SHORT FORM ORDER

INDEX NO. 29956/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ENCORE LAKE GROVE HOMEOWNERS ASSOCIATION, INC., ENCORE LAKE GROVE CONDOMINIUM I and ENCORE LAKE GROVE CONDOMINIUM II,

Plaintiffs,

-against-

CASHIN ASSOCIATES, P.C.,

Defendant.

ORIG. RETURN DATE: FEBRUARY 22, 2011
FINAL SUBMISSION DATE: JUNE 30, 2011
MTN. SEQ. #: 002 (001)
MOTION: MG

PLTF'S/PET'S ATTORNEY:
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SMITHTOWN, NEW YORK 11787
631-265-0010

DEFT'S/RESP ATTORNEY:
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Upon the following papers numbered 1 to 11 read on this motion FOR DISMISSAL.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affidavit in Opposition and supporting papers 5-7; Memorandum of Law 8; Replying Affirmation and supporting papers 9, 10; Reply Memorandum of Law 11; it is,

ORDERED that this motion by defendant, CASHIN ASSOCIATES, P.C. ("defendant"), for an Order, pursuant to CPLR 3211, dismissing plaintiffs' complaint as a matter of law on the grounds that:

(1) plaintiffs have failed to comply with the notice of claim requirements of the General Municipal Law;

(2) defendant cannot be held liable to plaintiffs as it was acting in its capacity as an employee of a municipality;

(3) plaintiffs lack privity to prevail on their breach of contract claim against defendant; and

(4) defendant did not owe plaintiffs a duty of care with respect to the alleged inspections,

is hereby **GRANTED** as set forth hereinafter. The Court has received opposition hereto from plaintiffs.

This claim arises out of inspection services performed by defendant for the Incorporated Village of Lake Grove ("Village") on buildings in condominium complexes known as Encore Lake Grove Condominium I and Encore Lake Grove Condominium II (the "Condominiums"). Plaintiffs allege that defendant negligently performed the inspections by failing to disclose "substantial defects" and unsafe conditions in the Condominiums and appurtenant common areas, and that plaintiffs relied upon the Certificates of Occupancy issued by the Village when purchasing the Condominiums. Specifically, plaintiffs allege that defendant's inspections failed to reveal that fire walls had not been erected in Buildings "A" and "B" of the complex. By their complaint, plaintiffs seek damages in the amount of $3,000,000.00; however, in opposition to the instant application, plaintiffs estimate the cost of the installation of the fire walls to be $650,000.00.

Plaintiffs commenced this action on August 24, 2010, by Summons with Notice. Defendant appeared on October 13, 2010, by service of a Demand for Complaint. Thereafter, plaintiffs served a Complaint dated December 1, 2010, asserting two causes of action, to wit: breach of contract and negligence.

Plaintiffs allege that the Village entered into an agreement with defendant to inspect the Condominiums prior to issuing the Certificates of Occupancy. Based upon representations made by defendant, the Village issued the Certificates of Occupancy, which allegedly implied that the Condominiums were safe for occupancy and in compliance with all applicable requirements. Plaintiffs contend that the purchasers of the Condominiums were intended third-party beneficiaries to the agreement between the Village and defendant.

Defendant has now made the instant motion to dismiss the Complaint on the grounds described hereinabove. In particular, defendant alleges that pursuant to Village Resolution #70 dated August 1, 2002, it was hired as Village Engineer. Therefore, defendant alleges that the acts complained of herein were performed in its capacity as a Village employee, entitling it to the protections of the General Municipal Law, including the requirement that plaintiffs serve a notice of claim prior to commencement of an action. Further, defendant argues that as the inspections were discretionary acts involving the exercise of professional judgment, it cannot be held liable to plaintiffs absent a special relationship. Moreover, defendant alleges that plaintiffs may not assert a breach of contract claim, as they lack privity or a relationship approaching privity with defendant, and plaintiffs were not intended third-party beneficiaries of the

agreement between defendant and the Village. Finally, with respect to the negligence cause of action, defendant argues that it did not owe plaintiffs a duty of care, but rather owed the Village a duty of care when it performed the inspections.

