Residential Bd. of Mgrs. of the Toren Condominium v BFC Partners
2014 NY Slip Op 33963(U)
September 29, 2014
Supreme Court, New York County
Docket Number: 108131/11
Judge: Arthur F. Engoron
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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THE RESIDENTIAL BOARD OF MANAGERS OF THE TOREN CONDOMINIUM, on its own behalf and as attorney-in-fact and agent for all non-sponsor residential unit owners of the Toren Condominium,

Plaintiff,

- against -

BFC PARTNERS, et al.,

Defendants.

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Index Number: 108131/11

Sequence Number: 006

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, collectively numbered 1, were used on this motion to dismiss by defendant Skidmore, Owings & Merrill LLP:

	Papers Numbered:
Moving Papers	1
Opposition Papers	(memorandum of law only)
Reply Papers	(memorandum of law only)

Upon the foregoing papers, the motion is granted.

Basic Background

Plaintiff is the Board of Managers of the Toren Condominium, located at 150 Myrtle Avenue, Brooklyn, NY. In an agreement dated June 19, 2007 (Takacs Aff., Exh. A) ("the Agreement"), defendant-developer Myrtle Owner LLC ("Myrtle") retained defendant Skidmore Owings & Merrill ("SOM") to provide architectural services for construction of the building. The Agreement (at p. 33) expressly eschews the creation of any rights on behalf of third-parties:

> this Agreement and the services of the Architect ... are intended for the sole benefit[,] use and enjoyment of Owner. [T]his Agreement is not intended and shall not be deemed to be entered into for the benefit of or to confer any benefit upon any third party, including any successor ownership entity, condominium board ... or owners of individual condominium units ... . [N]othing contained in this Agreement and no services performed hereunder shall be deemed to create a

> contractual relationship with or a cause of action in favor of a third party against the ... Architect.

On or about July 30, 2009 SOM submitted a "property description" (Takacs Aff., Exh. C) to the New York State Attorney General. On or about October 7, 2009, SOM submitted a Certification and Report (Takacs Aff., Exh. B) to the Attorney General. Some or all of "these materials were incorporated in the Offering Plan provided by Myrtle ... to prospective individual unit owners now represented by the Board." Moving Memo, 2-3.

In its current complaint (Sliwinkski Aff., Exh. C), plaintiff has purported to assert four causes of action against SOM: professional malpractice (5th); professional negligence (6th); fraud (7th); and negligent misrepresentation (14th). The gist of the plaintiffs' grievances, at least as concerns SOM, is that negligent design and/or construction of the roof membrane and drainage systems and/or the "curtain wall" system(s) has allowed water to infiltrate and damage the building.

SOM now moves, pursuant to CPLR 3211(a) (1) and (7), to dismiss, based on documentary evidence and/or for failure to state a cause of action, respectively.

Discussion

As plaintiff and SOM did not contract with each other, there is no "privity of contract" between them, and plaintiff has not asserted any straight breach of contract claim against SOM.

Furthermore, as SOM argues, Residential Bd. Of Mgrs. of Zeckendorf Towers v Union Square-14th St. Assoc., 190 AD2d 636 (1st Dept 1993), precludes a straight negligence claim here:

> The IAS Court also properly dismissed plaintiff's causes of action for negligence and breach of contract against defendant Kumagai, which contracted solely with the owner for purposes of monitoring the activities of the construction manager, since plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship... , and since plaintiff is only an incidental, not intended beneficiary of defendant Kumagai's contract with the owner ... . Absent privity of contract, plaintiff has no right to recover from defendant Kumagai either for negligence or breach of contract ... .

Id. at 637 (citations omitted); see generally, Key Intl. Mfg., Inc. v Morse/Diesel, Inc., 142 AD2d 448, 453 (2d Dept 1988) ("the rule which bars recovery for economic losses in the absence of privity as applied to actions against architects or engineers is also settled as a matter of New York law"); Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 50 AD3d 503, 504 (1st Dept 2008) ("Since plaintiff had no contractual or other relationship with the ... architect ... and is, at best, only an incidental, rather than an intended, beneficiary of the contracts that [the architect] entered into with the sponsors, plaintiff may not recover for negligence or breach of contract from [the architect]."); Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 (1st Dept 2013) ("The tort claims against the architect fail for lack of contractual privity, or

the functional equivalency of privity[.]"); Bri-Den Constr. Co., Inc. v Kapell & Kostow Architects, P.C., 56 AD3d 355, *1 (1st Dept 2008):

