

**Board of Directors of Lefferts Gardens II
Condominium v Lefferts Blvd. Corp.**

2013 NY Slip Op 30649(U)

February 22, 2013

Supreme Court, Queens County

Docket Number: 7274/12

Judge: Timothy J. Dufficy

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. TIMOTHY J. DUFFICY
Justice

IA Part 35

-----X
THE BOARD OF DIRECTORS OF THE LEFFERTS
GARDENS II CONDOMINIUM, VLADAMIR
DRUZMININ, ELIZABETH DRUZMININ,
THELLIE REBELLO, TOMMY REBELLO, SHAHEED
RATTANI, ABBAS RATTANI, MICHELE GAYLE
ABBAS RATTANI, MICHELE GAYLE, SANJAY
TRIVEDI, WAGNER COELLO, SANDRA COELLO,
SATHYA GAGENPALLY AND ANITA GAGENPALLY,

Index No. 7274/12
Mot. Date: 11/15/12
Mot. Cal. No. 14
Mot. Seq. 1

Plaintiffs,

-against-

LEFFERTS BLVD. CORP., YANIV LEVY, YAIR
BOHADANA, EYAL OVADIA, AKIVA EMERGI,
LEFFERTS BLVD. HOLDING CORP., GERALD J.
CALIENDO R.A. A.I.A ARCHITECT, P.C., MAELY
DEVELOPMENT CORP., HOD CONSTRUCTION
CORP., AND MILESTONE DEVELOPMENT CORP.,

Defendants,

-----X
The following papers numbered 1 to 10 read on this motion by defendants Gerald J. Caliendo, R.A., AIA, sued herein as Gerald J. Caliendo, R.A., AIA Architect, P.C. (Caliendo), to dismiss the complaint and any cross claims.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-7
Reply Affidavits	8-10

As an initial mater, the caption above reflects the caption of the Verified Complaint.

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for money damages relating to alleged construction defects at premises located at 8822 and 8824 Lefferts Boulevard, in the County of Queens. Caliendo was allegedly retained by non-party HOD Inc. to provide architectural services in connection with the construction at said premises. The plaintiffs' complaint has alleged that Caliendo is liable for claims sounding in aiding and abetting a breach of fiduciary duty, breach of warranty, breach of limited warranty, negligent misrepresentation arising out of a contract, fraud in the inducement, fraudulent concealment, negligent construction and maintenance, and professional malpractice.

Caliendo has moved to dismiss the complaint and any cross-claims pursuant to CPLR 3211 (a)(1), upon documentary evidence. In support of its motion, Caliendo has relied upon, among other things, a copy of the pleadings and a copy of Caliendo's agreement with HOD Inc. "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Marine Ins. Co. v Scottsdale Ins. Co.*, 2013 NY Slip Op 00444, *1 [2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]). A professional may have a duty to a third party who is not a client if the circumstances exist which forge a bond between the parties "so close as to approach that of privity" (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989], quoting *Ultramares Corp. v Touche*, 255 NY 170, 182-183 [1931]). In order to determine if such a relationship exists, the court must consider certain "criteria for liability: (1) awareness that the reports 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 defendants linking them to the party or parties and evincing defendant's understanding of their reliance" (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d at 425).

In light of the criteria to be considered, the documentary evidence submitted has failed to resolve all factual issues as a matter of law, at least, as to whether Caliendo's involvement and responsibilities were sufficient to create a relationship approaching privity with the plaintiffs (*see id.*, at 424; *Ofman v Katz*, 89 AD3d 909, 910-911 [2011]). Therefore, Caliendo is not entitled to the relief sought on this branch of its motion.

Caliendo has also moved to dismiss the complaint, pursuant to CPLR 3211 (a)(7), for failure to state a cause of action. "In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must afford the pleading a liberal construction ... accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"

(*Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2010] [internal citation omitted]; see *Leon v Martinez*, 84 NY2d at 87; *Nationwide Insulation & Sales, Inc. v Nova Cas. Co.*, 74 AD3d 1297, 1298 [2010]).

The plaintiffs' second cause of action alleged against Caliendo is for aiding and abetting a breach of fiduciary duty. "To state such a claim, a plaintiff must plead a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom" (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [2007]; see *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101 [2006], *lv denied* 8 NY3d 804 [2007]; *Oikonomos, Inc. v Bahrenberg*, 38 Misc3d 1207[A], *15 [2013]). "Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d at 101–102). The plaintiffs' complaint has alleged a claim for breach of fiduciary duty and has sufficiently alleged that Caliendo had actual knowledge of the primary wrong. Therefore, when the plaintiffs' allegations are accorded "the benefit of every possible favorable inference," the facts, as alleged, warrant the denial of the branch of Caliendo's motion as to the plaintiffs' second cause of action because they "fit within [a] cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]).

The third and fourth causes of action alleged are for breach of warranty and breach of limited warranty. In light of the allegations in the complaint that there was a warranty and a limited warranty in existence, that Caliendo breached that warranty and limited warranty, and based upon the terms which the plaintiffs have alleged that they relied on, giving the allegations every possible favorable inference, the plaintiffs' causes of action for breach of warranty and breach of limited warranty each fit within a cognizable legal theory (see *Leon v Martinez*, 84 NY2d at 87-88; see *Valley Cadillac Corp. v Dick*, 238 AD2d 894 [1997]); see also *Ainger v Michigan General Corp.*, 476 FSupp 1209 [1979], *affd* 632 F2d 1025 [1980]). Therefore, Caliendo is not entitled to the dismissal of the plaintiffs' third and fourth causes of action.

The plaintiffs have alleged a fifth cause of action against Caliendo for negligent misrepresentation arising out of a contract. "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Since the complaint has alleged the essential elements of this cause of action

when the allegations are afforded every favorable inference, Caliendo is not entitled to the dismissal of this cause of action (*see Leon v Martinez*, 84 NY2d at 87-88).

The sixth cause of action in the complaint for fraud in the inducement. “[T]he elements of fraud in the inducement are a misrepresentation of a material fact, falsity, scienter, reasonable reliance and injury” (*Khindri v Getty Petroleum Marketing, Inc.*, 33 Misc3d 1208[A], *3 [2011]; *see Kleinman v Blue Ridge Foods, LLC*, 32 Misc3d 1219[A], *6 [2011]). Upon a review of the allegations contained in the complaint, and while giving them every possible favorable inference, plaintiffs have sufficiently alleged the elements for this cause of action. Therefore, Caliendo is not entitled to the dismissal of this cause of action.

The plaintiffs’ seventh cause of action alleges fraudulent concealment, which requires that a plaintiff “allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury... [and] that the defendant had a duty to disclose material information and that it failed to do so” (*Gomez-Jimenez v New York Law School*, ___ AD3d ___, 956 NYS2d 54, 59 [2012] [internal quotes and citation omitted]). “In addition, in any action based upon fraud, ‘the circumstances constituting the wrong shall be stated in detail’ ” (*id.*, quoting CPLR 3016 [b]). When the plaintiffs’ allegations are accorded “the benefit of every possible favorable inference,” the facts, as alleged, warrant the denial of the branch of Caliendo’s motion as to plaintiff’s seventh cause of action because they “fit within [a] cognizable legal theory” (*Leon v Martinez*, 84 NY2d at 87-88).

The eighth cause of action alleges negligent construction and maintenance. The plaintiffs must allege “the elements of a negligence claim, which are the existence of a duty, a breach of that duty, and that such breach was a proximate cause of the events which produced the injury” (*Lapidus v State*, 57 AD3d 83, 92 [2008]). After reviewing the complaint and giving it every possible favorable inference, the court finds that the plaintiffs have sufficiently alleged the elements of this cause of action. Therefore, Caliendo is not entitled to the relief sought on this branch of its motion.

The ninth cause of action has alleged professional malpractice, which claim requires the plaintiffs to allege that a defendant departed from accepted standards of practice and whether any such departure was a proximate cause of the plaintiffs’ injury (*see Georgetown Mews Owners' Corp. v Campus Assoc.*, 289 AD2d 376 [2001]; *Estate of Burke v Repetti & Co.*, 255 AD2d 483 [1998]). Based upon the allegations in the complaint, the plaintiffs have

sufficiently alleged the elements of a professional malpractice cause of action and, thus, Caliendo is not entitled to the dismissal of plaintiffs' ninth cause of action.

The defendants shall interpose an Answer to the plaintiffs' Complaint within twenty (20) days of the date of service of a copy of this Order with Notice of Entry.

Accordingly, Caliendo's motion is denied in its entirety.

Dated: February 22, 2013

TIMOTHY J. DUFFICY, J.S.C.