**, 257 AD2d 287, 291). For example, if the plaintiff alleges that he was induced to enter into a transaction because the defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to a breach-of-contract claim. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract and, therefore, involves a separate breach of duty (**Id.** at 291-292).

Gray alleges that Dr. Baraban induced him to begin work on the project without a building permit by falsely representing that one had already been obtained. At his deposition, Gray testified that he started preliminary work that did not require a building permit sometime around Christmas 2004, after Dr. Baraban told him that the building permit was forthcoming. Gray also testified that, as soon as he realized Dr. Baraban had not obtained the building permit, in early January 2005, he ceased working on the project. In his affidavit in support of his motion for summary judgment, Gray avers that he began preliminary work that did not require a building permit while waiting for the building permit to be approved. On January 3, 2005, Dr. Baraban showed him a fire prevention permit, which Dr. Baraban mistakenly believed was the building permit. Gray avers that he advised Dr. Baraban that it was not a building permit and that Dr. Baraban proceeded to try to obtain the correct permit. On January 6, 2005, the stop work order

was issued. The court finds that, under these circumstances, Gray has failed to establish his cross claim for fraud as a matter of law. Accordingly, the first cross claim is dismissed.

Gray's second cross claim against Dr. Baraban is for indemnification. When, as here, there is no express agreement creating a right to indemnification, an implied right to indemnification can still be found in two sets of circumstances. One is an implied right to indemnification based on the special nature of a contractual relationship between the parties. The other is a tort-based right to indemnification, which is found when there is a great disparity of fault between two tortfeasors and one tortfeasor has paid for a loss that was primarily the responsibility of the other (**People's Democratic Republic of Yemen v Goodpasture, Inc.** 782 F2d 345, 351). The burden of establishing an implied agreement to indemnify is a heavy one, especially in business relationships where parties are free to negotiate for express indemnification clauses (**City of New York v Black & Vleach,** US Dist Ct, SD NY, 95 Civ 1299[LAP], Preska, J., 1997, *10). Nothing in the evidence before the court suggests the existence of a special relationship between Gray and Dr. Baraban or the existence of a nondelegable duty, which is central to the theory of implied contractual indemnity (**City of New York v Black & Vleach**, *supra* at *11). Moreover, the facts of this case do not give rise to a claim for tort-based indemnification. The predicate of tort-based indemnity is vicarious liability without actual fault on the part of the proposed indemnitee (**Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, 252 AD2d 951, 952). A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for tort-based indemnification (**Mathis v Central Park Conservancy**, 251 AD2d 171, 172). Because Linwen does not seek to hold Gray vicariously liable for any negligence by Dr. Baraban, Gray has no cause of action against Dr. Baraban for tort-based indemnification (**Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, *supra* at 952). Accordingly, the second cross claim is dismissed.

Gray's third cross claim against Dr. Baraban is for contribution. The right to contribution is statutory (*see*, CPLR 1401) and is limited to actions sounding in tort. It is not founded on nor does it arise from contract (*see*, **McDermott v City of New York**, 50 NY2d 211, 216). Because the only remaining cause of action against Gray sounds in quasi-contract, Gray has no right to contribution from Dr. Baraban (*cf.*, **Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, *supra* at 952). Accordingly, the third cross claim is dismissed.

Gray's fourth cross claim against Dr. Baraban is for negligence. As a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from or in addition to the breach of contract (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, 243 AD2d 107, 118). It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. Merely charging a breach of a "duty of due care," employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim (*see*, **Clark-**

Fitzpatrick, Inc., v Long Is. R.R. Co., 70 NY2d 382, 389-390). When the plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory (*see*, **Sommer v Federal Signal Corp.,** 79 NY2d 540, 552). The court finds that Gray's fourth cross claim for negligence is simply a restatement of his breach-of-contract claim against Dr. Baraban in the language of tort law. Accordingly, the fourth cross claim is dismissed.

The court finds that Gray is entitled to summary judgment against Dr. Baraban on the fifth cross claim for breach of contract on the issue of liability only. It is undisputed that the two contracts required Dr. Baraban to obtain a building permit for the project and that he failed to do so. Accordingly, the court finds as a matter of law that Dr. Baraban breached the contracts and that Gray is entitled to summary judgment on the issue of liability. Whether Gray was required to be licensed is issue that goes to Gray's ability to recover damages, if any, from Dr. Baraban. Thus, the parties are directed to proceed to trial on the issue of damages on the fifth cross claim.