> There is admittedly no contractual privity between the parties, and the court properly found that plaintiff contractor failed to state a cause of action under any of the theories set forth in the complaint because it failed to demonstrate the "functional equivalent of contractual privity" under the three prong test set forth in Ossining Union Free School Dist. v Anderson LaRocca Anderson (73 NY2d 417, 419 [1989]). In Ossining the Court of Appeals rejected the argument that reliance on plans and specifications included in the bid package constituted the functional equivalent of privity, holding that any asserted reliance must be by a known party and not a class of potential parties, such as future bidders. Even were we to find that a class composed of prequalified bidders was sufficiently known for purposes of Ossining, the prequalified bidders were simply not "known" at the time of the complained-of conduct.

Plaintiff admits that "New York's economic loss doctrine is a jurisprudential principle that a plaintiff cannot recover in tort for purely economic losses caused by defendant's negligence." Opp. Memo at 9. Plaintiff's claim, id., that the doctrine is limited to product-liability cases is belied by the cases cited above, is not supported by the cases plaintiff cites, and appears unsupported by logic. Plaintiff's citation to Barkany Asset Recovery & Mgt. v Southwest Sec., Inc., 41 Misc 3d 673 (Sup Ct, Kings County 2013), a case that (as its name suggests) does not even use the word "architect," for the proposition that "privity is not a condition precedent to recover economic losses against an architect," hardly engenders confidence in plaintiff's analysis.

Not surprisingly, plaintiff argues (Opp. Memo at 11) that "the functional equivalency of privity" exists here. Simply put, it does not. See Sykes v RFD Third Ave 1 Assoc., LLC, 15 NY3d 370, 373 (2010) (dismissing negligent misrepresentation claims against mechanical engineers):

> [defendants] must have been aware that [their] reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the [defendants] linking them to that party or parties, which evinces the [defendants] understanding of that party or parties' reliance."

The key phrase here is "known party." This requires knowledge of "the identity of the specific nonprivy party who would be relying upon [defendants]." Credit Alliance Corp. v Arthur Andersen & Co., 65 NY2d 536, 554 (1985), quoted in Sykes, 15 NY3d at 374. SOM claims, and plaintiff does not dispute, that SOM did not know the identity of the plaintiff or the specific unit owners when it performed its work (indeed, for all that appears, the plaintiff did not exist, and the eventual individual unit owners could not possibly have been known, at that time). The instant facts are so fundamentally distinguishable from those set forth by Judge (later Chief Judge) Kaye in her thoughtful and thorough opinion in Ossining Union Free Sch. Dist. v Anderson LaRocca

Anderson, 73 NY2d 417 (1989), that one would be hard-pressed to know where to begin to explicate the differences (but see Reply Memo at 10). In Board of Mgrs. of Marke Gardens Condominium v. 240/242 Franklin Ave. LLC, 20 Misc 3d 1138(A), *3 (Supreme Court, Kings County 2008), upon which plaintiff heavily relies, the contract at issue did not "attempt to limit defendant Architect's exposure to liability from third party beneficiaries." In AFA Protective Sys. v American Tel. & Tel. Co., 57 NY2d 912 (1982) (a case on which this Court performed considerable work for the plaintiff some 34 years ago), which plaintiff cites for the proposition that "whether a special relationship exists ... should also be left to the finder of fact," the claim of a "special relationship" was based on the fact that the telephone wires upon which the plaintiff's entire central station alarm business depended were available only from the defendant (SOM's description of this case, Reply Memo at 11, is topsy-turvy, but that is of no moment here).

Thus, whatever, exactly, plaintiff means by "professional malpractice" and "professional negligence" (and this Court considers them "duplicative" or "indistinguishable" if not the exact same thing, at least here), they are clearly breach of contract and/or negligence claims, and fall pursuant to Zeckendorf, Key, and Kerusa, et al.; and plaintiff's negligent misrepresentation claim falls pursuant to Sutton, Sykes, and Alliance.

Plaintiff's fraud claim must also be dismissed. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009). Perusing plaintiff's seventh purported cause of action turns up nothing more specific than the following:

> 92. Thus, upon information and belief Skidmore knew or had reason to know from visual inspections it made of the construction, that the Building, including the units contained therein, could and would not be delivered in accordance with the terms, conditions, and representations set forth in the Property Description.
>
> 93. Alternatively, Skidmore could and should have known, with reasonable effort, that certain conditions at the Building (including but not limited to the conditions described above) were not accurately described in the Property Description and, if Skidmore did not know, it made no reasonable effort to learn the truth.

Seventh Cause of Action (emphasis added). What "could and would" be are opinions and/or predictions, which are not actionable. And, what "conditions" are we talking about? In what way were they "not accurately described." As an old case had it (more or less), if I sell you a portion of my land, and I tell you that I do not intend to erect a gas station on my portion, and I intend to do just that, I have defrauded you. If I sell you a rabbit and tell you it's a hare, and I know the difference and you do not, I have defrauded you. If I tell you that building I am selling

you is covered by a hidden waterproof membrane, and there is no membrane at all, then I have defrauded you. But if I simply tell the Attorney General that a building is being constructed according to plan, and the owner incorporates that statement in an offer to sell it, and you claim it was not true, then the least you can do, if you sue me, is tell me, particularly, what I knew that informed me that the building was not being constructed according to plan. Any disgruntled purchaser can claim that an architect "knew" that a building was going bad; but a lawsuit based thereon has to be more than a hunch, as must a request for disclosure.

Indeed, plaintiff states that "SOM's documentary evidence and the questions they raise are all exclusively in SOM's possession and control." Opp. Memo at 7 (emphasis added). Thus, plaintiff has no evidence of fraud, and any attempt to obtain it through disclosure would be the proverbial, much-maligned "fishing expedition."

Plaintiff's negligent misrepresentation and fraud claims appear to be attempts to "end run" around the fact that plaintiff cannot maintain breach of contract or negligence claims. The gravamen of the complaint as against SOM is that SOM did something wrong. But as plaintiff cannot sue SOM for what SOM did, plaintiff has sued SOM for what SOM said. As SOM points out, what SOM said was basically just the parroting of some statutory language to the Attorney General, which Myrtle then including in the condominium Offering Plan. If that language omitted what was necessary, then the Attorney General could sue under the Martin Act, General Business Law Article 23-A (and there is no indication that he has). If that language contains affirmative misrepresentations, then, at a bare minimum, this Court would need to know what they are. Simply saying that SOM knew that the building was not being constructed according to plan is far too general to act as the predicate of a fraud claim under New York law. (This Court agrees with plaintiff that the Martin Act does not pre-empt plaintiff's purported common law fraud claim.)

Plaintiff argues (Opp. Memo at 15-16) that "Professionals ... may be subject to tort liability for failure to exercise reasonable care irrespective of a contractual obligation." Well, yes! If all liability was based on contract, we could stop teaching torts to first-year law students.

Moreover, this Court notes, again, that the Agreement provided that "no services performed [t]hereunder shall be deemed to create... a cause of action in favor of a third party against the ... Architect." Anything and everything SOM said about the building was a "service performed" under the Agreement. Furthermore, the individual unit owners obviously had, or could have demanded, a copy of the Agreement, and thus had actual or constructive knowledge of its contents. Although SOM does not argue this, this Court finds that plaintiff could not have justifiably relied on SOM's certification and reports given that the Agreement expressly excludes such reliance as the basis for any misrepresentation claims. Lack of justifiable reliance, alone, defeats a fraud claim. The point is not that parties to a contract can absolve themselves of all liability for all things to all third-parties; obviously not. The point is that parties who voluntarily enter into contracts have constructive (if not actual) knowledge of all contracts upon which their own contracts expressly depend, and upon which they might later seek to base liability.

Finally, the tenor and thrust of the cases cited above is that condominium owners cannot sue the design and construction professionals of their building; rather, they can sue the entity to whom they gave their money, as plaintiff has done here. Plaintiff's statement (Opp. Memo at 2) that "[t]he unique factual circumstances of this case ... distinguish this matter from all other black letter law cited by SOM" is not self-explanatory and never sufficiently explained. Rather, as against SOM, the instant case is a garden-variety lawsuit by disgruntled purchasers of condominium units against a design professional, and is of the sort that courts routinely dismiss.

Final Analysis

Plaintiff has not and could not assert breach of contract claims against SOM. The cases cited above foreclose any negligence claim. Finally plaintiff has failed to plead fraud with particularity (much less suggested that any evidence of it exists), and the documentary evidence precludes justifiable reliance, a necessary element of any such claim.

Conclusion

Thus, for the reasons stated herein, the instant motion is granted; the complaint is dismissed as against defendant Skidmore, Owings & Merrill, LLP only; and the clerk is directed to amend and/or supplement the file and/or enter judgment accordingly.

Dated: September 29, 2014

Arthur F. Engoron, J.S.C.