Board of Mgrs. of Ocean One Condominium v Ocean One Condominium, Inc.
2015 NY Slip Op 30371(U)
February 23, 2015
Supreme Court, Queens County
Docket Number: 704031/2013
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

ORIGINAL

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

BOARD OF MANAGERS OF OCEAN ONE CONDONIMUM, Plaintiff,	Index Number 704031/ 2013
-against-	Motion Date August 19, 2014
OCEAN ONE CONDOMINIUM, INC., ET AL., Defendants.	Motion Seq. No. 5

FILED
FEB 26 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 11 read on this motion by defendant William Leggio Architect, LLC (WLA) to dismiss the complaint and all cross claims against it pursuant to CPLR 3211(a)(1), (5), and (7).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 9
Reply Affidavits	10 - 11

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

This is an action to recover damages for the alleged defective design and construction of a condominium building located at 151 Beach Street in Rockaway, New York. On August 10, 2004, non-party A&J Rockaway, LLC (A&J), the owner of the building and general contractor, contracted with WLA to perform architectural and engineering services at the condominium. Defendant Ocean One Condominium, Inc. (sponsor) is the sponsor of the initial offering of the condominium and defendant Rosemill, LLC (Rosemill) is an affiliate of the sponsor and acted as the general contractor and construction manager for the construction of the building. It is alleged in the complaint that A&J was succeeded in interest by the

sponsor and/or Rosemill. The remaining defendants are corporations that allegedly manufactured or installed the siding, windows, and air conditioning systems at the building. A certificate of occupancy for the building was issued on September 24, 2010 and the first closing of a unit in the building occurred on October 20, 2010. In November 2011, WLA was contacted by nonparty Rubin Management, the management company of the condominium, regarding the existence of water infiltration problems at the building. It is alleged that WLA consulted with the sponsor from November 2011 through January 2013 regarding this issue. On September 23, 2013, plaintiff, the board of managers of the condominium consisting of a group of resident unit owners, commenced the within action by filing a summons with notice. Plaintiff subsequently filed a complaint on March 19, 2014 and an amended complaint on April 30, 2014, alleging causes of action for breach of contract, professional malpractice, and negligence against WLA.

That branch of WLA's motion to dismiss the complaint pursuant to CPLR 3211(a)(5) on the ground that the claims asserted against it are time-barred is denied. On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired (*see Bill Kolb, Jr., Subaru, Inc. v LJ Rabinowitz, CPA*, 117 AD3d 978 [2014]). An action to recover damages for professional malpractice, other than medical, dental, or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort, is subject to a three-year statute of limitations (CPLR 214[6]). A cause of action against an architect accrues upon completion of performance and when the professional relationship with the owner ends (*see Frank v Mazs Group, LLC*, 30 AD3d 369 [2006]). The completion of an architect's obligations must be viewed in light of the particular circumstances of the case (*Id.*). It is well-settled that where, as here, the architect is contractually obligated to conduct inspections to determine completion dates and issue a final certificate of payment, a cause of action against the architect does not accrue until the final certificate is issued (*see Parsons Brinckerhoff Quade & Douglas v EnergyPro Constr. Partners*, 271 AD2d 233 [2000]); *Methodist Hosp. v Perkins & Will Partnership*, 203 AD2d 435 [1994]; *Matter of Kohn Pederson Fox Assoc. [FDIC]*, 189 AD2d 557 [1993]). Issuance of the final certificate of payment represents a significant contractual right of the owner and concomitant obligation of the architect (*see State of New York v Lundin*, 60 NY2d 987, 989 [1983]). In this case, contrary to WLA's contention, WLA's contractual duties and, thus, its professional relationship with the owner, did not end upon issuance of its final invoice dated August 31, 2010. Rather, section 2.6.6.1, entitled Project Completion, of the contract

between WLA and A&J required WLA to "issue a final Certificate for Payment based upon a final inspection indicating the Work complies the requirements of the Contract Documents." WLA, however, submitted no evidence that it issued a final certificate of payment for the subject project.

WLA also moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Id.*). Where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (*see DiGiacomo v Levine*, 76 AD3d 946, 949 [2010]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2003]).

