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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

ASSOULINE RITZI, LLC and LICHTEN RITZ2, LLC,

Plaintiffs,

- v -

EDWARD I. MILLS & ASSOCIATES, ARCHITECTS, PC, EDWARD I. MILLS and JAMES KETTIG,

Defendant.

Index No.: 602552/2006

Motion Date: 02/15/11*

Motion Seq. No.: 005

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

BACKGROUND

Defendants Edward I. Mills & Associates, Architects, PC (defendant), Edward I. Mills (Mills) and James Kettig (Kettig) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

This is an architectural malpractice claim brought against defendant architectural firm and two of its architects. According to the complaint, plaintiffs allege that defendants informed them that applicable zoning laws would permit plaintiffs

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

to add six floors to a then-existing five-story building, located at 16 Warren Street, New York, New York ("the Warren Street building"). The complaint further alleges that, relying on such information, plaintiffs purchased the building for $5 million, planning to renovate the property and convert it into residential condominiums.

Plaintiffs are two companies owned by a husband and wife, Joseph Assouline (Assouline) and Vebeke Lichten (Lichten), who have been buying and rehabilitating buildings for more than twenty-five years. Assouline has a master's degree in business administration, and Lichten is an architect with a master's degree in architecture and has taught at the Pratt Institute. Plaintiffs assert that they reside in Pennsylvania, that this was to be their first rehab project in New York, and that they are unfamiliar with New York City zoning requirements.

In their complaint, plaintiffs allege that they relied on defendants' representations in deciding to purchase the Warren Street building instead of another building known as 119 Chambers Street ("the Chambers Street building"). They based their choice on defendants' representations that the zoning laws would permit the renovation and construction of six additional stories to the Warren Street building. They further claim that, in applying for a work permit, defendants negligently cited what plaintiffs' claim are fictitious New York City zoning codes: 111-104 (c) (2)

(i) (ii), (iii), (iv) and (v). Specifically, plaintiffs contend that the zoning regulations relied upon by defendants were outdated and misinterpreted, and that, in 2001, the zoning laws were updated so as to include the Warren Street building in the new regulations, which prohibited the erection of six additional stories to the existing structure.

Defendants counter that the changes in the zoning regulations were merely numerical, not substantive.

In depositions, plaintiffs testified that two real estate brokers, Ruth Hardinger (Hardinger) and Michael Horton (Horton), showed them the two buildings. According to plaintiffs, after r plaintiffs viewed the buildings, Hardinger called Kettig, an employee of the defendant architectural firm, to obtain his professional opinion about the buildings in relation to plaintiffs' intent. Plaintiffs averred that after Hardinger made the telephone call, she told plaintiffs that Kettig did not believe that it would be permissible to add more than one floor to the 119 Chambers Street building because it was in an historic district, but that he believed that as it was not in the historic district, it would be permissible to erect six additional stories to the 16 Warren Street building.

However, in her examination before trial, Hardinger denies that she ever made such a call, or that Kettig ever told her anything related to the representations alleged by plaintiffs.

She stated that before she showed the Warren Street building to plaintiffs, she phoned Peter DeCheser, the listing real estate broker for the building, and elicited his opinion that if plaintiffs purchased the Warren Street building and the adjacent building, which was also for sale, it would be permissible to add six additional stories to the buildings under the zoning laws.

On June 3, 2004, Kettig wrote to Lichten to confirm that defendants were engaged to provide a zoning analysis of the 119 Chambers Street building. Defendants assert that plaintiffs never agreed that defendants would perform such an analysis with respect to 16 Warren Street. Mills states that he proposed to prepare a comprehensive set of drawings that would cover, among other things, a zoning analysis, but that plaintiffs chose not to do that.

There is no dispute that the parties entered into a Standard Form Agreement between Owner and Architect, which provided that defendants would review all applicable zoning codes. The agreement included a statement that there were certain zoning issues with respect to the first floor commercial area, which would present challenges to doing the renovations that plaintiffs desired.

Plaintiffs contend that based on defendants' representations that plaintiffs could add six additional floors to the building, plaintiffs purchased the Warren Street property in December of

2004.

In accordance with their contract with plaintiffs, defendants submitted plans to the Department of Buildings (DOB) to ascertain DOB's rules and regulations on zoning. In March 2005, DOB objected to the planned height renovations. Defendants informed plaintiffs of DOB's ruling before plaintiffs started any construction. However, according to defendants, plaintiffs, despite knowing that the zoning laws would not allow them to make the changes to the building that they wanted, retained a new architect, Manuel Glas Architects (Glas). Glas provided plaintiffs with different plans that called for the demolition of the building and construction of a new 11-story structure. DOB issued a permit for the demolition of the building on March 22, 2006 pursuant to the Glas proposal, and demolition was started in July of 2006. A Certificate of Occupancy for the building was issued in October, 2008.

Defendants assert that they had no involvement in the decision to demolish the building. Nor did they have any role in the design or construction of the new building. Defendants maintain that they contemplated neither the demolition of the existing building nor the construction of a new one in their transactions with the plaintiffs.

Plaintiffs contend that the zoning challenges stated in the proposal by defendants related only to the ground-floor

commercial section of the property. They argue that the proposal, which was signed by defendant architectural firm's principal, confirmed defendants' opinion conveyed through the broker in December 2004 when 119 Chambers Street and the 16 Warren Street properties were both under consideration by plaintiffs, that the Warren Street building could be converted to 11 stories "as of right," i.e. there would be no zoning objection made to the erection of the additional floors.

As "Project Parameters", the Standard Form of Agreement states "the objective or use is: Gut renovation and addition of new floor levels for residential use". For the "Owner's Program", the Standard Form of Agreement states "Gut renovation and addition of new floor levels for residential use."

Plaintiffs contend that defendants' negligent and fraudulent misrepresentations and malpractice resulted in additional costs arising out of delays in construction that coupled with a subsequent decline in the real estate market caused them severe financial damages.

The complaint asserts four causes of action: (1) negligent professional malpractice; (2) negligent misrepresentation; (3) breach of contract; and (4) fraudulent misrepresentation.

In their motion papers, defendants state that, for the purposes of their motion for summary judgment, they "assume the validity of plaintiffs' allegations and deposition testimony."

They argue that the first cause of action, for professional malpractice based on their zoning opinion, should be dismissed because plaintiffs failed to mitigate damages. In addition, they argue that the damages that they allegedly suffered were not proximately caused by defendants' malpractice. Defendants also contend that the second, third and fourth causes of action should be dismissed because they are duplicative of the malpractice claim.

More specifically as to mitigation defense, defendants assert that plaintiffs could have offset any damages by selling the building, rather than demolishing it and erecting a new structure. They base this assertion on the affidavit of Peter DeCheser, a managing director of Jones Lang LaSalle, a worldwide real estate services firm. DeCheser states that, had the building been sold during 2005 or 2006, prior to demolition, plaintiffs would have made a profit on the building.

By order of this court, dated February 2, 2009, that part of plaintiffs' complaint seeking lost income on the expected revenue from the property was dismissed. Defendants argue that, after the court dismissed the claim for damages for lost income, plaintiffs were unable to identify what damages they are now seeking, or how those damages were proximately caused by defendants' actions.

In opposition, plaintiffs say that, in making the decision

to purchase the Warren Street property, they were relying on the representations of defendants that they could make the changes that they wanted to the building, and that once they discovered that DOB did not approve their plans, they diligently sought alternatives. Plaintiffs also say that the damages that they are seeking relate to their mortgage payments ($2,425,742.12), real estate taxes ($186,483.95), bank reserve funds ($550,000.00), additional borrowing ($1,100,000.00) and refinancing fees ($67,000.00), all of which were occasioned by their attempt to mitigate damages when DOB refused to grant a work permit to construct the additional stories.

DISCUSSION

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary 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 for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d

223, 231 (1978).

That portion of defendants' motion for summary judgment dismissing the first cause of action for malpractice is denied.

As stated above, for the purposes of this motion, defendants are not challenging plaintiff's assertions that defendants' failure to interpret the zoning regulations properly was professional malpractice, and that plaintiffs purchased the property based on defendants' professional representations about zoning matters.

It has been held that architects may be held liable for proposing the construction of a building where zoning height restrictions would prohibit such a structure. *QB, LLC v A/R Architects, LLP,* 19 AD3d 675 (2d Dept 2005). As a consequence, with respect to the first cause of action the court's scrutiny is limited to a determination whether as a matter of law, defendants have established that plaintiffs failed to use reasonable means to mitigate their damages, or that any malpractice by the defendants was not a substantial factor in causing damages to plaintiffs.

The law generally imposes upon a party subjected to injury the duty of making reasonable efforts to minimize the injury (*see Holy Properties Ltd., L.P. v Kenneth Cole Productions,* 87 NY2d 130 [1995]), and no recovery may be had for losses which the injured party may have prevented by reasonable exertions. *Wilmot*

v State of New York, 32 NY2d 164 (1973).

Defendants maintain that plaintiffs could have mitigated their damages by selling the building; plaintiffs aver that they used all reasonable efforts to mitigate their damages, which included the demolition of the existing structure. Moreover, plaintiffs maintain that, but for defendants' representations, they never would have purchased the building or suffered any damages whatsoever.

It is defendants'

> "burden to establish not only that plaintiff[s] failed to make diligent efforts to mitigate [their] damages, but also the extent which such efforts would have diminished [their] damages. Moreover, if plaintiff[s] reasonably made such diligent efforts to mitigate, it does not matter if, in retrospect, another, better means of limiting the financial injury was possible [internal citations omitted]."

