

Lehm Holdings, LLC v Certified Constr. Corp.

2013 NY Slip Op 32278(U)

September 20, 2013

Sup Ct, NY County

Docket Number: 653556/201/2

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 653556/2012
 LEHM HOLDINGS LLC
 vs
 CERTIFIED CONSTRUCTION CORP.
 Sequence Number : 003
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3, 4, 5, 6, 7, 8, 9
 Answering Affidavits — Exhibits _____ | No(s). 10, 11
 Replying Affidavits _____ | No(s). 12, 13, 14

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 9/20/13


 _____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

LEHM HOLDINGS, LLC,

Plaintiff,

- v -

Index No.
653556/2012

**DECISION
and ORDER**

Mot. Seq. 2,3,4

CERTIFIED CONSTRUCTION CORP., JOHN
GRADY, JOE GRADY, BELMONT FREEMAN,
AKF ENGINEERS LLP, and ROSS DALLAND,
P.E.,

Defendants.

-----X

CERTIFIED CONSTRUCTION CORP., JOHN GRADY,
JOE GRADY,

Third-Party Plaintiffs,

-v-

CRAIG LUCAS, STUART ZIMMER, KENNETH
VAN LIEW, ZIMMER LUCAS PARTNERS INC.,
MARK PEDIN, DOUGLAS RADEKE, IGOR
LACKMAN, C&R CIVIL INC., H.T.O.
ARCHITECTS, PLLC, GLOBAL DEVELOPMENT
SERVICES, SHARP MANAGEMENT, LLC, FIVE
STAR ROOFING, LLC, JOHN BARDSLEY, INC.,
H. THOMAS O'HARA, JOE AND BARBARA MARINO,
and JOHN BARDSLEY,

Third-Party Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

This is an action filed by plaintiff Lehm Holdings, LLC (“Plaintiff” or “Lehm”) seeking recovery of damages in connection with the restoration and conversion of a historic five story townhouse, commonly known as the “Lehman House,” owned by Lehm and located at 7 West 54th Street, New York, New York (“the Project”). Plaintiff filed an Amended Verified Complaint on December 20, 2012 against Certified Construction Corp. (“Certified”), John Grady, Joe Grady, Belmont Freeman, AKF Engineers, LLP, and Ross Dalland, P.E., the Project’s general contractor, the officers of the general contractor, architect and engineers, respectively. The Complaint alleges nine causes of action based on Defendants’ alleged failure to “properly design, manage and construct the Project,” “properly administer and perform the work,” and “meet applicable building codes and other legal requirements.”

Certified, the general contractor of the Project, and John Grady and Joe Grady, Certified’s principals, subsequently commenced a third party action against third party defendants and additional parties relating to the Project. The Third Party Complaint alleges seven causes of action sounding in breach of contract, negligence/gross negligence, fraud, tortious interference with a contract, tortious interference with prospective economic gain, unjust enrichment and defamation.

Presently before the Court are motions to dismiss Plaintiff’s Complaint and Certified’s Third-Party Complaint.

Mot. Seq. #2

Defendant Belmont Freeman Architects s/h/a Belmont Freeman’s (“Belmont Freeman”) moves for an Order, pursuant to CPLR §3211(a)(1) and (7), to dismiss Plaintiff’s fourth and eighth causes of action. In support of its motion, Belmont Freeman submits the affirmation of Aaron Abraham. Plaintiff opposes.

As against Belmont Freeman, Plaintiff Lehm asserts the following claims: breach of contract (first cause of action), unjust enrichment (fourth cause of action), and malpractice and gross malpractice (eighth cause of action). Belmont Freeman does not move to dismiss the first cause of action.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; or
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Belmont Freeman moves to dismiss the fourth and eighth causes of action against it on the basis that: (1) the unjust enrichment claim should be dismissed because the validity of the contract between Plaintiff and Belmont Freeman concerning Belmont Freeman’s services for the Project is not in dispute and (2) the malpractice and gross negligence claims should be dismissed because such causes of action are “impermissible attempts to turn a breach of contract claim into a tort claim.”

Plaintiff’s first cause of action of the Amended Complaint is for breach of contract against Belmont Freeman. The Complaint alleges that in or about April

2005, Plaintiff engaged Belmont Freeman to provide architectural and construction administration services in connection with the Project. The Complaint further alleges that in or about June 2005, Plaintiff and Belmont Freeman entered into an agreement setting forth the terms and conditions upon which Belmont Freeman would provide services in connection with the Project.

“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *See Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]. Here, in light of the existence of a written agreement between Plaintiff and Belmont Freeman with respect to Belmont Freeman’s services in connection with the Project, which is not in dispute, Plaintiff’s fourth cause of action for unjust enrichment fails as a matter of law as against Belmont Freeman.

Plaintiff’s eighth cause of action asserts negligence and gross negligence against Belmont Freeman. Failure to use due care in design or supervision allows recovery of both tort and contract damages. *See Sears, Roebuck & Co. v. Enco Associates, Inc.*, 43 N.Y.2d 389, 396 [1977]). The eighth cause of action asserts, “As the primary architect performing architectural and construction administration services for the Project, Freeman owed a duty to Lehm to perform such services in a manner consistent with the level of learning, skill and experience ordinarily exercised by similar architects, and to use reasonable and ordinary care and diligence to perform such work” and that Freeman breached that duty “by providing defective services in connection with [the] Project, including without limitation, designing the Project in a manner not consistent with applicable building codes and legal requirements and failing to administer construction of the Project.” The eighth cause of action further alleges that “Freeman knew or recklessly disregarded the risks and losses associated with the breach of his duties and his failure to diligently perform their services, which constituted gross negligence.” Turning to the four corners of the Complaint, Plaintiff’s eighth cause of action states a cause of action for malpractice and gross negligence against Belmont Freeman distinct from Plaintiff’s first cause of action and therefore remains.

Mot Seq. #3

Third party defendants Craig Lucas (“Lucas”), Stuart Zimmer (“Zimmer”), Kenneth Van Liew, Zimmer Lucas Partners, LLC (sued incorrectly as Zimmer Lucas Partners, Inc.), Ignor Lakhman, incorrectly sued as Igor Lackman, Global Development Services, Inc., Joe Marino, Barbara Marino and Sharp Management move, pursuant to CPLR §3211(a)(7), for an Order dismissing the Third Party Complaint filed by Certified, John Grady, and Joe Grady. Certified, John Grady, and Joe Grady oppose.

On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the plaintiff accorded the benefit of every possible inference. (*See, Leon v. Martinez*, 84 NY2d 83 [1994]). The court’s function on a motion to dismiss pursuant to CPLR §3211(a)(7) is to determine whether the plaintiff’s factual allegations fit within any cognizable theory, without regard to whether the allegations ultimately can be established. (*See, Union State Bank v. Weiss*, 65 AD3d 584 [2nd Dept 2009]).

Certified, the general contract or of the Project, and John Grady, and Joe Grady, the principals of Certified, commenced a third party action against third party defendants and additional parties relating to the Project. The Amended Third Party Complaint alleges seven causes of action sounding in breach of contract, negligence/gross negligence, fraud, tortious interference with a contract, tortious interference with prospective gain, unjust enrichment and defamation.

The third party Complaint alleges that in or around April 2005, plaintiff Lehm and its principals Craig Lucas and Stuart Zimmer engaged the services of Certified to “provide limited demolition and debris removal services” on the Project and Lucas and Zimmer, as owners of the building and general project managers, “increased the scope of the work to be performed by Certified” “in a piece-meal fashion, adding additional services to be performed periodically.”

The third party Complaint complaint further alleges, “Through the course of the project, plaintiffs also engaged third party defendants H.T.O. Architects PLLC, Global Development Services Inc., C&R Civic Inc., Sharp Management, LLC, Five Star Roofing, LLC, and John Bardsley Inc. to provide other services in connection with the project” and that in or around November, 2010, Kenneth Van Liew and

Global Development Services Inc. were also engaged by Plaintiff to provide construction and management services on the Project.

The first cause of action of the third party Complaint alleges breach of contract against third party defendants Zimmer Lucas Partners, Craig Lucas, and Stuart Zimmer. It alleges that Zimmer Lucas Partners, Zimmer, and Lucas entered into a subcontractor agreement with Certified, that Certified performed all of its duties under the agreement, and that third party defendants materially and breached their obligations under the agreement by failing to make timely payments, and carelessly and negligently interfering with Certified's efforts to complete the Project.

Movants contend that Certified's first cause of action fails because while it alleges breach of contract as against Zimmer Lucas, Craig Lucas, and Stuart Zimmer, there was no privity of contract between the parties. Lucas and Zimmer, managing members of Zimmer Lucas, submit affidavits, stating that Zimmer Lucas Partners is a financial services investment group and at relevant times, Lehm was a wholly owned subsidiary of Zimmer Lucas. Lucas and Zimmer aver that Lehm contracted with Certified to provide general services for the Project and that Zimmer Lucas did not enter into a contract with Certified. Lucas and Zimmer further aver that they did not enter into a contract with Certified. No contract is attached to the affidavits.

In opposition, Certified submits the attorney affirmation of Constantine Bardis and a memorandum of law, in which Certified contends: privity existed between Certified, Craig Lucas, Stuart Zimmer and Zimmer Lucas and alternatively, Certified was an intended third party beneficiary of subcontract agreements. Certified contends that Certified and John Grady entered into an oral agreement with Craig Lucas and Stuart Zimmer as individuals, and as representatives of Zimmer Lucas Partners, to perform demolition and debris removal services, not Plaintiff. Alternatively, Certified contends that it was an intended third party beneficiary of the contracts that exist between the third party defendants. Certified alleges that it is undisputed that valid contracts exist between the third party defendants, that those contracts with trade contractors were intended to benefit Certified, as general contractor, in completing the project and receiving payment, and that if not for the negligence of the third party defendants, Certified would have directly benefitted from the site owner [Plaintiff].

In their reply, Movants respond that no oral agreement with Certified existed, and that Certified failed to provide an affidavit to support such an allegation. They further contend that Certified contracted directly with Plaintiff to perform general contracting services for the Project, Certified's Project invoices were addressed and sent directly to Plaintiff, and Plaintiff directly paid Certified for its services from its checking account.

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

Parties asserting third-party beneficiary rights under a contract must show “(1) the existence of a valid and binding contract between 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.” *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y. 3d 783, 751 [2006]. “Performance rendered directly to plaintiff would indicate that plaintiff is a third-party beneficiary.” *See Tarrant Apparel Group v. Camillo Consulting Group, Inc.*, 40 A.D.3d 556 [1st Dep't 2007].

Here, turning to the four corners of the Complaint and accepting all allegations as true, a breach of contract claim is plead as against third party defendants Zimmer Lucas Partners, Stuart Zimmer, and Craig Zimmer based on the allegations that Certified entered into an oral agreement with them, that Certified performed all of its duties under the agreement, and that third party defendants materially and breached their obligations under the agreement.

The second cause of action of the Third Party Complaint alleges negligence and gross negligence against “all third party defendants.” “A viable tort claim against a professional requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity.” *Onebeacon Insurance Company v. Winden, LLC*, 2008 N.Y. Misc. LEXIS 9398 (N.Y. Sup. Ct. Aug. 14, 2008); *Ossining Union Free School Dist.*

v. Anderson LaRocca Anderson, 73 N.Y.2d 417 (1989). See also *143 Bergen Street LLC v. Ruderman*, 39 Misc. 2d 1203(A)(N.Y. Sup. Ct. March 22, 2013) (“[c]onsidering the scope of his involvement with the project, [defendant] should have understood that his services were being relied on by the owners of the property”). Furthermore, an independent duty may be imposed by law in connection with services performed by professionals regardless of the damages sought or whether the parties were in privity. *New York Central Mut. Fire Ins. Co. v. Glider Oil Co., Inc.*, 90 A.D.3d 1638, 1641 (4th Dep’t 2011) (“A legal duty independent of contractual obligations may be imposed by law as an incident to the parties’ relationship.”). Gross negligence is defined as “conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.” *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y. 2d 821, 823-24 [1993]).

The second cause of action alleges, “As general contractors, architects, designers, and construction managers performing their respective services in connection with the project, third party defendants H.T.O. Architects PLLC, Global Development Services Inc., C&R Civic Inc., Sharp Management, LLC, Five Star Roofing, LLC, H. Thomas O’Hara, Kenneth Van Liew, Douglas Radeke, Igor Lackman, and John Bardsley owed a duty to Certified to perform such services in a manner consistent with the level of learning, skill, and experience ordinarily exercised by similar general contractors, architects, designers, and construction managers,” and “breached their duties to Certified by, among other things, performing their services and work defectively and contrary to sound construction, architectural, managerial and design practices, and failing to execute their work in an efficient, workmanlike, professional and competent manner,” “knew or recklessly disregarded the risks and losses associated with the breach of their duties and their failure to diligently perform their services, which constituted gross negligence,” and Certified has been damaged.

While the second cause of action is for negligence and gross negligence against “all third party defendants,” the allegations contained in that cause of action are directed only at the following defendants: H.T.O. Architects PLLC, Global Development Services Inc., C&R Civic Inc., Sharp Management, LLC, Five Star Roofing, LLC, H. Thomas O’Hara, Kenneth Van Liew, Douglas Radeke, Igor

Lackman, and John Bardsley. The allegations within that cause of action are not directed at third party defendants Zimmer Lucas, Stuart Zimmer, or Craig Lucas, Barbara Marino, and Joe Marino. As for third party defendants Kenneth Van Liew, Igor Lakhman, incorrectly sued as Igor Lackman, Global Development Services, Inc., and Sharp Management, there are no factual allegations contained within the Third Party Complaint that provide a basis to support a finding that those third party defendants owed Certified any duty to support a negligence and/or gross negligence claim.

The third cause of action alleges fraud against third party defendants Craig Lucas, Stuart Zimmer, Kenneth Van Liew, and Igor Lackman. “The elements of a cause of action for fraud are (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury.” *House of Spices (India), Inc. v SMJ Servs., Inc.*, 2011 N.Y. Misc. LEXIS 1922 (N.Y. Misc. 2011). “[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR §3016(b), which requires, in the case of a cause of action based on fraud, that ‘the circumstances constituting the wrong shall be stated in detail.’” (*Id.*)(citations omitted). In its third cause of action, Certified alleges that Lucas, Zimmer, Van Liew, and Lackman “made misrepresentations of material facts with the knowledge of their falsity at the time they were made,” Certified “justifiably and reasonably relied on these fraudulent misrepresentations to its detriment,” third party defendants’ conduct constitutes fraud, and Certified has been damaged. The Third Party Complaint, however, fails to allege any factual allegations concerning the alleged fraud and therefore fails to satisfy the pleading requirement set forth under CPLR §3016(b).¹

The fifth cause of action alleges tortious interference with a contract as against third party defendants Craig Lucas and Stuart Zimmer. The fifth cause of action alleges that Craig Lucas and Stuart Zimmer “engaged Certified to perform general contracting services on the project”, “had knowledge of this relationship” and “breached the duty owed to Certified by way of this relationship and did interfere

¹The fourth cause of action alleges malpractice and gross against H.T.O Architects and H. Thomas O’Hara.

with Certified's contractual obligations," "[t]his interference was both intentional and improper," and Certified was damaged. Based on the same allegations, the sixth cause of action alleges tortious interference with prospective economic gain as against Craig Lucas and Stuart Zimmer.

"To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D. 3d 40, 47 [1st Dept 2009]. Here, the fifth and sixth causes of action fail to allege that Craig Lucas and Stuart Zimmer interfered with a contract that Certified had with a third party, but rather allege that Lucas and Zimmer interfered with a contract that they allegedly had directly with Certified. As such, the fifth and sixth causes of action fail to state a cause of action.

The seventh cause of action (improperly designated as the sixth) alleges unjust enrichment against all third party defendants. It alleges that, "Upon the belief that third party defendants would honor payment for the work Certified performed on the project, Certified dutifully and diligently completed and incurred expenses on behalf of third party defendants" and "third party defendants have been unjustly enriched by retaining payments made by Certified, as well as benefitting from work performed by Certified without payment." "[T]o prevail on a claim of unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Cruz v. McAneney*, 31 A.D.3d 54, 59, 816 N.Y.S.2d 486 [2006]). Here, with the exception of third party defendants Craig Lucas, Stuart Zimmer, and Zimmer Lucas Partners which whom the Certified alleges to have had an agreement with, there are no factual allegations that the other third party defendants/Movants Kenneth Van Liew, Ignor Lakhman, incorrectly sued as Igor Lackman, Global Development Services, Inc., Joe Marino, Barbara Marino and Sharp Management were unjustly enriched at Certified's expense to make out a claim for unjust enrichment.

The eighth cause of action (improperly designated as the seventh) alleges defamation against third party defendants Craig Lucas and Stuart Zimmer. CPLR §3016 (a) requires that in an action for libel or slander, “the particular words complained of ... be set forth in the complaint.” The complaint also must allege the time, place and manner of the false statement and specify to whom it was made. (*Dillon v. City of New York*, 261 AD3d 34, 704 NYS2d 1 [1st Dept 1999]). Here, Certified alleges that defendants “have made false and defamatory statements against the interest of Certified, including representations that Certified and John Grady were responsible for the theft and conversion of property,” that said statements were made to a third party and false, and resulted in injury. However, the Complaint fails to allege the time, place and manner of the alleged false statement or specify to whom it was made and as such, fails to allege the necessary elements of defamation.

Mot. Seq. #4

Third party defendants John Bardsley, Inc. and John Bardsley (“the Bardsley Defendants”) move for an Order pursuant to CPLR §§3211(a)(1), (5), and (7), to dismiss the Third Party Complaint filed by Defendant Certified and all cross claims. Certified opposes.

As against the Bardsley Defendants, the Third Party Complaint alleges the following causes of action: second cause of action, which alleges negligence and gross negligence against all defendants, and the sixth cause of action, which alleges unjust enrichment against all defendants.

In support of their motion, Bardsley Defendants submit the affirmation of Anthony Balsamo and affidavit of John Bardsley, an interior designer and the principal of John Bardsley, Inc. Bardsley avers that “[d]uring the period from January 12, 2007 through February 12, 2008, he was retained by Craig Lucas, of Zimmer Lucas Capital, to submit construction relating office plans and elevations in connection” with the Project” and that neither Bardsley or John Bardsley, Inc. “entered into any contracts or understandings with the third party plaintiffs in connection with the Project. All our services were provided exclusively for Zimmer.”

The second cause of action alleges that Bardsley Defendants “owed a duty Certified to perform such services in a manner consistent with the level of learning,

skill, and experience ordinarily exercised by similar general contractors, architects, designers, and construction managers,” and “breached their duties to Certified by, among other things, performing their services and work defectively and contrary to sound construction, architectural, managerial and design practices, and failing to execute their work in an efficient, workmanlike, professional and competent manner,” “knew or recklessly disregarded the risks and losses associated with the breach of their duties and their failure to diligently perform their services, which constituted gross negligence,” causing Certified to be damaged.

The Bardsley Defendants contend dismissal is warranted because there are no allegations to support that a duty was owed by them to Certified and because the statute of limitations has expired as Mr. Bardsley last performed services in connection with the plans and specifications in 2008.

In their opposition, Certified claims to be an intended third party beneficiary of the contracts between Zimmer Lucas Partners and the other trade contractors, which would include Bardsley Defendants. Certified does not address the Bardsley Defendants’ argument that the statute of limitations has run.

“A viable tort claim against a professional requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity.” *Onebeacon Insurance Company v Winden, LLC*, 2008 N.Y. Misc. LEXIS 9398 (N.Y. Sup. Ct. Aug. 14, 2008). “A legal duty independent of contractual obligations may be imposed by law as an incident to the parties’ relationship.” *New York Central Mut. Fire Ins. Co. v. Glider Oil Co., Inc.*, 90 A.D.3d 1638, 1641 (4th Dep’t 2011). Gross negligence is defined as “conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.” *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y. 2d 821, 823-24 [1993]).

“A cause of action to recover damages for professional malpractice against an architect for defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship (citations omitted), not when the injury occurred or the defective

condition was discovered.” *Greenport v. Manning Plumbing & Heating Corp.*, 2011 N.Y. Misc. LEXIS 410, *6 (N.Y. Misc. 2011).

Here, Certified’s second cause of action for negligence/gross negligence fails as against the Bardsley Defendants because there are no factual allegations to support any alleged duty owed by Defendants to third party plaintiffs Certified and the Grady’s, as there is no allegation that the parties were in privity of contract or the functional equivalent or there was a special relationship that gives rise to a duty owed by the Bardsley Defendants to Certified.

“[T]o prevail on a claim of unjust enrichment, “a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (*Cruz v. McAneney*, 31 A.D.3d 54, 59 [2006]). As there are no factual allegations contained in the Third Party Complaint that the Bardsley Defendants were “enriched” at Certified’s expense, Certified’s sixth cause of action for unjust enrichment as against the Bardsley Defendants fails to state a claim.

Wherefore it is hereby

ORDERED that third party defendant Belmont Freeman Architects s/h/a Belmont Freeman’s partial motion to dismiss (Mot. Seq. #2) is granted only to the extent that the second cause of action asserted in Plaintiff’s Lehm Holding, LLC’s Amended Complaint is dismissed as against said defendant; and it is further

ORDERED that third party defendants Craig Lucas, Stuart Zimmer, Kenneth Van Liew, Zimmer Lucas Partners, LLC (sued incorrectly as Zimmer Lucas Partners, Inc.), Ignor Lakhman, incorrectly sued as Igor Lackman, Global Development Services, Inc., Joe Marino, Barbara Marino and Sharp Management’s motion to dismiss the Third Party Complaint filed by Certified, John Grady, and Joe Grady (Mot. Seq. #3) is granted to the extent that all causes of action of the Third Party Complaint asserted against these defendants are dismissed with the exception of the first cause of action for breach of contract as against Zimmer Lucas Partners, LLC, Craig Lucas, and Stuart Zimmer, and the sixth [sic] cause of action for unjust

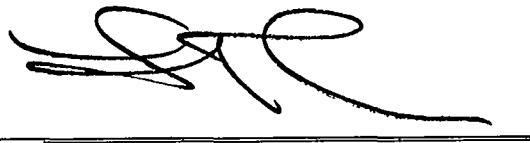
enrichment as against Zimmer Lucas Partners, LLC, Craig Lucas, and Stuart Zimmer only; and it is further

ORDERED that third party defendants John Bardsley and John Bardsley, Inc.'s motion to dismiss is granted, and the Third Party Complaint filed by Certified Construction Corp., John Grady, and Joe Grady, is dismissed as against said defendants, and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

9/20/13



EILEEN A. RAKOWER, J.S.C.