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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 113610/2008

WASHINGTON HEIGHTS OPTICAL

VS.

MCNEIL, GARRISON

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

FILED

OCT 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1, 2 |
| Answering Affidavits — Exhibits | 3, 4 |
| Replying Affidavits | 5 |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by third-party defendants is granted in accordance with the attached memorandum decision.

(consolidated for disposition with motion sequence #005)

Dated: 10/11/11

JUDGE DORIS LING-COHAN 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: PART 36

----------X

WASHINGTON HEIGHTS OPTICAL, INC., NORICE ORMSBY and ROBERT ORMSBY,

Plaintiff,

-against-

GARRISON McNEIL, Individually, and GARRISON McNEIL & ASSOCIATES, ARCHITECTS,

Defendants.

Index № 113610/08

Motion Seq. No.: 004 & 005

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GARRISON McNEIL, Individually, and GARRISON McNEIL & ASSOCIATES, ARCHITECTS,

Third-Party Plaintiffs,

-against-

YURI KATZ, Individually, and KATZ ASSOCIATES CONSULTING ENGINEERS,

Third-Party Defendants.



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DORIS LING-COHAN, J.:

Under motion sequence 004, third-party defendants Yuri Katz and Katz Associates Consulting Engineers (together, Katz) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint for common-law indemnification. Under motion sequence 005, defendants Garrison McNeil and Garrison McNeil & Associates, Architects (GMA) together move, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiffs' negligence cause of action, and pursuant to CPLR 3212, for an order granting summary judgment dismissing the balance of the complaint, and all cross claims against GMA. The motions under motion sequence numbers 004 and 005 are consolidated for disposition.

The following facts are taken from the pleadings, the parties' deposition transcripts, affidavits, written agreements and various documents submitted in connection with the motions.

This action arises out of a contract dispute between plaintiffs Washington Heights Optical, Inc. (Washington Heights Optical), Norice Ormsby (N. Ormsby) and Robert Ormsby (R. Ormsby) (together, plaintiffs or N. Ormsby, as appropriate) and GMA over architectural services GMA provided for the renovation of a 774 square foot retail space which plaintiffs leased from nonparty Port Authority of New York and New Jersey (Port Authority). The retail space was, and is, inside the George Washington Bridge bus station and terminal located at 4211 Broadway in upper Manhattan (the Terminal).

In April 2003, N. Ormsby purchased an existing optical business located in the Terminal from nonparty Dr. Edward Friedman. It was N. Ormsby's intent to operate the business under the new name "Washington Heights Optical" upon completion of some minor changes to the retail space. Prior to the purchase, N. Ormsby met with Port Authority's real estate representative for the Terminal, Tom Rush (Rush), in order to negotiate her own lease for space. During their discussions, Rush indicated that he wanted the space updated and he informed her that she would need to install a new fire alarm, which he estimated at costing not more than $10,000. N. Ormsby showed him plans of how she intended her refurbished optical store to look. These plans consisted of a schematic drawing of a proposed optical store layout prepared by nonparty Fashion Optical, Inc. (Fashion Optical), and N. Ormsby's own description of new sheetrock, paint, cleaned flooring, a new, consistent lighting system, and the elimination of old partitions. She recalls Rush commenting approvingly of her plans. N. Ormsby also recalls coming away from her meeting understanding that she would need to hire an architect to

incorporate the required fire alarm into her plans, and then to present the newly revised plan to Port Authority for its official approval.

It is undisputed that, in September 2003, Port Authority prepared a lease for the space (the Lease) and sent it to N. Ormsby for her signature. According to N. Ormsby, Rush told her that the very fact that she was sent a Lease meant that the Port Authority approved her plans, and that once she signed it, she could start talking with contractors (N. Ormsby Dep., at 58). N. Ormsby reviewed the Lease with her attorney (*id.* at 41), and after making a few inquiries and changes, signed and returned the Lease on or about October 27, 2003.

During this same time period, N. Ormsby met with four or five different architects before hiring GMA. According to N. Ormsby, she met with Alfred Eatman (Eatman) of GMA in early October 2003, and told him of her plans to do some minor renovations in a leased space for her small optical business. She explained that she was looking to have an architect put her ideas and Fashion Optical's schematic drawing together into a scaled drawing for use by contractors, and that the architect would have to work with Port Authority in order to get its approval. After a meeting with McNeil, she hired GMA by a written Letter Agreement dated October 20, 2003, which was signed by GMA and N. Ormsby on October 21, 2003, and October 30, 2003, respectively.

Almost immediately, GMA began working with the Port Authority and preparing architectural renderings to meet their requirements/specifications for the Washington Heights Optical renovation. It is undisputed that GMA began working on the project, prior to Port Authority's execution and return of a signed copy of the Lease, which did not occur until March 11, 2004. It is also undisputed that GMA revised the plans for the renovation in accordance with

the Port Authority's various requests, and that the Port Authority did not give final approval to the revised plans until June 2004. The renovation work, starting with gutting the space, began soon after approval was given.

The contractor plaintiffs used for the demolition and construction phases of the project was the same contractor N. Ormsby and her husband R. Ormsby used previously to finish the basement of their home, Andrew Mangione of D-Tak Construction (Mangione). GMA selected Katz to handle the project's "MEP" (mechanical, electrical and plumbing) issues. Additional contractors were brought in as the project became more complicated due to the frequent inspections and unexpected further demands made by the Port Authority for the use and installation of particular systems and materials. According to plaintiffs, what began as an essentially cosmetic renovation to an existing optical business, rapidly developed into a more substantial construction project, requiring the installation of, among other unexpected things, an elaborate fire protection system, a smoke purge system, a smoke damper system, new electrical wiring, and other costly components not previously mentioned by Port Authority or GMA in her communications with them, prior to her signing the Lease or the Letter Agreement.

Following completion of the renovation, plaintiffs commenced this action sounding, essentially, in contract and tort,[1] to recover damages stemming from the numerous revisions GMA purportedly made to the original plans at the Port Authority's request, but without N. Ormsby's knowledge and consent. Plaintiffs assert in their complaint that GMA breached the

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[1]Plaintiffs' "third cause of action" seeks monetary or other relief based upon GMA's alleged failure to comply with requests and subpoenas for records, documents and other materials in defendants' possession. GMA also seeks a dismissal of this demand, improperly designated as a cause of action.

Letter Agreement and committed professional malpractice by preparing and submitting for the Port Authority's approval, plans which effectuate each of the Port Authority's directives, demands and "whims," despite the fact that they exceeded the scope of the Lease, plaintiffs' budget and plaintiffs' known expectations. Plaintiffs further assert that, but for GMA's complicity in Port Authority's wrongdoing, they would not have sustained damages in an amount exceeding $200,000.00.

In its third-party claim for common-law indemnification, GMA contends that if it is held liable to plaintiffs in any respect, such liability is due to the negligent manner in which Katz performed its "MEP" work.

With respect to the first-party complaint, plaintiffs allege that GMA breached the Letter Agreement by: (1) preparing plans before receiving a copy of the fully executed Lease or the Port Authority's guidelines; (2) incorporating into the plans each of Port Authority's directives regardless of whether they were required under the Lease, required of other tenants, or reasonably suited to the 774 square foot space; (3) not advising plaintiffs of, or obtaining plaintiffs' consent to, the extra costs involved in complying with the Port Authority's excessive directives; and (4) charging sums exceeding those required under the Letter Agreement. In their professional malpractice claim, plaintiffs repeat the above charges, and add the allegation that GMA materially altered the scope of the renovation without obtaining plaintiffs' consent.

The gravamen of GMA's motion is that there is no evidence that it failed to comply with each of the Letter Agreement's terms, or that it materially altered the scope of the renovation project without plaintiffs' knowledge and consent, entitling it to summary judgment.

It is well settled that as the proponent of the motion for a summary dismissal of the first-

party complaint, GMA "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To this end, GMA submits, along with N. Ormsby's deposition transcript, a copy of the Letter Agreement which states:

> Dear Ms. Ormsby,
>
> As per your instructions at our meeting of 9 October . . . we have prepared a preliminary proposal for Architectural Services . . .
>
> It is our understanding that the project currently calls for the design of a[n] approximately 774 square foot build-out of an existing storefront to house a new optometrist's office as shown on the Conceptual drawing. The work will include the reorganizing of partitions, new finishes, with MEP and sprinkler modifications and new fire alarm to be tied into the existing building system.
>
> During the meeting we discussed the special requirements of construction within The Port Authority facilities. Our services would also include submitting documents to the Port Authority [] for approval of this project. We would, of course, work closely with the Port Authority to comply with their guidelines. We will also be available for meetings to clarify questions and to address comments as required.
>
> Should you decide to allow our firm to do this project we would propose using Yuri Katz and Associates for the Mechanical-Electrical-Plumbing (MEP). This firm is very experienced and familiar with this kind of project. Based upon our conversations and the small size of this project I would like to propose a fee of twenty thousand dollars ($20,000.00) Scheduled as follows:
>
> 1. Initial payment due upon signing contract $3,000.00.
> 2. Approval of Schematic design 20% ($20,000.00) = $4,000.00.
> 3. Completion of construction documents 50% ($20,000.00) = $10,000.00.
> 4. Construction phase 15% ($20,000.00) = $3,000.00 divided into equal monthly payments based upon the construction schedule.
>
> Our firm is prepared to commence work on this project immediately and would work with you to develop a schedule to meet your goals. I trust that I've covered the issues that you requested. Please call should you have any questions. It was a pleasure meeting you and your office manager and I look forward to working with you.
>
> If this letter form of agreement meets with your approval it will serve as our contract. Please sign one and return it to our office, keep the other for your record.

Not only does the Letter Agreement contain language specifically obligating GMA to work closely with Port Authority in order to prepare and submit documents which would bring about

Port Authority's approval, but it is evident that none of the alleged breaches of contract are actually founded in the language of the Letter Agreement. The Letter Agreement makes no reference to a lease, a set of guidelines, budgetary considerations or a time frame, other than to note its (GMA's) readiness to start immediately.

In fact, an examination of N. Ormsby's deposition testimony, comprising some 454 pages, reveals that, with the exception of the fire alarm, N. Ormsby purposefully did not disclose much of this now-disputed information to GMA. N. Ormsby neither provided GMA with her budget or information as to limitations on spending, nor did she instruct GMA to wait until some unspecified time or event, such as receipt of Port Authority's guidelines or an executed Lease, before commencing work. To the contrary, N. Ormsby made it clear during her preliminary talks with GMA that, as the architect, it would need to work with Port Authority ("to make sure that the work was done correctly"), yet she chose not to mention that Port Authority had not returned a signed copy of the Lease ("because I don't know if it was any of their business"), she did not discuss any of the Lease terms or the need for Port Authority approval prior to opening the store ("I didn't discuss anything that was in the lease"), and she did not ask questions related to fees or to the scope of the work (N. Ormsby Dep., at 63, 64, 67 - 69). By way of explanation, N. Ormsby stated that she did not need to discuss costs because she could estimate what the renovation project would cost based upon her experience with Mangione when he finished her home basement (*id.* at 132).

With respect to the fire alarm, N. Ormsby acknowledged receipt of a copy of the memorandum that GMA sent to Rush, dated December 3, 2003, which contains GMA's questions about the Port Authority's requirements and New York code regulations, and a series of specific

questions prepared by Yuri Katz regarding the fire alarm, air conditioning, and other proposed "MEP" work. N. Ormsby testified that Garrison McNeil explained to her that the fire alarm is "tied in with a sprinkler system and HVAC," and that she did not ask further questions about the balance of the information contained in the memorandum (*id.* at 83). She also did not question the $10,000 estimate given by Rush, or question what installation of the fire alarm would entail. She was waiting for the Port Authority to provide her with further information (*id.* at 168).

GMA's submission of copies of the documents it exchanged with the Port Authority and Katz, most of which N. Ormsby testified to having received and/or reviewed, confirms her testimonial acknowledgment that she was aware that GMA started working on the project almost immediately after they executed the Letter Agreement, and that GMA did so with her knowledge and consent (*id.* at 107, 113). Accordingly, by submitting, revising and resubmitting plans for the renovation of the retail location, and ultimately getting the Port Authority's approval, GMA met the terms of the Letter Agreement and is entitled to summary judgment of dismissal as to the breach of contract claim.

GMA has also sustained its burden with respect to plaintiffs' cause of action for professional malpractice. This claim centers on GMA's willingness to revise and continue to revise their renderings at the direction of the Port Authority resulting in the expansion of a simple cosmetic renovation into a vastly different, more complicated and expensive construction project without their knowledge or consent. This, plaintiffs contend, violates Rule 3.103 of The American Institute of Architects Code of Ethics and Rules of Conduct (A.I.A. Code) which states: "[m]embers shall not materially alter the scope or objectives of a project without the client's consent" (www.aia.org/about/ethicsandbylaws/index.htm). Plaintiffs also claim, in their

Affirmation in Opposition, that GMA violated several other rules regarding an architect's duty to communicate with, and obtain the consent of, its client, as needed, during the course of their professional relationship.

GMA, again, relies on portions of N. Ormsby's deposition testimony to support its motion for summary judgment. GMA contends that it maintained consistent contact with N. Ormsby, was available at all times to answer her questions on any aspect of the renovation, including the documents it routinely copied to her as the project progressed. GMA references portions of N. Ormsby's deposition testimony in which she repeatedly demonstrated her lack of recall and/or understanding as to the Port Authority's requirements, GMA's role, and the point in time at which she had a functional lease. According to the transcript, N. Ormsby was able to recall being copied on many, but not all, of the documents which GMA exchanged with Port Authority (N. Ormsby Dep., at 160, 161, 178 - 181), and she clearly recalled paying GMA according to the benchmarks set forth in the Letter Agreement. She testified that she was surprised by the type of work required to complete the project (which she said surprised the contractors as well), the costs associated with that work, and the time it took to complete each phase of the renovation. She also recalled questioning GMA, Port Authority, and Katz about these issues as the work proceeded, but acknowledged that "[she] did not come out and say that [she] would not comply with these plans" (*id.* at 205).

It is clear from her testimony that the particulars of the requirements demanded by Port Authority and implemented by GMA exceeded N. Ormsby's initial understanding of what she would have to do to get the Port Authority's approval to open her optical store. Her testimony confirms, however, that despite the fact that the project seemed to be snowballing out of her

control and over her budget, N. Ormsby proceeded with the renovations and continued to hire additional ("specialized") contractors, as needed, in order to complete the project (*id.* at 181 - 182, 184, 204). Therefore, having made a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to plaintiffs to demonstrate, through relevant proof in admissible form, the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiffs' opposition chiefly consists of a sworn affidavit in which N. Ormsby attempts to rectify her prior testimony in order to forestall summary judgment. Plaintiffs' assertion that she assumed that GMA would not proceed with any work prior to receiving a copy of the fully executed Lease or set of Port Authority guidelines, is repeatedly contradicted by her deposition testimony. Additionally, N. Ormsby's efforts to create issues of fact as to: what constituted a "kick-off" meeting; why she was not in attendance at a preliminary meeting of professionals and contractors held at the Port Authority's office back in December 2003; or why GMA was entitled to a $4,000 fee for submitting the original Fashion Optical plan to Port Authority, are unavailing. To the extent that these issues are not premised on "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), they are not relevant to the terms of the Letter Agreement, and they do not raise material questions of fact sufficient to preclude a summary dismissal of the cause of action for professional malpractice (*id.*). In fact, plaintiffs' current objection to GMA's initial submission of what was, essentially, the Fashion Optical plan, contradicts the balance of her argument in which she expresses both surprise and objection to GMA's altering of the Fashion Optical plan to satisfy the "whims" and demands of the Port Authority.

Moreover, N. Ormsby offers no explanation for the discrepancies between the testimony

she provided at her deposition and the statements contained in her affidavit. She also offers no rational basis for having withheld vital information from GMA, for failing to question terms and information contained in the Lease, the Letter Agreement, and the revised plans and documents copied to her, or for having proceeded with renovations she did not want through quiet acquiescence (N. Ormsby Dep., at 77 - 78, 168-69, 187 - 189, 190 - 191). Her tailored statements intended to avoid the consequences of her deposition, do not convert her multiple, prior acknowledgments and sworn statements of uncertainty and lack of recall as to whether she was copied on discussions between GMA, Port Authority and Katz, or kept abreast of changes to the renovation plans, into probative evidence that GMA enabled the material alteration of the scope of the project without her consent, or otherwise committed professional malpractice or breach of contract.

Finally, plaintiffs' claim for professional malpractice must be dismissed due to their lack of an expert affidavit to support any aspect of the malpractice accusation, including the alleged failures to comply with aspects of the A.I.A Code. It is well settled that "[a] claim of professional negligence requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury" (*D.D. Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000]). Neither the sworn affidavit of N. Ormsby, nor the affirmation of plaintiffs' counsel, remedies this fatal deficiency.

With respect to plaintiffs' third cause of action, the allegations supporting this claim are more properly characterized as discovery demands (*see* footnote 1). Inasmuch as the contract and tort claims are being dismissed for the reasons set forth above, the court does not need to reach plaintiff's discovery demands. Further, as the complaint is being dismissed, the motion to dismiss

the third-party complaint by third-party defendants is granted, the claims asserted therein rely upon the success of the claims asserted in the complaint.

Accordingly, it is

ORDERED that defendants Garrison McNeil and Garrison McNeil & Associates, Architects' motion pursuant to CPLR 3211 (a) (7) and CPLR 3212 is granted to the extent that the first-party complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED the third-party defendants' Yuri Katz and Katz Associates Consulting Engineers' motion for summary judgement is granted to the extent that the third-party complaint is dismissed with costs and disbursements to third-party defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiffs, with notice of entry.



Dated: 10/11/11

Doris Ling-Cohan, J.S.C.

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