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SCANNED ON 9/6/2013

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

PAMELA ELLEN FLAKOWITZ, LUDMILA PORTNOY, MENDEL PORTNOY, SHANNON MAER, et al.,

Plaintiffs,

- against -

YAIR LEVY, YL RECTOR STREET LLC, YL MANAGER LLC, YL MANAGMENT LLC, YL REALTY INC., YL REAL ESTATE DEVELOPERS, YL RECTOR HOLDINGS I LLC. YL RECTOR HOLDINGS II LLC, YL RECTOR HOLDINGS III LLC, SHVO MARKETING, COOPER SQUARE REALTY, INC., and HIGH RISE FLOORING & CONSTRUCTION, LLC,

Defendants.

INDEX NO. 114700/09

MOTION SEQ. NO. 002

FILED
SEP 06 2013
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5, were read on this motion to dismiss by defendant High Rise Flooring & Construction, LLC.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

This is an action brought by Pamela Ellen Flakowitz, Ludmila Portnoy, Mendel Portnoy, Shannon Maer, et al. (collectively, plaintiffs) seeking money damages for alleged negligence, fraud, conversion, and misappropriation relating to construction work done at 255 Rector Place, New York, New York (Subject Premises). Before the Court is a motion by defendant High Rise Flooring & Construction LLC (High Rise) pursuant to CPLR 3211 and/or 3212, seeking dismissal of the complaint as asserted against it, on the basis that there is no factual or legal ground for the cause of action interposed against it. Plaintiff has responded in opposition to this motion. Discovery is not complete and Note of Issue has not been filed.

BACKGROUND

Plaintiffs are occupants and/or owners of units within the Subject Premises. On or about April 4, 2007 non-parties American Flooring and NTD Construction Corp. (NTD or General Contractor) entered into a contract wherein American Flooring was to, *inter alia*, install wood flooring, supplied by the owner, in the Subject Premises (Notice of Motion, exhibit C). As a result of the flooring work and other construction done at the Subject Premises, plaintiffs commenced this action by the filing of a Summons with Notice, on or about October 20, 2009. Subsequently, High Rise contracted with two plaintiffs, Maria Rapetskaya (Rapetskaya) on November 19, 2009 to repair a section of damaged hardwood flooring in her unit, and with Brian Gallozzi (Gallozzi) on July 29, 2009 to inject, wax, and buff 350 square feet of Gallozzi's hardwood flooring (Notice of Motion, exhibit E). On October 27, 2010 American Flooring went out of business.

Plaintiffs filed an Amended Summons and Verified Complaint on November 19, 2009, wherein their First Cause of Action asserted against High Rise alleges that High Rise was retained by defendant YL Rector Street LLC, sponsors of Subject Premises, and/or general contractor of the Subject Premises to install flooring through the premises, including but not limited to the plaintiffs' individual units (Verified Complaint at ¶ 229). Plaintiffs further allege that High Rise negligently abandoned the contracted-for work without completing same, and negligently installed the wrong type of flooring including but not limited to the plaintiffs' individual units, such that the flooring is coming up and mis-leveled creating a trip hazard (Verified Complaint at ¶ 230 -232). Plaintiffs' allege this negligence and breach of contract have caused plaintiffs to sustain economic losses of no less than one hundred million ($100,000,000.00) dollars.

Now before the Court is a motion by High Rise pursuant to CPLR 3211 and/or 3212, seeking dismissal of the First Cause of Action asserted against it on the basis that: (1) High

Rise was not a party to any contract between American Flooring and the General Contractor with respect to the work allegedly performed at the Subject Premises as alleged in the complaint and did not perform the installation work as alleged, (2) there was no contract between High Rise and the plaintiffs in this case, and (3) High Rise cannot be held liable for the alleged negligent performance of a construction contract as a matter of law (Affirmation in Support at ¶7).

STANDARDS

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature that fits within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am.,*

Inc., 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff's allegations for breach of contract]).

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

In support of its motion, High Rise contends that the First Cause of Action asserted

against it should be dismissed because plaintiffs have no privity of contract with High Rise. High Rise further proffers that it cannot be held liable as it was not a party to the contract for the installation of flooring at the Subject Premises.

In opposition, plaintiffs contend that High Rise was a party to the contract relating to the flooring installation work done at the Subject Premises, and is liable for the floor work done because they assumed liability after American Flooring dissolved. Plaintiffs also proffer that High Rise should be held liable for the flooring contract between American Flooring and the General Contractor on the basis that American Flooring and High Rise are alter-egos of each other. Plaintiffs' support their claim for successor liability by putting forth evidence of overlapping ownership, alleging Brian Murphy (Murphy) is the sole owner of both entities and that both entities share the same address (*see* Affirmation in Opposition, exhibit A). The Court notes that plaintiffs do not assert the successor liability theory in their complaint, nor do plaintiffs cross-move to amend the Complaint to allege successor liability.

The Court finds that High Rise has met its prima facie burden of establishing its entitlement to dismissal as a matter of law. In turning to plaintiffs' opposition, plaintiffs have failed to prove High Rise was a party to the flooring contract at the Subject Premises or that High Rise has any type of successor liability to American Flooring. Plaintiffs do not put forth any contracts between the general contractors and High Rise for the flooring installation work, or any outside evidence that High Rise performed the work as alleged in the complaint.

Under New York Law, "an assignee or successor will not be bound to the terms of a contract absent an affirmative assumption of the duties under the contract" (*Amalgamated Tr. Union Local 1181, AFL-CIO v City of New York*, 45 AD3d 788, 790 [2d Dept 2007]; *Anderson v New York & H.R. Co.*, 132 AD 183, 183 [1st Dept 1909] ["in the absence of express contract, the assignee of a personal contract is not liable on the covenants of his assignor"]). Here, plaintiff has failed to put forth sufficient evidence to show High Rise assumed duties under the

contract between NDR and American Flooring, or that High Rise is an alter ego of American Flooring (*see Worldcom Network Servs. v Polar Communications Corp.*, 278 AD2d 182 [1st Dept 2000] [evidence that three individuals who formed the original company who were thereafter employed by another company, is insufficient to infer a relationship between the two companies, much less a relationship sufficiently close to serve as a predicate for the imposition of successor liability]).

Although High Rise signed individual contracts with two plaintiffs, Rapetskaya and Gallozzi, to do limited repair and waxing work in their individual units, these contracts are not for installation of wood flooring, and the contracts do not create privity of contract between all plaintiffs and High Rise for the claims put forth in the First Cause of Action. Additionally, these contracts were not signed until after this action was commenced. It is well established that "absent privity of contract, plaintiff has no right to recover from defendant [for] breach of contract" (*Residential Board of Mangers of Zeckendorf Towers v Union Square – 14th Street Associates*, 190 AD2d 636, 637 [1st Dept 1993]; *see Pevensey Press v Prentice-Hall, Inc.*, 161 AD2d 500 [1st Dept 1990]; *CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720 [2d Dept 2009] ["liability for breach of contract does not lie about absent proof of a contractual relationship or privity between the parties"]).

Moreover, plaintiffs here have not alleged that they are third-party beneficiaries to the contract between the General Contractor and American Flooring for the flooring work at the Subject Premises. Further, with respect to construction contracts,

> Generally it has been held that the ordinary construction contract—i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party—does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries (*Port Chester Elec. Const. Corp. v Atlas*, 40 NY2d 652, 656 [1976] citing *Cerp Const. Co v J. J. Cleary, Inc.*, 59 Misc2d 489 [Sup Ct, Kings County 1968]; *International Erectors v Wilhoit Steel Erectors &*

Rental Serv., 400 F2d 465 [5th Cir 1968]; *Watson v American Creosote Works*, 84 P2d 431 [Okla Sup Ct 1938]; *see* 4 Corbin, Contracts, § 779D).

As there is no privity of contract between plaintiffs and High Rise, and it was not expressed that plaintiffs were intended third-party beneficiaries, High Rise has a defense as a matter of law.

In addition to breach of contract, High Rise avers that the plaintiffs do not have a cause of action for negligence against High Rise as it is well settled that a "simple breach of contract matter cannot also be construed as a tort if the allegation is not independent of the contract itself" (*Clark-Fitzpatrick v Long Island Rail Road Company*, 70 NY2d 382, 389 [1997]; *see also Megaris Furs v Gimbel Brothers,* 172 AD2d 209 [1st Dept 1991] [court held there was no cause of action for "negligent performance of [a] contract"]; *see also Rezu Enterprises, Inc. v Isanim*, 80 AD3d 427 [1st Dept 2011] [dismissing cause of action because plaintiffs failed to establish that the alleged fraud was independent from the breach of contract or that it violated a legal duty separate from the duty owed under the contract]). Here, the negligence alleged by plaintiffs are within the four corners of the flooring installation agreement with American Flooring. As the legal duty that defendant allegedly violated is not separate from the duty that would be owed under their contract, the Court finds that there is no cause of action for High Rise's potential negligent performance of a contract. Moreover, while plaintiffs argue in opposition that the summary judgment motion is premature, plaintiffs fail to set forth a reliable factual basis for that assertion such as to warrant denial of High Rise's motion (*see Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500-501 [1st Dept 2011] ["plaintiff . . . will not be allowed to use pretrial discovery as a fishing expedition when [it] cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions"], quoting *Devore v Pfizer Inc.*, 58 AD3d 138, 144 [1st Dept 2008]).

As a result of the foregoing, the Court finds it appropriate to grant the herein motion for dismissal.

CONCLUSION

For these reasons and upon the forgoing papers, it is,

ORDERED that defendant High Rise Flooring and Construction LLC's motion is granted and the First Cause of Action is dismissed and the complaint is dismissed as against it; and it is further,

ORDERED that within 30 days of Entry, counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9-4-13

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST**