Preliminary Conference May 7, 2012

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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HIGHLAND HC, LLC,

Plaintiff,

-against -

PEDER SCOTT, PW SCOTT ENGINEERING & ARCHITECTURE, P.C. and MELANIE ANCIN SCOTT,

Defendants.

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DECISION & ORDER

Index No. 1346-2011

Sequence No. 2

LUBELL, J.

The following papers were considered in connection with this motion by defendants for an Order pursuant to the Federal Arbitration Act and CPLR §§2201, 7501 and 7503, compelling arbitration and staying this lawsuit pending arbitration; pursuant to §3211, dismissing certain claims for failure to state causes of action; and granting such other and further relief as this Court may seem just and proper:

PAPERS	**NUMBERED**
Motion/Affirmation/Affidavit/Exhibits A-B	1A
Memorandum of Law in Support of Motion	1B
Affidavit of Melanie Ancin Scott/Affidavit	1C
Affidavit of Peder Scott/Affidavit/Exhibits A-D	1D
Amended Complaint	2A
Memorandum of Law in Opposition	2B
Reply Memorandum of Law	3
Sur-Reply Affirmation	4

Plaintiff Highland HC, LLC ("Highland"), a Delaware limited liability company with a Connecticut business address, retained defendant PW Scott Engineering and Architecture, P.C. ("PW Scott, PC"), a New York professional corporation with a New York State principal place of business, to perform professional architectural and engineering services in connection with a construction project

located in Newtown, Connecticut, (the "Project"). The Project involves the renovation of an existing building and the construction of two others. The individual defendants, Peder Scott and Melanie Ancin Scott, are principals, officers and directors of PW Scott, P.C.

The Project was to be completed in three separate and successive phases. Towards that end, the parties entered into three separate contracts. Through the first, dated September 12, 2006 (the "First Contract"), PW Scott, P.C. agreed to provide Highland with "existing condition" drawings, a design of the exterior facade, a parking site plan, construction documents for additions, and plans for the renovation of an existing building for use as a restaurant. By virtue of their July 8, 2007 contract (the "Second Contract"), PW Scott, P.C. agreed to provide site plan submission services. Finally, by contract dated December 20, 2007 (the "Third Contract"), PW Scott, P.C. agreed to prepare construction drawings.

An examination of the respective contracts reveals the following with respect to the arbitration clauses upon which a portion of the instant application rests.

The penultimate paragraph of the First and Third Contracts reads in pertinent part as follows:

> . . . If everything is acceptable to you, please sign all pages, *including the General Conditions page*, and return them to our office along with your deposit. No work will begin on this project until this office has received both the signed contract and deposit [emphasis added].

The "General Conditions" page is attached to and behind the signature page of the First and Third Contracts and appears as the last page to the respective set of documents. Among other provisions, the General Contract page contains the following:

> Any and all disputes between the parties to this contract shall be adjudicated by arbitration under the auspices of the American Arbitration Association. Such proceeding shall take place in the State of New York. The award rendered by the arbitrator

> or arbitrators shall be fixed and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Notwithstanding the directive that "all pages, including the General Conditions page" be signed, no signatures appear on the General Conditions page. In addition, while the First Contract is signed on behalf of PW Scott, P.C. and Highland, the Third Contract is only signed by Highland.

In contrast to the First and Third Contracts (which explicitly direct the execution of the General Conditions page), the penultimate paragraph of the Second Contract provides:

> . . . *The attached General Conditions are a part of this proposal* and include description of reimbursables. If everything meets with your approval, please sign below and return the original to this office along with required releases and deposit [emphasis added].

Similar to First Contract, the Second Contract is executed by both parties.

Eighteen "Purchase Orders" and twelve "Change Orders", all prepared by PW Scott, P.C. and signed by either Michael Breede or Bill Brunetti on behalf of Highland, were also exchanged between the parties on various dates and for various reasons as the Project progressed.

This litigation follows the completion of the first phase and the commencement of the second whereupon the relationship between the parties broke down.

Through this action, Highland seeks damages for alleged design errors in the elevator system, a stairway, two retaining walls, the placement of a generator and gas meter, and the roof. Highland also claims that defendant's plans called for more steel than was reasonably required, that there were delays in the transmission of drawings, and that there were excessive changes in filed construction plans. In the end, Highland argues that defendants actions and or inactions resulted in cost overruns, remediation costs and lost income. Beyond that, Highland alleges that

defendants improperly billed for remediation and other work and for administrative and ministerial back-office time. Highland also charges defendants with overbilling.

Causes of action are asserted for professional malpractice, breach of fiduciary duty, fraud, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, negligent misrepresentation, breach of contract and violation of the Connecticut Unfair Trade Practices Act ("CUTPA").

"Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate" (Shah v. Monpat Const., Inc., 65 AD3d 541, 543 [2nd Dept 2009]). Whether under Federal, New York or Connecticut law, it is axiomatic that a meritorious motion to compel arbitration must be founded upon an agreement in writing.

> Arbitration is a creature of contract and without a contractual agreement to arbitrate there can be no arbitration. John A. Errichetti Associates v. Boutin, 183 Conn. 481, 488, 439 A.2d 416 (1981), and cases cited therein. Even though it is the policy of the law to favor settlement of disputes by arbitration; Board of Education v. Waterbury Teachers' Assn., 174 Conn. 123, 126, 384 A.2d 350 (1977); arbitration agreements are to be strictly construed and such agreements should not be extended by implication. School Authority v. Bogar & Bink, 261 Pa.Super. 350, 353, 396 A.2d 433 (1978).

(Wesleyan Univ. v. Rissil Const. Associates, Inc., 1 Conn. App. 351, 354-55, 472 A.2d 23, 25 [Appellate Court of Ct. 1984]). "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 [1960]). "[P]arties consenting to arbitration surrender many of their normal rights under the procedural and substantive law of the State" (Thomas Crimmins Contracting Co., Inc., 74 N.Y.2d 166 [1989]). Thus,

> . . . "a party may not be compelled to arbitrate a dispute unless there is evidence which affirmatively establishe[s] that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute." God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP, 10 AD3d 671, 672 (2nd Dept 2004), aff'd 6 NY3d 371 (2006). Since an agreement to arbitrate involves the "surrender [of] the right to resort to the courts," such an agreement must be clear, explicit, and unequivocal and must not depend upon implication or subtlety. Waldron v. Goddess, 61 NY2d 181, 183-184 (1984).

(WYS Design Partnership Architects, P.C. v. Bd. of Managers of 285 Lafayette St. Condominium, 29 Misc 3d 1201(A) [Sup Ct 2010]).

The party seeking to compel arbitration bears the burden of demonstrating the existence of a "clear and unequivocal" agreement to arbitrate (Matter of Siegel v. 141 Bowery Corp., 51 A.D.2d 209, 212, 380 N.Y.S.2d 232 [1st Dept 1976]; see also, Gerling Global Reins. Corp. v. Home Ins. Co., 302 AD2d 118, 123 [1st Dept 2002]). Where, as here, there are several contracts between the parties, all of which present the opportunity to agree to arbitration, "it may fairly be said that it is the overall intention of the parties as gleaned from such documents which should control" (Siegel v. 141 Bowery Corp., 51 AD2d 209, 212 [1st Dept 1976]).

Upon a reading of the three contracts, all of which were prepared by PW Scott, P.C., and upon examination of the manner of their execution, the Court does not conclude that there exists an "overall intention" or mutual agreement to arbitrate. Although the Second Contract incorporates by reference the General Conditions page containing the arbitration clause, the First Contract and the Third Contract (the last contract) do not. Significantly, the First Contract and Third Contract call for the separate execution of the General Conditions page wherein the arbitration clause is found, and no signatures appear thereon.

With that being said and there being no merit to any of the other arguments advanced in favor of arbitration, the Court will address the merits of defendants' CPLR 3211(a)(7) motion to dismiss plaintiff's claim for punitive damages and for breach of fiduciary duty as appear in the Amended Complaint.

Whether examined under New York or Connecticut law, the Court finds that plaintiff has failed to state a cause of action for breach of fiduciary duty as a matter of law. Where, as here, the claims underlying the breach of fiduciary duty cause of action are, in essence, duplicative of the breach of contract claim, such a separate cause of action cannot stand (Hylan Elec. Contr., Inc. v. MasTec N. Am., Inc., 74 AD3d 1148, 1150 [2d Dept 2010]; see, Cinque v. Schieferstein, 292 A.D.2d 197, 198 [1st Dept 2002]; Routh v. Preusch, CV030197042, 2004 WL 2165906 [Conn Super Ct Sept. 1, 2004] [relationship of client and architect does not impose on defendants a unique level of loyalty or trust which characterizes a fiduciary relationship]).

Plaintiff's claim for punitive damages relates to its allegations of defendants' "tortious and fraudulent misconduct and egregious breaches of fiduciary duties . . . from, *inter alia*, what is believed to be a willful campaign to bilk Highland to make payments for work that was not performed, as well as for re-work that should never have been required but for the misconduct complained of herein . . . " (Amended Complaint, Par. 8).

"[A] court may award punitive damages on a fraud claim if a plaintiff has established that a defendant committed 'gross, wanton or willful fraud or other morally culpable conduct'" (Borkowski v. Borkowski, 39 N.Y.2d 982, 983, 387 N.Y.S.2d 233 [1976]). Here, Highland has advanced a valid *prima facie* cause of action for punitive damages in connection with its allegations of fraudulent overbilling and double-billing, as is set forth in the Amended Complaint at paragraphs 91 through 117.

"Punitive damages are [also] available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (Swersky v. Dreyer and Traub, 219 AD2d 321, 328 [1st Dept 1996]). An examination of the Amended Complaint shows a sufficiency in this regard such that the claim for punitive damages survives the motion.

Given the Court's dismissal of the cause of action for breach of fiduciary duty, that aspect of defendants' motion to dismiss the claim for punitive damages thereon is denied as moot.

Based upon the foregoing, it is hereby

ORDERED, that the motion to compel arbitration is hereby denied; and, it is further

ORDERED, that the CPLR 3211(a)(7) motion is granted to the extent hereinabove indicated and is otherwise denied; and, it is further

ORDERED, that the parties appear before the Court at 9:30 a.m. on May 7, 2012 for a Preliminary Conference on the Amended Complaint as herein deemed constituted.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
March 27, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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