Initially, the Court finds unavailing defendant's claims with respect to the notice of claim requirements of the General Municipal Law. By Village Resolution #70 dated August 1, 2002, the Village retained defendant "for engineering review services of proposed projects with rate of compensation as per attached fee schedule." The attached fee schedule set forth the 2002 hourly billing rate for each of the positions at defendant's firm, including engineer, architect, and manager. Furthermore, in Village Resolution #99 dated November 3, 2005, passed in connection with the construction of the Condominiums, defendant is characterized as "the duly appointed engineering consultants for the Village." This 2005 Resolution was passed in response to a request by the builder, WCI Communities, Inc. ("WCI"), for general building inspection services on a regularly scheduled basis during the construction of the Condominiums. The 2005 Resolution provided that defendant would bill the Village for its services, and then the Village would thereafter be reimbursed by WCI. Plaintiffs contend that defendant controlled the manner and means of the inspections; that defendant possessed a high degree of skill for the inspections; and that defendant failed to attach evidence of the tax treatment of defendant or a W-2 wage statement or any other indicia of employee payments to its moving papers. Based upon the foregoing, the Court finds that defendant was an independent contractor retained by the Village, and not an employee of the Village which would require the condition precedent of service of a notice of claim (*see* General Municipal Law § 50-e; *Cmty. for Creative Non-Violence v Reid*, 490 US 730 [1989]; *Aymes v Bonelli*, 980 F 2d 857 [2d Cir 1992]).

With respect to plaintiffs' breach of contract claim, the elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*see e.g. Flomenbaum v New York University*, 71 AD3d 80 [2009]; *Hecht v Components Intern., Inc.*, 22 Misc 3d 360 [Sup Ct, Nassau County 2008]). It is undisputed that plaintiffs were not parties to the agreement between the Village and defendant. As such, there is no privity of contract between the parties herein. However, plaintiffs argue that they are in near privity with defendant. In order to establish the functional equivalent of privity or "near privity," the following criteria must be satisfied: (1) awareness that the inspections were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct

by the defendant linking it to the party or parties and evincing defendant's understanding of their reliance (*Ossining Union Free School Dist. v Anderson*, 73 NY2d 417 [1989]; *Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536 [1985]).

Here, the Court finds that while defendant was aware that WCI had requested inspections in connection with the construction of the Condominiums, and had performed such inspections, plaintiffs were not "known parties" at that time relying on those inspections, nor was there conduct by defendant linking it to plaintiffs and evincing defendant's understanding of their reliance. In contrast, defendant was performing the inspections for the Village at the behest of WCI.

Moreover, defendant has sufficiently demonstrated to the Court that plaintiffs were not intended third-party beneficiaries of the agreement between defendant and the Village. A third party may recover as an intended beneficiary of a contract between others only if it is clear that the parties purposed to confer a benefit on that third party; furthermore, the benefit must be more than merely incidental to the benefits afforded the contracting parties; it must be such as to evince an intent to permit enforcement by the third party (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38 [1985]); *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NYS2d 314 [1983]) and the best evidence of this is to be found in the language of the contract itself (*see Nepco Forged Products, Inc. v Consolidated Edison Co.*, 99 AD2d 508 [1984]). In the instant matter, contrary to plaintiffs' allegation, neither defendant nor the Village intended their agreement to benefit plaintiffs as third-party beneficiaries as the plain language of the 2005 Resolution does not include such language (*see Port Chester Electrical Constr. Corp. v. Atlas*, 40 NY2d 652 [1976]).

Furthermore, a party asserting third-party beneficiary rights under a contract must establish: (1) the existence of a valid and binding contract between the other parties; (2) that the contract was intended for their benefit; and (3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314 [1983]). The Court finds that plaintiffs, as future owners of the Condominiums, have failed to demonstrate that the 2005 Resolution conferred an immediate benefit upon them, sufficient to indicate the assumption by defendant of a duty to compensate plaintiffs if such benefit was lost.

Finally, with respect to the cause of action sounding in negligence, the elements of common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty

constituted a proximate cause of the injury. In the absence of a duty, there is no breach and without a breach there is no liability (*see Ruiz v Griffin*, 71 AD3d 1112 [2010]; *Petrosky v Brasner*, 181 Misc 2d 897 [Sup Ct, New York County 1999]). Here, the Court finds that defendant did not owe a duty of care to plaintiffs, who were unknown and unidentified entities at the time of the inspections. Any duty defendant owed would be to the Village or WCI, not to plaintiffs.

In addition, it is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (*Meyers v Waverly Fabrics*, 65 NY2d 75 [1985]; *Logan v Empire Blue Cross & Blue Shield*, 275 AD2d 187 [2000]). This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract (*see Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382 [1882]; *Riffat v Continental Ins. Co.*, 104 AD2d 301 [1984]). In the instant matter, the Court finds that plaintiffs have not alleged the violation of a legal duty independent of the agreement between the Village and defendant to support a cause of action for negligence against defendant.

Accordingly, this motion by defendant is **GRANTED**, and this action is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: January 12, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION