[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 108752/2006
BENJAMIN, ALVIN
vs.
RICE, PAUL
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: AUG 09 2011
AUG 0 0 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

Alvin Benjamin and Deborah Benjamin,

Plaintiff (s),

-against-

Paul Rice, AIA, Paul Rice and Paul Rice Architecture,

Defendant (s).

----------x

Paul Rice,

3rd Party Plaintiff (s),

-against-

Metropolitan Renovations, Inc., Metropolitan Renovations II, LLC, and Kent Katter,

3rd Party Defendant (s).

----------x

DECISION/ ORDER
Index No.: 108752-06
Seq. No.: 007, 008, 009

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.
590166-08

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Seq. No. 007	
Rice n/m (3212) w/ KJW affirm, PR affid, exhs	1
Benjamin opp w/DEK affirm, DB, DC, LC, EC, JL, MG affids	2
Benjamin exhs (sep back)	3
Rice reply w/KJW affirm, exhs	4
Motion Seq. No. 008	
Metropolitan n/m (3212) w/AJT affirm, KK affid, exhs	5
Rice opp w/KJW affirm, PR affid, exhs	6
Metropolitan reply w/VJT affirm, KK affid	7
Motion Seq. No. 009	
Benjamin n/m (3212) w/DEK affirm, DB affid, exhs	8
Rice opp w/KJW affirm, PR affid, exhs	9
Benjamin reply w/DEK affirm, DB affid, exhs	10

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by Alvin Benjamin and Deborah Benjamin (collectively "the Benjamins") against Paul Rice, AIA, Paul Rice and Paul Rice Architecture (collectively "Rice" or "architect") for professional malpractice and other claims. Rice has commenced a third party action against Metropolitan Renovations, Inc. ("Metropolitan"), Metropolitan Renovations II, LLC ("Metropolitan II") and Kent Katter ("Katter") (collectively "Metropolitan defendants"). Katter is the principal of Metropolitan, the general contractor for the Benjamin project. Issue has been joined in the main and third party actions. Presently before the court are three (3) timely motions for summary judgment or partial summary judgment and other relief (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The motions are by Rice (motion seq no. 7), Metropolitan (motion seq no. 8) and Benjamin (partial summary jugment) (motion seq no. 9), all of which are consolidated for decision in this decision and order.

Arguments

The Benjamins are the owners and tenants of apartment 15A at 930 Fifth Avenue, New York, New York ("apartment"). When the Benjamins decided to renovate their apartment they selected Rice as their architect and hired Metropolitan as the general contractor for the project.

Pursuant to the Benjamins' Architectural Services Agreement with Rice, prepared September 1, 2004 and revised October 8, 2004, ("Rice contract") it was agreed Rice would provide "Architectural Services," "Interior Design Services," "Consulting Services" and "Additional Services." The section delineated as the "Scope

of Architectural Services" indicates that Rice was to prepare documents for use by the owner and Metropolitan in the renovation of the apartment (i.e. pre-design, schematics, design development and construction documents). Pursuant to another section of the Rice contract - "Scope of Interior Design Services," the Benjamins hired Rice to provide the following services:

> The Architect shall prepare a furnishing layout for the space. This layout will include the design and detailing of any custom millwork, cabinetry or furnishings. Thereafter, the Architect shall make recommendations with respect to the selection of all moveable furnishings, furniture and decorative work (i.e. flooring, window treatments, wall coverings, furniture, decorative lighting fixtures, accessories and any special paint treatments, custom wood work, custom light fixtures, etc., to be performed by artisans retained by the Architect). In connection therewith, the Architect will prepare such data and illustrations for furniture, furnishings and equipment as may be appropriate for the project, including specially designed items or elements.

The Benjamins entered into a separate contract with Metropolitan Renovations, Inc. dated May 20, 2005 ("Metropolitan contract"). The Metropolitan contract was signed by Katter, as President. Pursuant to this contract, it was agreed that Metropolitan would provide labor and materials for the renovation work required in Rice's architect drawings dated May 19, 2005.

Rice began working on the Benjamins' project and continued to do work for them until January 2006 when the Benjamins started questioning his right to charge and collect commissions for purchases he made on their behalf to furnish the apartment. Following a meeting with the Benjamins, it was agreed he would be paid $147,000 for prospective architectural services from that date forward in three equal installments. Correspondence from Denise Coyle, Esq., the attorney for the Benjamins, dated

January 24, 2006 sets forth the terms of this agreement:

> At this point, your services will be limited to the architectural services only. It is further understood and agreed that this service will be performed for the lump sum of $147,000. This money will represent all monies owed from today to final completion of project. This payment amount will be paid in three (3) equal installments over the next three (3) months.

Rice received one payment for $49,000 following that letter. Shortly thereafter, in February 2006, Rice was terminated from the project altogether and barred from the job site premises. When he wrote to Attorney Coyle March 20, 2006, asking for the next installment to be paid to him, she wrote back that the $147,000 was for "future architectural work" and to complete the project. "At that point we still were of the belief that you were definitely going to continue through the end of the project. . ." but that since he had been terminated and no work was done, not only was he not entitled to the second (or third) installment, the Benjamins had not received any services for the $49,000 he had been paid. Whereas Rice claims he is owed the balance of the $147,000 plus expenses (i.e. $87,736.84), the Benjamins have asserted the following causes of action ("__COA") against him: 1st COA- professional negligence; 2nd COA- breach of contract; 3rd COA- unjust enrichment; 4th OCA- conversion; 5th COA- tortious interference with contract; 6th COA- 3rd party beneficiary; 7th COA - breach of good faith and fair dealing; 8th COA- accounting.

The foregoing are all based general allegations that the work Rice did for the Benjamins was incomplete and done in a faulty, negligent and untimely manner, requiring the Benjamins to expend additional money to have the work corrected. Specifically, they contend Rice failed to provide complete and accurate construction

documents, furniture layouts and supervision. In addition to their deposition testimony, and the sworn affidavits of Deborah Benjamins, the Benjamins also rely on the sworn affidavit of Michael Gadaleta, a registered architect who also prepared a written "Review Report" for them dated December 2010 ("Gadalet's report").

The Benjamins allege and Gadaleta opines that, among other things, Rice failed to submit a final package of design development documents to the plaintiffs for their approval, he failed to make available in advance sufficiently detailed drawings to the contractors, the drawings that were made available in advance were grossly inadequate, lacked clarity and were defective which is why Rice spent an inordinate amount of time at the job site, he never prepared a complete layout of the furnishings, only design sketches, which is why (allegedly) costly custom millwork for such things as radiator covers ultimately did not fit.

Rice contends the Benjamins fabricated these "problems" to blunt his counterclaims for breach of contract/unpaid services and he denies having had any responsibiliity for the construction of the project. Rice also denies the architectural drawings he provided were in any way defective, incomplete, unusable or that they deviated from prevailing standards of architectural practice. He urges the court to not consider Gadaleta's expert report and affidavit because they are belated submissions, disclosed for the first time in opposition to his motion.

In addition to their dispute about payment for future architectural services, there is also dispute between Rice and the Benjamins about the interior decoration services he provided. In her January 24, 2006 letter, Attorney Coyle also demanded that Rice provide "a full accounting of what monies went through [the account designated for the

furnishings] and all monies still remaining. The remaining balance should be forwarded to this office within the next two weeks . . ." Attorney Coyle goes on to request that "[with] respect to the furnishings which have been ordered, I would like an accounting of your commission on those items as well. This statement should include a listing of those items and the commissions you have received to date. I would also like a statement as to what furnishings you are still owed a commission and the amounts. From this point forward Linda Cohen will be solely responsible for the selection and purchasing of all remaining furnishings..."

While both sides agree that the aggregate sum of $839,612.04 was paid to Rice in one form or another, there is marked disagreement about whether these monies were properly applied (as argued by Rice) or unaccounted for (as the Benjamins allege). Thus, while Rice has provided a spreadsheet showing payments to third party vendors, engineers and related consultants, the Benjamins argue that those documented payments (to engineers, related consultants and vendors, plus payments to vendors) only total $364,827.71, leaving an unaccounted for sum of $474,784.33. Plaintiffs allege that Rice must account for that money because it was entrusted to him to make purchases on their behalf, not as fees for him to keep. Rice, on the other hand, contends he is owed an additional $265,908.87 for fees and commissions owed, but unpaid. Whereas Rice seeks an accounting, Rice argues they are not entitled to it because the parties have a contract and he is not a fiduciary.

Rice filed a mechanic's lien in the amount of $265,908.87, consisting of $87,736.84 for architectural services and $178,172.03 for commissions due on furnishings, furniture and fixtures. The Benjamins (who have bonded the lien) seek

summary judgment discharging the lien insofar as it pertains to the commissions and so as to permit them to file a new bond in the lesser amount of $87,736.84. They contend it is impossible to have a valid lien on a non-permanent improvement and that under Lien Law §§ 2 [4] and 3, there can only be a lien for work, materials or plans that contribute to a permanent improvement of the property. Rice contends the apartment was gutted and all the work done was "permanent." He claims the commissions owed were for labor and services provided by contractors who installed things such as peepholes, hinges, keyholes, cabinet pulls – some of which were gold plated – and custom made.

Rice has asserted a counterclaim for consequential damages (lost income/lost profits) because he passed up other construction jobs with the expectation he would complete (and be paid for) the Benjamins' project. At his deposition he testified about 6 prospective clients who approached him to work for them. Of these 6, he entered into contracts with, and was actually paid for work by, two of them (Peck and Ho). He provided design services/studies for Peck and estimates that had he agreed to do the construction documents for her that she requested, he would have charged her $36,000. Rice testified at his deposition that he had to decline the job "because I was busy. It would have taken up a lot of time." Rice also testified he had a contract with Ho for some work but later turned down additional work Ho offered him on the project because he did not have the time to do the work because of the Benjamins' project. The Benjamins seeks summary judgment dismissing Rice's 5th counterclaim on the basis that it is too speculative and, in any event, their contract did not contemplate Rice being compensated for lost profits (i.e. consequential damages). Rice argues that his

estimated losses are reasonably accurate and that his counterclaim should proceed to trial.

The Metropolitan defendants have separately moved to dismiss Rice's third party action against them for judgment over. Rice's third party claims against the Metropolitan defendants are that "if there was any negligent performance, construction, renovation or improvement of the work performed at the subject Apartment, [Rice] alleges that is was solely Third Party Defendants who negligently performed, not [Rice], and that Third Party Defendants are solely responsible for such performance." Rice further alleges that "in the event liability is assessed against Third Party Plaintiff under [Benjamins' complaint against him] Third Party Defendants are liable therefore and are obligated to indemnify [Rice] for any and all damages that may be imposed [on him] by reason of the occurrences mentioned and described in the complaint . ."

The Metropolitan defendants claim that whatever responsibilities Rice had under the Rice contract is completely separate and apart from the responsibilities that Metropolitan had under its own contract with the plaintiffs. The Metropolitan defendants deny that anything they did constructionwise had any effect on the completeness of Rice's designs. Thus, Katter argues that if (as the Benjamins allege) Rice's designs and drawings were negligently drawn, any defect in them are entirely his own doing. The Metropolitan defendants deny that they helped Rice with or in any way worked on Rice's side of the Benjamins' project.

Katter argues that the claims against MRII should also be dismissed because MRII is not a party to the contract with the Benjamins nor did that entity have any involvement in the Benjamins' project. Katter claims the 3rd party complaint against him

personally should be dismissed because he is simply the president of Metropolitan and there is no basis to pierce the corporate veil.