Applying these principles to the case at bar, the court finds that WLA established that the complaint against it should be dismissed. With respect to the cause of action for breach of contract against WLA, the complaint alleges that plaintiff has standing to assert such a claim as a third-party beneficiary of the architect agreement between WLA and A&J. The complaint also alleges that plaintiff is entitled to enforce the architect agreement since it is the successor of the sponsor. In support of its motion, WLA contends that plaintiff does not have standing to maintain a breach of contract claim against it because plaintiff lacks contractual privity with WLA and plaintiff is not a third-party beneficiary of its contract with A&J. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit, and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427 [2000]). Here, unlike the contract at issue in *Board of Mgrs. of Alfred Condominium v Carol Mgt.*, 214 AD2d 380 (1995), upon which plaintiff primarily relies to support its contentions, the architect agreement between WLA and A&J does not contain a specific reference to eventual purchasers of the condominium units as intended beneficiaries of the contract. Rather, section 1.3.7.5 of the subject architect agreement states, "Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or

Architect." As such, plaintiff is, at best, only an incidental beneficiary of the architect agreement between WLA and A&J (*see generally Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 [1976]; *see e.g. Board of Mgrs. of NV 101 N 5th St. Condominium v Morton*, 2013 NY Slip Op 50575[U] [Sup Ct, Kings County 2013]; *Board of Managers of 374 Manhattan Ave. Condominium v Harlem Infil LLC*, 2010 NY Slip Op 31518[U], **36 [Sup Ct, NY County 2010]). Moreover, any assertion that the unit owners are successors of the sponsor is insufficient to establish the requisite contractual privity (*see e.g. Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 2012 NY Slip Op 31671[U] [Sup Ct, NY County, 2012]). In view of the foregoing, plaintiff is not in contractual privity with WLA and, thus, lacks standing to assert a claim for breach of contract against WLA.

For the same reasons, the professional malpractice cause of action against WLA must be dismissed. Specifically, in its professional malpractice cause of action, plaintiff alleges that WLA breached a duty owed to plaintiff as a third-party beneficiary of the architect agreement by failing to exercise due care in its design work and supervision of construction of the building. The professional malpractice claim fails because the complaint does not allege or show that WLA owed a legal duty to plaintiff independent of the architect agreement. Since, as previously discussed, plaintiff is not a third-party beneficiary of the subject architect agreement, there is no contractual privity between WLA and plaintiff and, thus, plaintiff has no standing to maintain a professional malpractice cause of action against WLA (*see generally 905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667 [2011]; *see e.g. Board of Mgrs. of the 231 Norman Ave. Condominium v 231 Norman Ave. Prop. Dev.*, 2012 NY Slip Op 51573[U], ***8-9 [Sup Ct, Kings County, 2012]).

Turning to the negligence cause of action against WLA, plaintiff's allegations of negligence are merely restatements, albeit in slightly different language, of the contractual obligations asserted in plaintiff's cause of action for breach of contract. In particular, the complaint alleges that WLA owed a duty to plaintiff "as an architect performing design work and overseeing construction at the Building" and that WLA breached its duty by failing to exercise reasonable care in its design work and oversight of the construction of the building. These allegations of negligence are based on defects in the construction of the condominium, which sound in breach of contract rather than tort (*see Gallup v Summerset Homes, LLC*, 82 AD3d 1658 [2011]). It is well-established that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from

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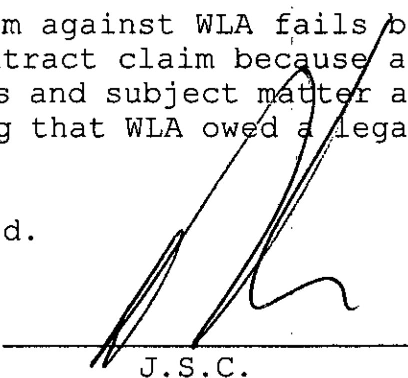
circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987];*Clemens Realty, LLC v New York City Dept. of Educ.*, 47 AD3d 666 [2008]). Simply alleging a duty of due care does not transform a breach of contract action into a tort claim (*Id.*). Therefore, plaintiff's negligence claim against WLA fails because it is duplicative of the breach of contract claim because as both arose from the same factual allegations and subject matter and the complaint does not allege facts showing that WLA owed a legal duty to plaintiff.

Accordingly, the motion is granted.



Dated: February 23, 2015

J.S.C.

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