

**Beck v Studio Kenji, Ltd.**

2012 NY Slip Op 30022(U)

January 6, 2012

Sup Ct, NY County

Docket Number: 108995/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
*Justice*  
*J.S.C.*

PART 2

*Beck*

INDEX NO. 108 995/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

- v -

*Studio Konji*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 09 2012

NEW YORK COUNTY CLERK'S OFFICE

*L.B.Y.*  
LOUIS B. YORK *J.S.C.*

Dated: 1/6/12

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 2

-----x  
ANDREW BECK III,

Plaintiff,

Index No. 108995/09

- against -

STUDIO KENJI, LTD., JUSTIN MIYAMOTO  
WEINER, and ELLEN HONIGSTOCK,

Defendants.  
-----x

**FILED**

**JAN 09 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

HON. LOUIS B. YORK, J.:

Plaintiff, Andrew Beck III, moves, pursuant to CPLR 3212, for summary judgment as to liability on his contract claims against defendants Studio Kenji, Ltd. ("Kenji"), Justin Miyamoto Weiner ("Weiner"), and Ellen Honigstock ("Honigstock").

**BACKGROUND**

Plaintiff commenced this action seeking to recover damages from defendants for allegedly defective design services provided for Unit PH7/8N, a duplex condominium unit located on the seventh and eighth floors of 169 Hudson Street, New York, New York (the "subject premises"). Plaintiff owns the subject premises. Kenji is a design consulting firm, and Weiner is its principal. Honigstock is a licensed architect.

On August 19, 2004, plaintiff and Kenji entered into a Design and Consulting Services Contract for the subject premises. The Contract contemplated the remodeling of the subject premises, including, *inter alia*, the removal of a large portion of the separation between the seventh and eighth floors. In addition,

the Contract required that Kenji provide services in compliance with certain specific fire and safety regulations.

The scope of Kenji's work under the Contract was to design the interior spaces and roof deck of the subject premises, and to provide the necessary documentation. Thus, Kenji was required to design and prepare drawings and architectural plans for the project, file said drawings and plans with the New York City Department of Buildings ("DOB"), and obtain all necessary approvals, all in compliance with applicable codes, rules and regulations.

The Contract divided the work into nine phases, namely (1) Pre-Design (establishing an accurate base of information required for the project), (2) Schematic Design and Development (combining the scope of the work with an accurate survey of the project, complying with applicable regulations of the New York City Building Code and the requirements of the Condominium Board, and presenting the schematic layout in a sign-off package), (3) Cost Estimating (determining the project budget), (4) Submittals (filing the project, where required, with the DOB, Landmark Preservation Commission, and submitting the project to the Condominium Board), (5) Construction Documents (producing documents and drawings that describe in detail the construction of the proposed work), (6) Bidding and Negotiation (assisting the client in selecting a contractor and in the preparation of a construction contract), (7) Decoration Services (coordinating the client's existing furnishings with new items), (8) Purchasing

Services (specifying and custom designing items to be purchased), and (9) Construction Administration (conducting site visits to inspect construction for compliance with DOB requirements and the contract documents) (see Contract, Plaintiff's Book of Exhs, Exh C).

Kenji prepared the architectural drawings and plans for the project, but did not have any licensed architects qualified to file said drawings and plans with the DOB. Thus, in July 2005, Kenji retained Honigstock to be the architect of record for the project. The scope of the architectural services contract included filing architectural drawings and conducting a final walk-through to verify compliance with the architectural drawings and the New York City Building Code.

Approximately one week after entering into the architectural services contract, Honigstock submitted the drawings and plans prepared by Kenji for the project for filing with the DOB. The filed architectural drawings and plans described, *inter alia*, the removal of a section of the separation between the seventh and eighth floors to create a double height space, as well as a cat walk connecting both ends of the apartment. After a cursory review, DOB approved the drawings and plans filed by Honigstock.

Plaintiff claims that by 2007, he had paid defendants approximately \$1.5 million for their work on the subject premises, and over \$4 million in construction costs. However, plaintiff asserts that the project remained incomplete, and defendants' work on the project was at a standstill by October

2007. Plaintiff further states that he learned from his furniture designer and the project's contractor that defendants could not properly complete the project. Plaintiff terminated defendants in January 2008, and engaged a new team to complete the design services for the subject premises.

In March 2008, plaintiff's newly retained team determined that many aspects of the work on the project, including the double height space opening, internal fire stairs, and exterior staircase, did not comply with certain DOB and fire safety codes, regulations, and DOB directives. Plaintiff states that upon the advice of DOB officials, the team undertook to eliminate the double height space design and return the apartment to its prior condition, at substantial additional costs and delays.

Thereafter, plaintiff commenced this action against defendants, alleging claims for breach of contract against all defendants (first cause of action); breach of fiduciary duty against Kenji and Weiner (second cause of action); breach of a third-party beneficiary contract against Honigstock (third cause of action); breach of the covenant of good faith and fair dealing against all defendants (fourth cause of action); unjust enrichment against all defendants (fifth cause of action); negligence against all defendants (sixth cause of action); gross negligence against all defendants (seventh cause of action); and professional malpractice against all defendants (eighth cause of action).