LaSalle Bank National Association v Nomura Asset Capital Corp., 47 AD3d 103, 107-108 (1st Dept 2007); *Eskanazi v Mackoul*, 72 AD3d 1012 (2d Dept 2010).

"The question of whether [a] party acted reasonably to mitigate its damages is a question of fact(*Tynan Incinerator Company, Inc. v International Fidelity Insurance Company*, 117 AD2d 796, 797 [2d Dept 1986]), and is based on a determination of the parties' credibility, among other factors. "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S.J. Capelin Associates, Inc. v Globe*

Manufacturing Corp., 34 NY2d 338, 341 (1974); *Ferrante v American Lung Association*, 90 NY2d 623 (1997). Nor does the court agree with defendants argument that plaintiffs' expert opinion in this regard should be dismissed as conclusory. "Conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment." *Bradley v Soundview Healthcenter, 4 AD3d 194* (1st Dept 2004).

Defendants' argument that even assuming *arguendo* that they performed negligently, such negligence, as a matter of law, was not the proximate cause of any damages that plaintiffs suffered also fails. *In Barnett v Schwartz, 47 AD3d 197 (2d Dept 2007)*, the appellate court affirmed the denial by the trial court of defendants' motion to set aside the verdict where the jury found that but for the lawyer's negligence in advising the plaintiffs to purchase a property on an "as is basis" without informing them of its classification as a hazardous waste site, the plaintiffs would not have incurred rent obligations under the lease of the property that they intended to use for the purpose of manufacturing barbeque sauce. Moreover, the appellate court sustained the verdict as to the award of damages finding that the "evidence supports the jury's conclusion that but for the defendants' negligence, the plaintiffs would not have incurred rent payment on property completely unsuitable for its intended use." *Barnett*, 207-208. So to here, it will be for the fact

finder to determine whether the plaintiffs have met their burden of showing that defendants were negligent and that such negligence was a substantial factor in causing plaintiffs to incur expenses that they otherwise would not have incurred.

Based on the foregoing, the court finds that there is a question of fact as to whether plaintiffs used reasonable efforts to mitigate their damages, and whether all of the damages they allegedly suffered were proximately caused by their mitigation efforts. Therefore, the court denies that portion of defendants' motion for summary judgment seeking to dismiss the first cause of action for professional malpractice.

However, the court does grant that portion of defendants' motion for summary judgment seeking to dismiss the second, third and fourth causes of action.

The second cause of action alleges negligent misrepresentation, and the fourth cause of action alleges fraudulent misrepresentation, said representations being the same representations forming the basis of the malpractice cause of action.

> "It is well settled that where a fraud claim gives rise to damages which are not separate and distinct from those flowing from an alleged [professional] malpractice cause of action, it must be dismissed. The complaint ... fail[s] to allege injuries arising from [fraudulent

misrepresentation] and/or negligent misrepresentation that are separate and apart from the injuries allegedly arising from [professional] malpractice. Accordingly, [plaintiffs]' [second and fourth] causes of action ... must be dismissed [internal citations omitted]."

Bellera v Handler, 284 AD2d 488, 490 (2d Dept 2001).

Furthermore, even though claims for breach of contract and malpractice may co-exist (*Children's Corner Learning Center v A. Miranda Contracting Corp.*, 64 AD3d 318 [1st Dept 2009]; *17 Vista Fee Associates v Teachers Insurance and Annuity Association of America*, 259 AD2d 75 [1st Dept 1999]),

> "[a]ctions for breach of contract have [only] been sustained where a specific result is guaranteed by the terms of the agreement, but not where the contracting party either expressly or impliedly promises to perform services of the standard generally followed in the profession or promises to use due care in the performance of the services to be rendered [internal quotation marks and citation omitted]."

530 East 89 Corp. v Unger, 54 AD2d 848, 849 (1st Dept 1976), *affd* 43 NY2d 776 (1977).

Since defendants did not promise plaintiffs that they would achieve a specific result under the contract, the third cause of action must be dismissed as duplicative of the first cause of action for professional malpractice.

Based on the foregoing, it is hereby

ORDERED that the portion of defendants' motion for summary judgment dismissing the second, third and fourth causes of action

[1]is granted; and it is further

ORDERED that the portion of defendants' motion for summary judgment dismissing the first cause of action is denied; and it is further

ORDERED that the parties shall appear for a Status Conference in IAS Part 59, 71 Thomas Street, Room 103, on April 12, 2011, 9:30 AM.

Dated: February 18, 2011

ENTER:

J.S.C.

DEBRA A. JAMES

[1]*Counsel appeared before me for a Pre-Trial Conference on February 15, 2011 at which time the court informed them that a decision on Motion Sequence Number 5 was imminent.