Gray's sixth and seventh cross claims are duplicative of his breach-of-contract claim against Dr. Baraban. Accordingly, they are dismissed.

Gray moves for summary judgment on his tenth and eleventh cross claims against Ross for negligence and gross negligence respectively. Ross opposes the motion, but does not move for summary judgment in his favor.

A motion for summary judgment, irrespective of by whom it is made, empowers the court to search the record and award judgment where appropriate (CPLR 3212[B]; **Grimaldi v Pagan**, 135 AD2d 496). The court finds that Ross is entitled to summary judgment dismissing Gray's tenth and eleventh cross claims. In the absence of contractual privity or a relationship that closely approximates privity, Ross did not owe Gray a duty of care (*see generally*, **Ossining Union Free School Dist. v Anderson, LaRocca, Anderson**, 73 NY2d 417; **Board of Mgrs. of Alfred Condominium v Carol Mgmt.**, 214 AD2d 380, 382-383; 49 **East 21 LLC v AJS Project Mgmt.**, 2007 NY Slip Op 32028[U] [2007]). The record reveals that there is no privity of contract between Ross and Gray, nor has a relationship akin to privity has been established. Accordingly, the tenth and eleventh cross claims are dismissed.

Gray's eighth cross claim against Ross is for indemnification. When, as here, there is no express agreement creating a right to indemnification, an implied right to indemnification can still be found in two sets of circumstances. One is an implied right to indemnification based on the special nature of a contractual relationship between the parties. The other is a tort-based right to indemnification, which is found when there is a great disparity of fault between two tortfeasors and one tortfeasor has paid for a loss that was primarily the responsibility of the other (**People's Democratic Republic of Yemen v Goodpasture, Inc**. 782 F2d 346, 351). The burden of establishing an implied agreement to indemnify is a heavy one, especially in business relationships where parties are free to negotiate for express indemnification

clauses (**City of New York v Black & Vleach**, US Dist Ct, SD NY, 95 Civ 1299[LAP], Preska, J., 1997, *10). There is no contractual privity between Gray and Ross, and nothing in the evidence before the court suggests the existence of a special relationship between them or the existence of a nondelegable duty, which is central to the theory of implied contractual indemnity (**City of New York v Black & Vleach**, *supra* at *11). Moreover, the facts of this case do not give rise to a claim for tort-based indemnification. The predicate of tort-based indemnity is vicarious liability without actual fault on the part of the proposed indemnitee (**Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, 252 AD2d 951, 952). A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for tort-based indemnification (**Mathis v Central Park Conservancy**, 251 AD2d 171, 172). Because Linwen does not seek to hold Gray vicariously liable for any negligence by Ross, Gray has no cause of action against Ross for tort-based indemnification (**Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, *supra* at 952). Accordingly, the eighth cross claim is dismissed.

Gray's ninth cross claim against Ross is for contribution. The right to contribution is statutory (*see*, CPLR 1401) and is limited to actions sounding in tort. It is not founded on nor does it arise from contract (*see*, **McDermott v City of New York**, 50 NY2d 211, 216). Because the only remaining cause of action against Gray sounds in quasi-contract, Gray has no right to contribution from Ross (*cf.*, **Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, *supra* at 952). Accordingly, the ninth cross claim is dismissed.

Linwen asserts five causes of action against Ross: the first for breach of contract, the second for fraud, the third for breach of warranty, the fourth for practicing engineering without a license, and the fifth for violating General Business Law § 349. Linwen moves for summary judgment against Ross. Ross opposes the motion, but does not move for summary judgment in his favor.

The court finds that questions of fact preclude the granting of summary judgment to Linwen on the first cause of action against Ross. In order for someone to be liable for a breach of contract, that person must be a party to the contract. Privity or its equivalent remains the predicate for imposing liability for nonperformance of contractual obligations (*see,* **Danica Plumbing & Heating v Amoco Constr. Co.**, 18 Misc 3d 1137[A], at *3 [and cases cited therein]). Ross has produced evidence in admissible form that he did not contract with Linwen, but that his corporation, ECI Consultants, Inc., was hired by Dr. Baraban to perform consulting and design services. Accordingly, summary judgment is denied as to the first cause of action for breach of contract.

A motion for summary judgment, irrespective of by whom it is made, empowers the court to search the record and award judgment where appropriate (CPLR 3212[B]; **Grimaldi v Pagan**, 135 AD2d 496). The court finds that Ross is entitled to summary judgment dismissing Linwen's remaining causes of action against him.

