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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 600840/2009

EL FOULY, SHARIF

VS.

LEPP, STEPHEN

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 600840-09

MOTION DATE 7/21/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/25/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SHARIF EL-FOULY and 34-12 36th AVENUE, LLC,

Plaintiffs,

-against-

STEPHEN LEPP and STEPHEN LEPP, AIA, ARCHITECT, a/k/a STEPHEN LEPP & ASSOCIATES, a/k/a STEPHEN LEPP & ASSOCIATES, P.C., a/k/a STEPHEN LEPP, P.C., a/k/a STEPHEN LEPP ASSOCIATES, ARCHITECTS & PLANNERS,

Defendants,

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Index No. 600840/2009

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

This action arises out of work performed by defendant Lepp on behalf of plaintiffs in connection with the conversion of a Long Island City warehouse into a high school. Plaintiffs allege causes of action for breach of contract, negligence, indemnification, unprofessional conduct, negligent misrepresentation and fraudulent misrepresentation. Defendants move to dismiss, pursuant to CPLR 3211 (a)(5) and (7), arguing that the claims are time-barred and the complaint fails to state a cause of action. Plaintiffs oppose.

Complaint Facts

The following account is based on allegations in the complaint and the affidavits accompanying this motion, and does not constitute findings of fact. Plaintiff Sharif el-Fouly is the sole member of 34-12 36th Avenue LLC (LLC), the owner of property located at the eponymous location in Long Island City. On December 24, 2001, the LLC entered into a lease for the property with the New York City School Construction Authority for use as a school by the New York City Department of Education (DOE). The LLC agreed to convert the building into a facility that could house a high school.

To this end, el-Fouly entered into an agreement with defendant architect Stephen Lepp on March 19, 2002, hiring Lepp to provide architectural services for the project. According to the agreement, Lepp was required to inspect the premises during construction to ensure that the contractor was following the plans and specifications, and was supposed to inform el-Fouly of any non-conforming work. Lepp was also responsible for certifying the completion of the work. However, Lepp performed his duties irresponsibly and negligently. The plans he drew up contained design errors. He failed to make periodic inspections and did not report work that deviated from the construction plans. By February 28, 2003, Lepp had certified that 95% of the renovation work had been finished, even though he knew or should have known that the work was defective.

In May of 2003, Lepp issued a "punchlist" of the work that the LLC still needed to do. Work on these items proceeded slowly until finally the DOE decided to finish the work on its own, claiming that the "vast majority of Alterations and Improvements remain[ed] incomplete and/or not to the satisfaction of DOE." El-Fouly Aff., Exh. 13, 2. The DOE hired Skanska to complete the work and then sought to hire Lepp to provide architectural services. Despite his ongoing obligations to el-Fouly, Lepp accepted the DOE's offer, albeit without informing el-Fouly. The cost of completing the work allegedly came to $4.4 million, which the DOE is now seeking from the LLC in a separate action currently pending before this court. Most of the alleged completion work originally was approved by Lepp. Plaintiffs contend that Lepp's failure to identify defects in the work led to the exorbitant claim against them.

Applicable Law

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Skillgames, LLC v Brody*,

1 AD3d 247, 250 (1st Dept. 2003), *citing McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998); *Morone v Morone*, 50 NY2d 481, 484 (1980). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, 1 AD3d at 250, *citing Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Statute of Limitations

Defendants argue that the malpractice action accrued when Lepp issued a certificate of substantial completion on May 30, 2003 or soon thereafter, claiming that "[t]he last date of [Lepp's] services on behalf of the plaintiff Owner [EL-]FOULY took place in June 2003." Lepp Affidavit ¶ 29. A malpractice action against an architect must be commenced within three years of accrual. CPLR § 214(6). Consequently, defendants argue, the suit, filed in 2009, is time-barred.

