SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

CRYSTAL CLEAR DEVELOPMENT, LLC,

Plaintiff(s),

-against-

DEVON ARCHITECTS OF NEW YORK, P.C., & STEVEN LANE,

Defendant(s).

ORIGINAL RETURN DATE:01/19/10
SUBMISSION DATE: 03/30/10
INDEX No.: 7851/09

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
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Motion by defendants pursuant to CPLR 3211(a)(5) and (7) to dismiss all claims in the complaint, with the exception of the claim for loss of profits, based on prior arbitration and awards or, in the alternative, for leave pursuant to CPLR 3025(b) to amend the answer to include the defense of collateral estoppel is determined as hereinafter provided.

That branch of defendants' motion to dismiss plaintiff's claim for loss of profits pursuant to CPLR 3212 is granted.

Cross motion by plaintiff for a conditional order of preclusion and the imposition of sanctions pursuant to CPLR 3126, 3124 and 22 NYCRR 130-1.1 has been withdrawn.

Plaintiff's request for leave pursuant to CPLR 3025(b) to amend the fourth cause of action to supplement the allegations of gross negligence is denied.

In this action plaintiff, the owner of property located at 240 Frost Street, Brooklyn, New York, seeks recovery against defendant architectural firm and its principal, defendant Steven Lane, arising from the construction of a new four-story condominium building with full cellar and eight residential units.

Defendant architectural firm was hired under an agreement (revised proposal) dated June 3, 2005, to perform architectural design, bidding and construction administration services. According to plaintiff, defendant Devon Architects of New York, P.C. (Devon) was responsible for verifying compliance with the construction documents as evidenced by paragraph 29 of the parties' agreement which states as follows:

> [P]lease note that in order for Devon to sign off on the work, we must perform several inspections during construction to verify compliance with the construction documents. These site visits will be charged on a time card basis for actual time spent using our standard billing rates as defined below. We expect there to be approximately 4-5 required inspections.

Subsequently general contractor, Futura Builders Group (Futura), not a party herein, was hired as general contractor on the project pursuant to a standard AIA agreement dated May 15, 2006. Due to Futura's alleged failure to carry out the required work in accordance with contract documents,* Futura was advised in or about January 5, 2007, of plaintiff's termination of the contract as of January 12, 2007. Construction was stopped at the site and defendants' services terminated. Prior thereto, plaintiff had presented various complaints to Futura and defendant Devon, as supervising entity on the project, that the work significantly deviated from approved architectural plans. According to the complaint, defendant Devon failed to insure that construction work was performed in accordance with approved plans and construction documents approved by the Department of Buildings in breach of its contract with plaintiff.

In accordance with their contract, the dispute between plaintiff and non party Futura proceeded to arbitration. By final award dated November 19, 2008, Futura's claim against Crystal Clear Development, LLC ("Crystal Clear") was denied and $33,756 plus interest was awarded to Crystal Clear on its counterclaims predicated on Futura's failure to perform in accordance with its obligations under an agreement with plaintiff Crystal Clear dated May 15, 2006. According to the counterclaim, Futura's work on the project was stopped and Crystal Clear was required to remedy multiple deficiencies by engaging the services of a new contractor to complete the project.

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* The alleged deviations from construction plans included, but were not limited to, location of structural beams, openings for balconies, locations of windows, omission of window openings, reduced size of trash enclosure and elimination of elements from foundation walls.

Defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(5) and (7) predicated on the contention that plaintiff improperly seeks a second bite at the apple in that, although repackaged as claims for breach of contract, architectural malpractice, fraudulent representation and gross negligence against defendant Devon and its principal, Steven Lane, the claims herein were previously fully litigated in the prior arbitration proceeding between plaintiff and its general contractor, Futura. In that proceeding, Crystal Clear, plaintiff herein, was awarded and paid $33,756 plus applicable interest on its counterclaim from January 18, 2007, in full satisfaction of all of its claims arising out of the project.

With respect to plaintiff's claim for lost profits, defendants argue that the cause of action must be dismissed pursuant to CPLR 3212 as prospective profits are not recoverable unless liability or defendant's responsibility to pay damage for any lost profits was within the contemplation of the parties at the time the contract was made.

The common law doctrine of *res judicata*, including the subsidiary doctrine of collateral estoppel, is designed to prevent relitigation by the same parties of the same claims or issues. Under the doctrine of collateral estoppel, a party is precluded from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity with it, whether or not the tribunals or causes of action are the same. *Motors Ins. Corp. v Mautone*, 41 AD3d 800, 801 [2d Dept. 2007]. It is a doctrine intended to reduce litigation and conserve the resources of the courts and litigants. It is based on the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it. *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455 [1985] (quotation marks omitted).Whether the prior adjudication occurred in the context of an administrative determination, an arbitration or a full fledged judicial proceeding, collateral estoppel is applicable only if the identical issue necessarily was decided in the prior action and is decisive of the present action. It is well settled that the doctrine of collateral estoppel is applicable to issues resolved in an earlier arbitration proceeding. *MAC Organization, Inc. v Dublin Co.*, 89 AD2d 581, 582 [2d Dept. 1982]. Preclusive effect, however, will not be given if the particular issue was not "actually litigated, squarely addressed and specifically decided." *Motors Ins. Corp. v Mautone,* 41 AD3d at 801 quoting *Ross v Medical Liability Mut. Ins.*, 75 NY2d 825 [1990]. The party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination. *Altegra Credit Co. v Tin Chu,* 29 AD3d 718, 719 [2d Dept. 2006] (quotation marks omitted).