In opposition to these arguments, Rice points out that Katter is married to Alvin Benjamin's daughter and he admits to signing the Metropolitan contract on behalf of Deborah Benjamin. Rice argues that Katter also testified at his deposition that Metropolitan is a "conduit" for payments and it has no employees. Thus, Rice claims that not only is Metropolitan responsible for its own negligent performance, Katter is personally liable because Metropolitan is a mere shell, solely created for this project. Rice insists that Katter (personally) colluded with the Benjamins to get Rice to work on this project for which he was not paid.

In support of his own motion for summary judgment dismissing the complaint, Rice contends the 1st and 4th through 8th COAs (all tort claims) must be dismissed as redundant of the breach of contract claim since they all spring from the contract and the plaintiffs cannot prove he breached some separate legal duty, aside from the breach of contract. Rice argues that, in any event, the Benjamins have alleged negligence and professional malpractice, but without any supporting facts and that there is no such claim as "negligent breach of contract." Rice denies he performed any shoddy construction work, as alleged in the complaint. Rice contends the Benjamins spoliated the evidence by barring him from the project and then hiring contractors to "fix" the mistakes he is alleged to have made and, therefore, he cannot disprove their claims.

Rice argues that the unjust enrichment COA must be dismissed because the Benjamins are proceeding on a contract theory and, therefore, cannot also assert a claim in quasi contract. Rice denies he ever took title to anything belonging to the

Benjamins and, therefore seeks dismissal of their action for conversion for that reason.

Rice also seeks summary judgment on his counterclaims for breach of contract and quantum meruit because he has not been paid his fees and commissions. Although unpleaded, he now seeks an accounting as well.

Discussion

Since Rice, the Metropolitan defendants and the Benjamins have moved for summary judgment, each movant bears the initial burden of setting forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 [1985]; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Only if this burden is met, will it then shift to the opposing party who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (Zuckerman v. City of New York, *supra*). If any movant fails to make out its prima facie case for summary judgment then the motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Ayotte v. Gervasio, 81 N.Y.2d 1062 [1993]).

The Benjamins' motion

Mechanic's Lien (Rice's 1st Counterclaim)

The Lien Law provides that "any work done upon such property or materials furnished for its permanent improvement" is lienable (Lien Law § 2 [4]). To be a "permanent improvement" within the meaning of the Lien Law, the labor or services performed must be "lasting, fixed in character, not subject to change and continuing in the same state" (Application of Magowan, 203 N.Y.S.2d 35 [Sup Ct. N.Y. Co. 1960]).

The purpose of the lien law is to protect those who have directly expended labor and materials to improve real property at the owner's direction (West Fair Elec Contractors v. Aetna Casualty & Surety Co., 87 NY2d 148 [1995]). Lien Law § 23 further provides that the law "is to be construed liberally to secure the beneficial interests and purposes thereof."

Part of the lien ($178,172.03) is to secure Rice's claim for unpaid commissions he claims to have earned by providing decorating services. Some of the commissions are for permanent fixtures, within the meaning of the Lien Law (see, Dura-Bilt Corp. v. Polimeni, 87 A.D.2d 661 [3rd Dept. 1982]; Tiflon Rug Mills v. Gavender Co., 77 A.D.2d 791 [4th Dept. 1980]). Lien Law § 19 [6] identifies the circumstances under which a lien may be vacated or cancelled. Principle among them is that the lien is facially invalid. A lien that is otherwise properly filed is not subject to summary discharge. Rice has raised convincing arguments that the commissions he charged and allegedly remain unpaid are for services rendered and that the purchases he made on behalf of the Benjamins were for things that are "permanent improvements." Such arguments defeat the Benjamins' motion for summary judgment dismissing any part of the lien without the need for a trial. Their motion for such relief is, therefore, denied.

Consequential Damages (Rice's 5th Counterclaim)

The Benjamins seek the dismissal of Rice's counterclaim for consequential damages. 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 Insurance Company of New York, 10 NY3d 187, 191 [2008]). Consequential damages may also be recoverable in limited circumstances such as

where such damages were within the contemplation of the parties as the probably result of a breach, i.e. those risks that were foreseen, foreseeable or probable at the time the contract was made (Bi-Economy Market, Inc. v. Harleysville Insurance Company of New York, supra). The Rice contract is more than simply a contract to pay a sum of money, it requires that Rice provide certain services to the Benjamins. In the Rice contract the Benjamins also reserved the right to ask Rice to personally perform certain "additional services" for them, as needed. An integral part of the Rice contract was also "Construction Administration" which required that he personally monitor the project to make sure it would be completed according to specifications, and "Consultation Services" requiring Rice to retain and coordinate consultants on behalf of the Benjamins for the project. Therefore, the Benjamins have not shown they are entitled to the dismissal of the 5th counterclaim without the need for a trial.

To the extent, however, that Rice's 5th counterclaim is based upon his interactions with putative clients Rudensky, Melvin, Miller and Crilly, the Benjamins are entitled to summary judgment because Rice's facts do not support a counterclaim for consequential damages as to those individuals. By his own deposition testimony, Rice only had some brief, limited contact with each of these individuals. Rice has no idea if any of them actually hired an architect or went forward with the projects they discussed with him. Thus, Rice's counterclaim for consequential damages based upon his interactions/negotiations as to those 4 individuals is entirely speculative. Mere expressions of hope or unsubstantiated allegations or assertions are insufficient to support the claim asserted and, therefore, are insufficient to defeat the Benjamins motion for dismissal of this counterclaim (Zuckerman v. City of New York, 49 N.Y.2d

557 [1980]).

The Benjamins' motion for summary judgment is denied, however, as to Rice's counterclaims for consequential damages based upon his interactions with clients Peck and Ho. Rice actually did work for each of Peck and Ho and Rice has presented triable issues of fact that each of these clients wanted him to take on more work for them on the projects they hired him to do. Rice states that he turned down the offers of increased responsibilities because he expected to be providing the Benjamins with ongoing, time consuming, personal services (i.e. construction management, hiring and coordinating the contracts, and additional services) and felt he could not divide his time among the projects.

Some of the legal authority cited by plaintiffs in support of their motions involves decisions after trial, not motions for summary judgment and are, therefore, unhelpful to them on this motion since this court cannot resolve issues of fact on a motion for summary judgment (Kenford Co. v County of Erie, 67 N.Y.2d 257 [1986]; Cornell Holdings, LLC v Woodland Cr. Assoc., LLC, 64 A.D.3d 1020 [3rd Dept 2009]). The Rice contract does not exclude consequential damages, as a matter of law, and Rice has, in any event, raised triable issues that the Benjamins anticipated his regular (if not day to day) personal involvement with their extensive project which made him unavailable to take on other clients.

The Metropolitan Defendants' Motion (3rd Party Action)

Claims against MRII

The Benjamins' renovation contract with the GC is with Metropolitan, not MRII. MRII has met its burden of proving that it has a complete defense to Rice's claims

against it for judgment over. In opposition Rice has failed to come forward with any triable issues of fact that he is entitled to judgment over against MRII. Therefore, MRII's motion for summary judgment dismissing the 3rd party action against Metropolitan Renovations II, LLC is granted and those claims are severed and dismissed.

Claims against Katter

Katter's motion for summary judgment against Rice dismissing the third party action against him individually is also granted. Metropolitan is a corporation and Katter is the president of Metropolitan. The law permits the incorporation of a business for the very purpose of escaping personal liability (Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103 [1st Dept 2002]). Even if, as Rice alleges, Metropolitan is a mere "shell" corporation, without any employees and completely dominated by Katter, Rice's claim against Katter is that he, personally, managed the project for Metropolitan and did so negligently. Those facts, even if proved, do not justify the corporate form being disregarded under the facts of this case (Hyland Meat Co., Inc. v. Tsagarakis, 202 A.D.2d 552 [2nd Dept 1994]). Therefore, the third party claims against Kent Katter, Individually, are severed and dismissed.