A cause of action sounding in fraud may not be based on statements that were promissory in nature at the time they were made and that related to future actions or conduct (*see*, **Rand v Laico**, 282 AD2d 444, **Brown v Lockwood**, 76 AD2d 721, 731). Mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud, and the injured party's remedy is to sue for breach of contract (*see*, **Brown v Lockwood**, *supra* at 731). Linwen alleges that Ross misrepresented that he would perform the work he was hired to perform in a workmanlike manner and in a manner on par with industry standards and customs. These representations are merely insincere promises of future performance and not statements of existing or present fact (*see*, **First Bank of the Americas v Motor Car Funding**, 257 AD2d 287, 291-292). Linwen also alleges that Ross misrepresented that he was a licensed engineer. A claim of fraud will not lie if the misrepresentation allegedly relied upon was not a matter within the peculiar knowledge of the party against whom the fraud is asserted and could have been discovered by the party allegedly defrauded through the exercise of due diligence (*see*, **Cohen v Cerier** 243 AD2d 670, 672). Whether Ross was a licensed engineer was not a matter peculiarly within Ross's knowledge and could have been discovered by Linwen through the exercise of due diligence. Accordingly, the second cause of action for fraud is dismissed.

The third cause of action against Ross is for breach of warranty. Ross denies that he made any warranties to Linwen, and Linwen has not produced any evidence that he did. Accordingly, the third cause of action is dismissed.

The fourth cause of action alleges that Ross violated Education Law §§ 7201 and 7202, unspecified sections of the Penal Law, and other unspecified statutes and laws by practicing engineering without a license. Education Law §§ 7201 merely defines the practice of engineering, and § 7202 provides that only a person licensed or otherwise authorized shall practice engineering or use the title "professional engineer." Neither section creates a private right of action. Moreover, it is the district attorney who generally retains sole authority to prosecute criminal activity (*see*, County Law § 700; **Kinberg v Kinberg**, 48 AD3d 387). Linwen has failed to establish that it has a private right to action to enforce either the Education Law or the Penal Law. Accordingly, the fourth cause of action is dismissed.

The fifth cause of action seeks to state a claim based on violation of General Business Law § 349, which makes unlawful deceptive acts or practices in conducting a business or furnishing a service. Parties claiming the benefit of the section must, at the threshold, charge conduct that has a broad impact on consumers at large (*see*, **NY Univ. v Continental Ins. Co.**, 87 NY2d 308, 320). Private contract disputes unique to the parties do not fall within the ambit of the statute (**Id.** at 320), which was not intended to turn a simple breach of contract into a tort or to become an adjunct to ordinary commercial litigation (*see*, **Teller v Bill Hayes, Ltd.**, 213 AD2d 141, 148). It is inapplicable when, as here, the contract was an arms-length transaction, the parties were knowledgeable and experienced, there was no solicitation by the defendant, the plaintiff was under no obligation to contract with the defendant, and there was no disparity of bargaining power (**Id.** at 148-149). The court is unpersuaded that Linwen's cause of action

against Ross for consumer fraud should be treated any differently than its cause of action against Ross for general fraud or that Linwen's breach-of-contract cause of action should be augmented by rights to additional recovery, with counsel fees and potential treble damages, just because the contract allegedly breached was arguably of a consumer nature (**Id.** at 149). Accordingly, the fifth cause of action is dismissed.

In sum, Linwen's second, third, fourth, and fifth causes of action against Ross are dismissed, and Linwen's sixth and eighth causes of action against Gray are dismissed. Gray's counterclaims and his first, second, third, fourth, sixth, and seventh cross claims against Baraban, as well as his eighth, ninth, tenth, and eleventh cross claims against Ross, are dismissed. Gray is awarded summary judgment on his fifth cross claim for breach of contract against Baraban on the issue of liability only. The parties are directed to proceed to trial on the remaining causes of action, i.e., the first cause of action for breach of contract against Ross and the seventh cause of action for unjust enrichment against Gray, and on the issue of damages.

Finally, the court declines to sanction Linwen. Contrary to Gray's contentions, Linwen's lawsuit is not frivolous within the meaning of 22 NYCRR 130-1.1(c).

HON. ELIZABETH HAZLITT EMERSON

Dated: **March 3, 2009**

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J.S.C.