Collateral estoppel is, however, an elastic doctrine. Whether a party had a full and fair opportunity to contest the prior determination requires consideration of the realities of litigation. No rigid rules are possible. The determination of whether there has been a full and fair opportunity to litigate in the prior action requires the exploration of the various elements which make up the realities of litigation. *Schwartz v Public Adm'r of Bronx County*, 24 NY2d 65, 72 [1969]. Among the factors to be considered in deciding whether a party has had its day in court are: the nature of the forum and importance of the claim in the prior litigation; the incentive and initiative to litigate and the actual extent of the litigation; the competence and

expertise of counsel; the availability of new evidence; the differences in the applicable law and the foreseeability of future litigation. *Ryan v New York Telephone Co.*, 62 NY2d 494, 501 [1984].

Under the circumstances extant, the record is devoid of any basis to conclude that plaintiff is precluded from litigating its claims against defendant for breach of contract or professional malpractice on the basis of prior arbitration/award. Defendant Devon was not a party to the arbitration and the claims alleged herein, including whether defendant Devon failed to use due care in the performance of its contract obligations and whether its performance fell short of applicable professional standards, were not fully and fairly litigated and decided in the arbitral forum.

Where, as here, a fraud claim, as plaintiff purports to allege in the third cause of action, merely restates a breach of contract claim, such a claim cannot be sustained. The third cause of action clearly lacks merit and must be dismissed. *Sforza v Health Ins. Plan of Greater New York, Inc.*, 210 AD2d 214 [2d Dept. 1994]. In order to state a cause of action to recover damages for fraud, a plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties. *Weitz v Smith*, 231 AD2d 518, 519 [2d Dept. 1996]. No such duty is alleged.

Under the facts as pled, there is no basis to pierce the corporate veil to hold defendant architect, Steven Lane, personally liable for gross negligence as alleged in the fourth cause of action or to grant leave to amend said cause of action to include additional language as to defendant Steven Lane's lack of supervision, willful disregard of written notices and fraudulent misrepresentations regarding compliance with approved plans. The allegations are insufficient to support a cause of action for gross negligence against the individual defendant.

Similarly plaintiff's claim for loss of profits is untenable. It is well settled that in a breach of contract action, the non-breaching party may recover general damages which are the natural and probable consequence of the breach. *Bi-Economy Market, Inc. v Harleysville Ins. Co. of New York*, 10 NY3d 187, 192 [2008]. In order to impose further liability on the breaching party for damages that do not naturally and directly flow from the breach, such unusual or extraordinary damages must have been reasonably contemplated by the parties at the time of or prior to contracting. *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]. The record is bereft of any such indication.

Generally leave to amend a pleading pursuant to CPLR 3025(b) should be granted where there is no significant prejudice or surprise to the opposing party and where the proof submitted in support of the motion indicates that the cause of action or defense asserted in the amendment may have merit. The determination whether to grant such relief is within the sound discretion of the court to be determined on a case by case basis. *Dialcom, LLC v AT&T Corp.*, 50 AD3d 727 [2d Dept. 2008]. The court will examine the merits of the proposed amendment, as leave should not be granted where the proposed amendment is totally without merit or palpably insufficient as a matter of law. *Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept. 2007].

Accordingly, the motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) is granted to the extent that the third and fourth causes of action are hereby dismissed.

All claims asserted against defendant Steven Lane individually are hereby dismissed. Accordingly, the caption is hereby amended to read as follows:

"CRYSTAL CLEAR DEVELOPMENT, LLC,

Plaintiff,

-against-

DEVON ARCHITECTS OF NEW YORK, P.C.,

Defendant."

Plaintiff's claim for lost profits is dismissed pursuant to CPLR 3212.

That branch of defendants' motion which seeks leave to amend the answer to include the defense of collateral estoppel is denied as academic.

The first and second causes of action for breach of contract against defendant Devon and architectural malpractice are hereby severed and continued.

Plaintiff's cross motion pursuant to CPLR 3025(b) to amend the fourth cause of action to supplement its claim for gross negligence is denied as the claim as proposed is palpably insufficient.

This decision constitutes the order of the court.

Dated: 5-10-10

HON THOMAS P. PHELAN

J.S.C.

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