Claims against all Metropolitan Defendants

The third party claims are also dismissed against all the Metropolitan defendants because the Benjamins' claims against Rice are for negligent design, incomplete and inaccurate construction documents, improper measurements for fabric and materials, failure to procure the correct furniture and carpet, and improper charges for work and commissions. The Metropolitan defendants have proved they did not prepare, edit, oversee, or have any involvement in Rice's designs or plans nor were they responsible

for furnishings. While Rice claims that Metropolitan may have negligently overseen the construction project, the Benjamins have not asserted any claim against Rice for negligent construction. Further arguments by Rice that the Benjamins have not sued the Metropolitan defendants because "Plaintiffs maintained a very close and figuratively incestuous relationship" are unavailing. Therefore, all claims against the Metropolitan defendants and the third party complaint in its entirety is dismissed.

Rice's Motion

Spoliation

Rice urges the court to deny the Benjamin's motion as a sanction for spoliation of evidence, the evidence being the defects allegedly repaired their contractors. "When a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." (Denoyelles v. Gallagher, 40 A.D.3d 1027, 1027 [2nd Dept 2007]). The burden is on the party requesting spoliation sanctions to demonstrate that the other party intentionally or negligently disposed of critical evidence, and that the moving party is compromised in its ability to defend the action (Squitieri v. City of New York, 248 A.D.2d 201 [1st Dept 1998]).

At bar, the issue is whether Rice deviated from prevailing standards of architectural practice in rendering his drawings. Rice's argument, that he was barred from accessing the work site and could not verify the need for the additional work allegedly done to "fix" the defective designs, does not support the imposition of discovery sanctions sought by him. While the drawings Rice made for the Benjamins may have had physical manifestations in the Benjamins' apartment, Rice has not shown

that he cannot defend against the Benjamins' claims or present his own case based upon his drawings alone (Kirkland v. New York City Housing Authority, 236 A.D.2d 170 [1st Dept 1997]). Therefore, the motion to have the complaint dismissed as a sanction for spoliation is denied.

Professional Malpractice and Negligence (Benjamins' 1st and 2nd COA)

Claims for professional malpractice and breach of contract may co-exist, even though both arise out of the professional's contractual obligations (Children's Corner Learning Center v. A. Miranda Contracting Corp., 64 A.D.3d 318 [1st Dept 2009]). However, merely alleging that the breach of contract duty arose from a lack of due care will not transform a simple breach of contract into a tort (Sommer v. Federal Signal Corp., 79 N.Y.2d 540 [1992]). Consequently, the professional may be subject to tort liability for failure to exercise reasonable care, irrespective of his or her contractual duties and it is policy, not the parties' contract, that gives rise to a duty of due care (Sommer v. Federal Signal Corp., supra).

Although Rice claims he did not breach his contract with the Benjamins and that he did not deviate from generally accepted standards and practices of the architectural profession, he has not proved he is entitled to summary judgment in his favor. His defenses are sharply contested by the Benjamins who, through their testimony, supporting affidavits and their expert's report, present starkly different facts. Such differences can only resolved by the trier of fact.

To the extent that Rice urges the court to not consider the report of the registered architect retained by the Benjamins, his motion is denied. CPLR 3101 [d] does not set an exact date by which expert disclosure must be made and Rice has not

identified any order by this court setting a deadline for such disclosure. Rice did serve a demand for expert disclosure, but the Benjamins did not disclose Gadaleta as their expert. However, the arguments espoused by Rice as to why this is prejudicial are not persuasive. Rice, like the Benjamins, knew or should have expected that this case would most likely involve expert testimony since expert testimony is required to prove malpractice unless the alleged malpractice can be evaluated by layperson (530 East 89 Corp. v. Unger, 43 NY2d 776 [1977]). Rice had the opportunity to retain his own expert and could have sought an adjournment of this motion (if necessary) to retain an expert to rebut the opinion offered by Gadaleta. This case is not yet scheduled for trial and he can do so now.

The cases relied upon by Rice setting forth circumstances in which the court has not considered an expert's report and/or affidavit are either inapposite or emanate from the Appellate Division, Second Department. The Second Department has always been traditionally been more conservative than the First Department on these issues (Connors, 2011 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101[d]; Lerner and Selmeci, *Timing of Expert Disclosures: A Preemptive Approach*, NYLJ, 8/5/11).

Since Gadaleta's opinion is based on facts in the record or personally known to him and his opinion has been considered (Santoni v. Bertelsmann et al., 21 A.D. 3rd 712 [1st Dept. 2005]). The sworn affidavits provided in opposition to Rice's motion and the expert's report raise triable issues of fact that Rice may have deviated from prevailing standards of architectural practice in rendering his drawings. Therefore, Rice's motion for summary judgment dismissing the 1st and 2nd COAs is denied.

Unjust Enrichment (3rd COA)

To support a claim for unjust enrichment, the plaintiff must state facts tending to show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 *cert. den.* 414 U.S. 829 [1973]). Since the Benjamins are proceeding on their claim that Rice breached his contract with them, there is no reason to keep this claim which is based upon quasi contract. Therefore, Rice's motion for summary judgment dismissing the 3rd COA is granted and the unjust enrichment COA is severed and dismissed.

Third Party Based Claims (4th, 5th and 6th COAs)

The Benjamins claim that once they confronted Rice about improperly charging commissions which were not owed under the Rice contract and he was terminated from the project, Rice instructed third parties to not deliver furnishings (fabrics, carpeting etc.) to the Benjamins, even though they had already been paid for or the Benjamins were ready to pay for them in full. The Benjamins have provided their testimony, Deborah Benjamin's sworn affidavit and copies of letters to these third parties urging them to deliver the items they had bought or ordered to no avail. In response to their requests the vendors indicated that they were withholding the deliveries at Rice's request. In fact Rice himself testified at his EBT that he gave those instructions. The Benjamins allege that these "hold" instructions establish the material elements of their conversion claim, their claim for tortious interference with contract and third party beneficiary claims because Rice was their agent, he had no right to stop delivery of these furnishings and that by having paid for these items (or, at least, ordered them for the apartment), Rice

converted, interfered or otherwise stood in the way of their being delivered to their rightful owners.

"Conversion" is the wrongful interference with the property of another (Republic of Haiti v. Duvalier, 211 AD2d 379 [1st Dept 1995]). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted (State v. Seventh Regiment Fund, Inc., 98 NY2d 249 [2002]). A conversion claim can be alleged alongside a breach of contract claim. Rice has failed to prove he is entitled to summary judgment dismissing this claim, as a matter of law and plaintiffs have raised triable issues of fact that must be decided before the court can apply the law. Therefore, Rice's motion for summary judgment dismissing the 4th COA for conversion is denied.

The elements of a tortious interference with contract claim is the existence of a valid contract between plaintiff and a third party, the defendant's intentional and unjustified procurement of the third party's breach of contract and resulting damages (JM Ball Chrysler LLC v. Marong Chrysler-Plymounth, Inc., 19 AD3d 1094 [4th Dept. 2005]). The Benjamins have raised triable issues of fact that Rice interfered with the agreements to have furnishings delivered to them that they had paid for or were willing to pay for. His argument, that they are not in privity, overlooks the fact that Rice was acting as the Benjamins' agent and although they did not have any direct contact with the vendors, those agreements were made by him on their behalf. Consequently, Rice has failed to prove he is entitled to summary judgment dismissing the 5th COA for tortious interference with contract.

A party asserting rights as a third-party beneficiary must establish "(1) the

existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 [2000]). Rice has failed to prove he is entitled to summary judgment dismissing this claim and it is denied.

Breach of Good Faith and Fair Dealing (7th COA)

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (Smith v. General Acc. Ins. Co., 91 NY2d 648 [1998]). A cause of action alleging breach of an implied covenant of good faith and fair dealing requires allegations that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff. A party who pleads a breach of duty and a breach of contract cannot assert the same facts to support both claims (Cerberus Int'l Ltd. v. Banter, Inc., 16 AD3d 126 [1st Dept 2005]). If a party does, then the breach of good faith and fair dealing cause of action must be dismissed as redundant (Engel hard Corp v. Research Corp., 268 AD2d 358 [1st Dept 2000]). The independent duty allegedly breached by Rice has to do with the third party vendors who were instructed by Rice to not deliver goods (furnishings, fabric, carpet, etc.) to the Benjamins even though they had been paid for or they were willing to pay for them. Since the Benjamins have triable issues of fact that this particular claim may not be redundant of their breach of contract cause of action, Rice's motion for summary judgment dismissing 7th COA is also denied.

Fiduciary Relationship/ Accounting (8th COA)

The Benjamins contend they have a right to an accounting (8th COA) because Rice is their fiduciary and, therefore, he has a duty to account to them for how monies they entrusted to him were applied, spent, etc. during the project, before he was terminated (Grossman v. Laurence Handprints-N.J., Inc., 90 A.D.2d 95 [1982]). The special relationship alleged is that they entrusted money to Rice which he was supposed to use to pay for furniture, furnishings, fixtures and other materials.

Rice acknowledges that plaintiffs entrusted money to him for that purpose and there is a dispute between the parties about whether it was properly used to pay those expenses or (as alleged by the Benjamins) misapplied -- a claim vigorously denied by Rice. While a breach of a fiduciary duty may be a triggering event to compel an equitable accounting, it is not a necessary event (see, Don Buchwald & Associates, Inc. v. Marber-Rich, 11 AD3d 277 [1st Dept. 2004]). Looking at the relationship between the parties, and considering the Benjamins' allegations, they have raised a triable issue of fact that there may be a discrepancy between the monies they entrusted to Rice to be paid to others and the invoices he has presented. The court is also persuaded by plaintiffs' arguments that Rice, as their agent for the disbursement of such funds, has a fiduciary relationship with the plaintiffs (Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 [2001]; Frank v. Sobel, 38 A.D.3d 229 [1st Dept 2007]). Therefore, Rice's motion to dismiss the Benjamins' cause of action for an accounting is denied.

Rice's request for an accounting

Leaving aside the issue that Rice's request for an accounting is an unpleaded

cause of action Rice (unlike the Benjamins) has failed to show that they owe him a fiduciary duty. The "accounting" his is requesting is indistinguishable from his breach of contract claim alleging unpaid commissions and for other services rendered. Therefore, Rice's request for an accounting is denied for those reasons.

Recapitulation and Conclusion

The motion by the Metropolitan defendants for summary judgment is granted in its entirety and the third party complaint is dismissed. The Benjamins' motion for partial summary judgment against Rice is denied as to his 1st counterclaim. Their motion as to Rice's 5th counterclaim is granted only to the extent provided, otherwise it is denied. Rice's motion for summary judgment is granted only as to the 3rd COA for unjust enrichment which is severed and dismissed. Otherwise Rice's motion is denied, including his request for an accounting.

This case is scheduled in mediation before Mediator Miles Vigilante. Plaintiffs shall serve a copy of this decision and order on the mediator. Since this case is ready for trial, plaintiffs shall also serve a copy of this decision and order on the Office of Trial Support.

In accordance with the foregoing,

It is hereby

ORDERED that the Clerk shall enter judgment in favor of third party defendant Metropolitan Renovations, Inc., Metropolitan Renovations II, LLC, and Kent Katter, against third party plaintiff Paul Rice dismissing the third party action with costs and disbursements; and it is further

ORDERED that the 5th counterclaim by Paul Rice, AIA, Paul Rice and Paul Rice Architecture is severed in part and dismissed only as it pertains to putative clients Rudensky, Melvin, Miller and Crilly; and it is further

ORDERED that the 3rd COA for unjust enrichment is severed and dismissed; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order on the mediator and the Office of Trial Support so the case can be scheduled for trial; and it is further

ORDERED that any relief requested but not expressly addressed is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 9, 2011

So Ordered:

Hon. Judith J. Gische, JSC