However, neither the issuance of a certificate of substantial completion or a temporary certificate of occupancy automatically marks the accrual of a malpractice action against an architect. "A cause of action against an architect accrues when his or her professional relationship with the owner ends." *In re Arbitration between Kohn Pederson Fox Assocs., P.C. and FDIC*, 189 AD2d 557, 558 (1st Dept. 1993). The point of termination "is not statutorily defined but must be judicially interpreted in light of the given situation and the responsibilities of the parties in carrying out their agreement." *Bd. of Educ. v Celotex Corp.*, 88 AD2d 713, 714 (3d Dept.) *aff'd* 58 NY2d 684 (1982). Where there exists a contract that defines the duties and obligations of the architect, the end of the relationship is marked by the architect's fulfillment of all of his significant contractual obligations. *State v Lundin*, 60 NY2d 987, 989 (1983); *Celotex*,

88 AD2d at 714; *see also Serradilla v Lords. Corp.*, 50 AD3d 345, 346 (1st Dept. 2008). Where a contract *explicitly* stipulates the end point of the relationship, that point is the date of accrual. *See Town of Warwasing v Camp, Dresser & McKee, Inc.*, 49 AD3d 1100, 1102 (3d Dept. 2008).

The statute of limitations has not accrued because under the terms of the contract between El-Fouly and Lepp, their relationship has not ended. In the standard AIA form agreement between an owner and an architect, the architect is obligated to provide construction phase administration services until the earlier of either the issuance of the final certificate of payment or sixty days after the date of substantial completion. El-Fouly Aff., Exh. 2, ¶ 2.6.1. However, Lepp agreed to modify this clause so that he would be "required to . . . provide the services under this Agreement until such time as a Final Certificate of Occupancy for the project has been issued." *Id.* at Rider, ¶ 8. At the very least, this extends the time Lepp would be required to provide construction phase administration services if el-Fouly so desired. Assuming the facts alleged in the complaint to be true, as the court must on a motion to dismiss, a final certificate of occupancy has not yet been issued for the project. Thus, Lepp is still obligated to perform architectural services for el-Fouly and their professional relationship has not ended.

Defendants argue that ¶ 8 is "an unenforceable attempt to extend a statute of limitations," citing *Bayridge Air Rights, Inc. v Blitman Constr. Corp.*, 80 NY2d 777 (1992). *Bayridge* is not on point. *Bayridge* dealt with an agreement to waive the statute of limitations and stipulate to a private one. Here, the date of accrual is based upon the terms of the parties' contract, that defines the termination of Lepp's professional relationship with plaintiff, which by law is the accrual date.

Failure to State a Cause of Action

Defendants also have moved the court to dismiss the entire complaint for failure to state a cause of action. Defendants urge that the fraud claim must be dismissed because it duplicates the breach of contract claim. While a fraud claim that is "merely duplicative" of another claim must be dismissed, *Varo, Inc. v Alvis PLC*, 261 AD2d 262 (1st Dept. 1999), the viability of a breach of contract claim does not necessarily render the claims of misrepresentation redundant. A party may allege both breach of contract and fraudulent or negligent misrepresentation, though the claims are based on identical acts. *Rodin Props.—Shore Mall, N.V. v Ullman*, 264 AD2d 367, 368-69 (1st Dept. 1999). Here, plaintiff alleges that Lepp certified the work as 95% complete when he knew or should have known that it was not true and that defective work had been performed. As a professional, Lepp had a duty to make truthful and accurate representations to his client, a duty which was extraneous to his contract. Therefore, plaintiff have alleged misrepresentations that go beyond breach of Lepp's contractual obligations to support their claim for fraud.

As another basis for dismissal, Lepp asserts that plaintiff has failed to state a claim because by the time he was hired by the DOE, his professional relationship with el-Fouly was finished. Lepp Aff., ¶¶ 20-24. As previously noted, this is incorrect since the contract required Lepp to perform services for el-Fouly until issuance of a final certificate of occupancy, which has not occurred.

Defendants finally assert that "it was incumbent upon the plaintiffs to submit an affidavit from a New York State licensed design professional to establish the merit of its causes of action." Krieg Reply Affirmation, ¶ 14. While an affidavit of merit is required to raise an issue of fact in opposition to a motion for summary judgment, *Zweng v DeBellis & Semmens*, 22

AD3d 845 (2d Dept. 2005), such an affidavit is not a pleading requirement. On a motion to dismiss the court is not permitted to assess the merits of the complaint's factual allegations. *Skillgames*, 1 AD3d at 250. Accordingly it is

ORDERED that defendants' motion to dismiss is denied and defendants are directed to answer the complaint within 20 days after service upon them of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 54, Room 418, of the courthouse located at 60 Centre Street, New York, N.Y., on November 19, 2009 at 9:30 a.m..

Dated: September 25, 2009

ENTER:

J.S.C.