Defendants answered, generally denying the allegations in the Complaint, and asserting numerous affirmative defenses.

Plaintiff now seeks summary judgment as to liability on his breach of contract claims against defendants.

#### DISCUSSION

As stated, the Complaint alleges eight causes of action under theories of breach of contract, negligence, and professional malpractice. Plaintiff requests summary judgment as to liability limited only to the breach of contract claim against defendants. Plaintiff essentially claims that the design and architectural drawings and plans prepared and filed by defendants did not comply with applicable DOB codes, rules, and regulations in many respects, including, *inter alia*, in the removal of a section of the fire separation between the seventh and eighth floors, and the creation of internal and external fire staircases.

In order to succeed on a claim for breach of contract, plaintiff must clearly establish the terms of the agreement, the consideration, the performance by plaintiff, and the basis of the alleged breach by defendant (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

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 demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

In seeking summary judgment as to liability on his breach of contract claims, plaintiff argues that defendants expressly contracted to design drawings and file architectural plans that were DOB code-compliant, and to obtain all approvals for the project, but that defendants failed to fulfill their contractual obligations. Specifically, plaintiff contends that the drawings and plans prepared and filed by defendants did not comply with various DOB and fire safety codes, and DOB directives.

Plaintiff fails to establish entitlement to summary judgment as to liability on his breach of contract claim against Weiner. As stated, plaintiff retained Kenji, not Weiner, individually, to provide design and consulting services for the subject premises. It is settled that "a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Matter of Morris*

*v New York State Dept. of Tax. & Fin.*, 82 NY2d 135, 140 [1993]). Thus, Weiner cannot be held personally liable to plaintiff, who contracted with Kenji, on the theory that while acting for Kenji, he made decisions and took steps that allegedly resulted in the Kenji breached an obligations under the Design and Consulting Services Contract (see *id.*). Thus, the branch of the motion that seeks summary judgment as to liability on the breach of contract claim against Weiner must be denied.

Plaintiff does, however, establish prima facie entitlement to summary judgment on the issue of liability for breach of contract against Kenji and Honigstock by providing evidence that their work did not comply with certain DOB and fire safety codes, regulations, and DOB directives (see DOB List of Objections, Plaintiff's Book of Exh, Exh Z), as required by the Design and Consulting Services Contract and architectural services contract. Furthermore, at an examination before trial ("EBT") held on November 11, 2010, Weiner acknowledged that additional submissions to DOB were required to resolve fire safety and egress issues with the drawings and plans for the project (see Weiner EBT, Plaintiff's Book of Exhs, Exh H, at 14-15). Honigstock's EBT testimony on December 6, 2010 also demonstrates her understanding that the drawings and plans were not code-compliant, as submitted to DOB (Honigstock EBT, Plaintiff's Book of Exhs, Exh I, at 54-55).

In opposition, defendants do not dispute that the drawings and plans for the subject premises failed to comply with DOB

requirements. Instead, defendants essentially urge that Kenji did not breach its contract with plaintiff, and cannot be held responsible for Honigstock's failure to ensure that the drawings and plans complied with DOB requirements. In addition, Kenji offers an affidavit from its own expert, Burton L. Roslyn, essentially stating that DOB would have approved the plans and drawings with minor modifications (Roslyn Affid, Affirm in Opp, Exh C). Honigstock provides a similar affidavit from her expert, Avani Parikh (Parikh Affid, Affid in Opp).

Defendants' arguments do not raise any triable issues of fact. Contrary to defendants' position, Phase 2 of the Design and Consulting Services Contract expressly required schematic design and development that complied with applicable DOB codes, rules, and regulations. Kenji does not dispute that it prepared the necessary drawings and plans, and retained Honigstock, a licensed architect, to fulfill its filing and walk through obligations under the Contract. Plaintiff's breach of contract claims are based on the failure of defendants to provide DOB code-compliant drawings and plans. The speculation that DOB would have approved the drawings and plans with only minor modifications is insufficient to defeat summary judgment.

Furthermore, any assertion that plaintiff has no remedy against Honigstock because he was not a party to architectural services contract is unavailing. "An obligation rooted in contract may engender a duty to those not in privity when the contracting party knows that the subject matter of a contract is

intended for the benefit of others" (*Van Vleet v Rhulen Agency, Inc.*, 180 AD2d 846, 849 [3d Dept 1992]). Here, the architectural services contract specifically identifies the subject premises as the subject matter of the agreement (see Retainer, Honigstock's Book of Exhs, Exh G), and the intention to benefit plaintiff is evident from the terms of the agreement (*id.*).

Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of plaintiff as to liability on his breach of contract claims against defendants Studio Kenji, Ltd. and Ellen Honigstock, and directing a trial as to damages for those claims, and the motion is otherwise denied.

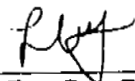
Dated: 1/6/12

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**FILED**

**JAN 09 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

  
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J. S. C.

**LOUIS B. YORK**  
J.S.C.