

Board of Mgrs. of Brightwater Towers Condominium v SNS Org., Ltd.
2017 NY Slip Op 30310(U)
February 17, 2017
Supreme Court, Kings County
Docket Number: 503102/16
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of February, 2017

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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BOARD OF MANAGERS OF BRIGHTWATER
TOWERS CONDOMINIUM,

Plaintiff,

- against -

SNS ORGANIZATION, LTD., d/b/a
PLATINUM ENERGY GROUP,
NEW YORK ENGINEERING ASSOCIATES, P.C.,
NEAL RUDIKOFF, P.E., STUART N. SCHWARTZ,
and ANTHONY N. MANGONE,

Defendants.

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**DECISION, ORDER,
AND JUDGMENT**

Index No. 503102/16

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion, Affirmations (Affidavits),
Memorandum of Law, and Exhibits Annexed _____
Affirmation in Opposition, Memorandum of Law,
and Exhibits Annexed _____
Reply Memorandum of Law _____

8-15, 16
23, 24, 25
27

Defendants New York Engineering Associates, P.C., and Neal Rudikoff, P.E., move, pre-answer, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint of plaintiff Board of Managers of Brightwater Towers Condominium (plaintiff) against them.

Background

Plaintiff is the owner of two apartment buildings at 501 and 601 Surf Avenue in Brooklyn. In February 2013, plaintiff retained defendant SNS Organization, Ltd., d/b/a Platinum Energy Group (SNS), as the general contractor to design, construct, install, and

implement an energy-efficient heat and domestic hot-water system for the apartment buildings (the Project) (Complaint, ¶¶ 13-14, 21). “SNS stated [to plaintiff] that it [SNS] was responsible for filing all mandatory paperwork with the NYC Department of Buildings [the DOB] . . . on the Project” (*id.*, ¶ 19). SNS hired defendant New York Engineering Associates, P.C. (NYEA) for engineering services on the Project (*id.*, ¶ 25). NYEA is an engineering company, which is a professional corporation owned by defendant Neal Rudikoff, P.E. (*id.*, ¶¶ 25-26). SNS also hired defendant Rudikoff as an engineer on the Project (*id.*, ¶ 27). Rudikoff is a professional engineer duly licensed in the State of New York (*id.*, ¶ 28). SNS utilized the services of NYEA and Rudikoff, among others, to prepare and file building plans with the DOB and to obtain permits from the DOB for the Project (*id.*, ¶ 34). NYEA submitted to DOB the Job Application and Building Plans, dated Mar. 6, 2013, for the Project (*id.*, ¶ 38). On the same date, Rudikoff professionally certified the Building Plans for the Project (*id.*, ¶ 39).

Plaintiff asserts as against NYEA and Rudikoff (collectively, defendants) a single cause of action for professional malpractice. According to the complaint:

Defendants were under a duty to provide to plaintiff services that were performed in a professional and workmanlike manner (¶ 76).

Defendants negligently performed their obligations with respect to the Project (¶ 77).

Defendants departed from the degree of skill and care as is required of a reasonably prudent professional engineer in performing their obligations with respect to the Project (¶ 78).

Defendants failed to perform the work on the Project in a professional manner in accordance with sound engineering practices and procedures (§ 79).

Defendants' negligent performance included their failure to design and submit building plans that were fully compliant with the rules and regulations of the DOB or to take the necessary steps and procedures to determine whether certification was appropriate (§ 80).

Defendants' acts and omissions constituted professional malpractice, and have caused plaintiff "serious" damages (§ 86).

Defendants' failure to properly perform their professional duties proximately caused plaintiff damages to its property and pecuniary interests, including: (1) the cost of the heating and hot water system; (2) engineering and expert costs; (3) the cost of repairs and installing temporary measures to address the errors with the heating and hot-water systems; (4) and such other and further economic and personal damages as may be determined at trial (§ 88).

In lieu of an answer, defendants have moved to dismiss the complaint insofar as asserted against them. Their proffered grounds for dismissal are two-fold; first, that plaintiff's claims against them are barred by documentary evidence under CPLR 3211 (a) (1); second, that plaintiff's claims against them fail to state a cause of action under CPLR 3211 (a) (7). Plaintiff opposes.

Discussion

Documentary Evidence (CPLR 3211 [a] [1])

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1), the moving defendant has the burden of providing documentary evidence that utterly refutes the

plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Matter of Palmore v Board of Educ. of Hempstead Union Free School Dist.*, 145 AD3d 1072, 1073 [2d Dept 2016]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

Here, the affidavit of defendant Rudikoff and the affidavit of Stuart N. Schwartz (the CEO of SNS) are not “documentary evidence” under CPLR 3211 (a) (1) because these affidavits do not “conclusively establish that a fact alleged in the complaint was undisputedly not a fact at all” (*Hartnagel v FTW Contr.*, 2017 NY Slip Op 00961, *2 [2d Dept 2017]). Defendants’ other evidentiary submissions are likewise insufficient to utterly refute plaintiff’s factual allegations (*id.*). Accordingly, the branch of defendants’ motion, pursuant to CPLR 3211 (a) (1), for dismissal of the complaint against them as barred by documentary evidence, is denied.

Failure to State a Cause of Action (CPLR 3211 [a] [7])

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference” (*Sawitsky v State*, 2017 NY Slip Op 00335, *1 [2d Dept 2017]). When evidentiary material outside the four corners of the complaint is considered, and the motion is not converted into one for summary judgment, the question becomes whether plaintiff has a cause of action, not whether plaintiff has stated one (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

It is well established that “the owner of a construction project may not recover compensation for economic damages caused by the negligence of an architect or engineer with whom it is not in privity of contract” (*Key Intern. Mfg., Inc. v Morse/Diesel, Inc.*, 142 AD2d 448, 450 [2d Dept 1988]). It is undisputed that no actual contract existed either between plaintiff and defendant NYEA or between plaintiff and defendant Rudikoff. As such, a viable claim may only be established if “a relationship [either between plaintiff and NYEA, or between plaintiff and Rudikoff was] so close as to approach that of privity” (*Ossinning Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 [1989]).

Here, even accepting plaintiff’s allegations as to defendants’ conduct on the Project, these allegations do not establish a relationship so close as to approach contractual privity because there is no showing that defendants were doing anything but providing the engineering services required of them under their contracts with SNS.

Essentially, plaintiff maintains that its co-signing of defendants’ certifications to the DOB establishes the necessary privity relationship between it and defendants. However, defendants’ submissions to the DOB, co-signed by plaintiff, constituted their (defendants’) representations to the DOB (but not to plaintiff) that the proposed work would comply with the DOB regulations.

Accordingly, the remaining branch of defendants’ motion, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint against them for failure to state a cause of action is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' pre-answer motion is granted to the extent that, pursuant to CPLR 3211 (a) (7), the complaint is dismissed against them, without costs or disbursements, for failure to state a cause of action, and their motion is otherwise denied; and it is further

ORDERED the action is severed and continued against the remaining defendants, SNS Organization, Ltd., d/b/a Platinum Energy Group, Stuart N. Schwartz, and Anthony N. Mangone; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference in Commercial Part 4 on March 10, 2017 at 10:__ a.m.

This constitutes the decision, order, and judgment of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL