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

PART 7

Index Number : 117211/2006

CORIO, LAURA M.D., PLLC

VS

R. LEWIN INTERIOR DESIGN

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE 1/7/09

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1-3
X not Answering Affidavits — Exhibits _____	4-6
Replying Affidavits _____	8

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as per the attached memorandum opinion (Decision and Order)

FILED
MAR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 3/6/09

J.S.C.

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

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 7

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LAURA CORIO, MD, PLLC and
LAURA CORIO, M.D.,

Plaintiffs,

- against -

R. LEWIN INTERIOR DESIGN, INC., RICHARD LEWIN, GEORGE RYCAR ARCHITECT, PC, GEORGE RYCAR, JMK CONSTRUCTION GROUP, LTD., JAY KOPF, JOHN LOMIO, and HAROUT NALBANDIAN, M.D.,

Defendants.

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Index No.: 117211/06

DECISION AND ORDER

HON. MICHAEL D. STALLMAN, J.:

BACKGROUND

Defendants George Rycar Professional Architect, P.C., sued herein as George Rycar Architect, PC, and George Rycar, individually (collectively, Rycar), move to dismiss the complaint as against them. Plaintiff cross-moves for leave to amend the complaint, pursuant to CPLR 3025 (b) and (c).

On November 19, 2001, plaintiff and defendant R. Lewin Interior Design, Inc. (RLID) entered into a contract whereby RLID agreed to perform planning, consulting, interior design and decoration services on plaintiff's leased office, and to obtain Department of Buildings and New York City Landmarks Preservation Commission permission to perform such work.

On January 4, 2002, plaintiff entered into a contract with defendant JMK Construction Group, Ltd. (JMK) as contractor, listing RLID as the architect of the project.

On January 4, 2003, Rycar was retained by RLID for the sole purpose of obtaining approval for the proposed work, labor and/or services from the Department of Buildings and the New York City Landmarks Preservation Commission. Rycar filed an application with the Department of Buildings, but shortly thereafter was directed by RLID to cease work on the applications. Rycar performed no further work on the project, and never had any contact with plaintiff.

During May of 2003, Rycar received a copy of a letter sent to defendant Harbout Nalbandian, M.D., the owner of the property leased by plaintiff, from the New York City Landmarks Preservation Commission, indicating that the application for the work remained incomplete. Rycar took no action in response to this letter.

RLID retained the services of Rycar because RLID is not a licensed architect. Plaintiff alleges that this fact was not known to her, and that, among other things, Rycar conspired to keep this information from her.

Plaintiff has alleged five causes of action: 1, breach of contract; 2, professional negligence; 3, fraud; 4, fraudulent inducement; and 5, conspiracy. In an earlier decision rendered by Justice Solomon of this court, the action was dismissed as against Jay Kopf, John Lomio, JMK and Harout Nalbandian, and the action against RLID and plaintiff was ordered stayed pending arbitration as required under their contract. Rycar did not participate in that earlier motion.

DISCUSSION

The proponent of a motion to dismiss a complaint must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's first cause of action, based on a theory of breach of contract, is dismissed. Absent a liquidating agreement, which does not exist in this matter, there is absolutely no privity of contract between plaintiff and Rycar so as to allow plaintiff to maintain this cause of action. *North Moore Street Developers, LLC v Meltzer/Mandl Architects, P.C.*, 23 AD3d 27 (1st Dept 2005).

Plaintiff's second cause of action, based on theory of professional negligence, is dismissed. CPLR 214 (6) imposes a three-year statute of limitations for bringing actions based on professional malpractice.

> "The legislative history makes clear that where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care

> or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214 (6), regardless of whether the theory is based in tort or in a breach of contract [internal quotation marks and citations omitted]."

Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Company, Inc.), 3 NY3d 538, 541-542 (2004); *see also Harris v Kahn, Hoffman, Nonemacher & Hochman, LLP*, ___ AD3d ___, 871 NYS2d 919 (2009).

The actions complained of occurred between January and March, 2002, and the complaint was not filed until 2006, thereby violated the mandates of CPLR 214 (6).

Plaintiff's third case of action, based on a theory of fraud, is dismissed.

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

> "[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept]) Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required "to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged

deception.

In the instant matter plaintiff's allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). Accordingly, the fraud cause of action is dismissed.

Plaintiff's fourth cause of action, based on a theory of fraudulent inducement, is similarly dismissed, for the reasons stated above.

Plaintiff's fifth cause of action, based on a theory of conspiracy, is dismissed, for the reasons stated in the decision of Justice Solomon on April 12, 2007. That decision, as to other defendants, is binding on plaintiff as law of the case.

Lastly, plaintiff's cross motion to amend the complaint, pursuant to CPLR 3025 (b) and (c), is denied.

> "Leave to amend a complaint should be liberally granted absent prejudice to the opposing party, as long as the proposed amendment is not palpably insufficient to state a cause of action. The determination whether to grant leave to amend a pleading is within the sound discretion of the court to be determined on a case-by-case basis. It is proper to deny a plaintiff leave to amend the complaint to re-assert a cause of action that was previously dismissed [internal quotation marks and citations omitted]."

Dialcom, LLC v A T & T Corp., 50 AD3d 727, 728 (2d Dept 2008); *Jackson Heights Care Center, LLC v Bloch*, 39 AD3d 477 (2d Dept 2007).

The proposed amendments provided by plaintiff in her cross motion papers are insufficient to withstand dismissal, containing nothing more than supplemental conclusory statements.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants George Rycar Professional Architect, P.C., sued herein as George Rycar Architect, PC,'s and George Rycar's motion to dismiss the complaint as to them is granted, and the complaint is hereby severed and dismissed as to them only; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff's cross-motion is denied.

Dated: **March 6, 2009**
New York, New York

ENTER:

Michael D. Stallman, J.S.C.

HON. MICHAEL D. STALLMAN

FILED
MAR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK