

Sutton Animal Hosp. PLLC v D&D Dev., Inc.
2018 NY Slip Op 32425(U)
September 24, 2018
Supreme Court, New York County
Docket Number: 652781/2016
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

SUTTON ANIMAL HOSPITAL PLLC,

Plaintiff,

- v -

D&D DEVELOPMENT, INC., DANIEL MAHONY, JOSEPH
GABRIEL, AIA, ARCHITECTS, P.C., JOSEPH GABRIEL, JOHN
AND JANE DOES 1-10, ABC CORPORATIONS 1-10, and
STERLING ENGINEERING SERVICES, P.C.

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 85, 87, 88

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 89

were read on this motion for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants JOSEPH GRABRIEL and JOSEPH GABRIEL, AIA, ARCHITECTS, P.C for summary judgment is granted with respect to the first cause of action (designated "count) of the first amended complaint; and it is further

ORDERED that the motion of defendant STERLING ENGINEERING SERVICES, P.C. to dismiss the complaint against it is granted with respect to the sixth cause of action (designated "count") of the first amended complaint; and it is further

ORDERED that the first cause of action and the sixth cause of action (designated "counts") of the first amended complaint are dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file a second amended complaint to replead the first and sixth cause of action incorrectly captioned "professional malpractice" as negligent misrepresentation; and it is further

ORDERED that the second amended complaint shall be served and filed within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, if plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the first and sixth causes of action shall be dismissed; and it is further

ORDERED that within thirty (30) days after service and filing of a second amended complaint, defendants Joseph Gabriel and Joseph Gabriel, AIA, Architects, and Sterling Engineering, P.C. shall serve and file a verified (amended) answer to the second verified amended complaint; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 331, 60 Centre Street, New York, New York, on December 4, 2018, at 11:00 AM.

DECISION

Moving defendants are correct that "'recovery will not be granted to a third person for pecuniary loss arising from the negligent representations of a professional with whom he or she has no contractual relationship'" (Key International Manufacturing, Inc. v Morse/Diesel, Inc., 142 AD2d 448, 452 [2d Dept. 1988]).

The first and sixth causes of action (captioned "counts") of the first amended complaint are entitled "Professional Malpractice" and allege, inter alia, that the architects/engineers

"failed to meet the standard of care required of all professional architects/engineers", "misrepresent[ed]... architectural/engineering skills"; "fail[ed] to comply with and uphold professional standards"; "required to exercise the ordinary and reasonable skill and knowledge required of all individuals license[sic] to engage in work as a professional architect/engineer"; "was bound to exercise reasonable care in designing and supervising the work it was contracted to perform" "professional negligence in its preparation of Construction Plans"; "fail[ed] to exercise the required care, diligence, skill and learning required of all professional architects/engineers".

As plaintiff seeks pecuniary loss only for such deviations from professional standards and does not allege any injury to real or personal property, such allegations state no cognizable claim against the moving defendants.

However, the complaint also alleges that the architect defendants "produced drawings" that were not code compliant and that the engineer defendant incorporated defective mechanical plans in the Construction Project plans. In addition, the opposing affidavit of plaintiff's expert states that the architects and engineers misrepresented that they were the Special Inspection Agency on their submissions to the New York City Department of Buildings. Such allegations sound in negligent misrepresentation and are analogous to the inaccurate findings that the Court of Appeals found to be actionable in Ossining Union Free School Dist. v Anderson LaRocca Anderson, (73 NY2d 417 [1989]). Plaintiff shall be granted leave to amend its pleadings to specify the misrepresentation(s) that were the subject of the drawings and/or mechanical plans that were transmitted to it, and upon which it reasonably relied to its detriment in the construction of its veterinary hospital.

With the exclusion of the allegations with respect to professional liability, and the inclusion of specific alleged misrepresentations in the drawings and plans, plaintiff will have a meritorious claim of negligent misrepresentation against each moving defendant. The first amended complaint and opposing affidavit clearly set forth that plaintiff had a relationship with each of them that was the "functional equivalent of contractual privity" as defined in Ossining Union, as such

claims meet the three-fold criteria for potential liability of the moving defendants articulated in Ossining Union, to wit, that "(1) [defendants possessed] awareness that the [drawing/plans] were to be used for a particular purpose; (2) [that there was] reliance by a known party or parties in furtherance of that purpose; and that there was (3) some conduct by the defendants linking them to the party or parties and evincing defendants' understanding of their reliance" (73 NY2d at 425).

With respect to the statute of limitations, the claim for negligent misrepresentation "accrues against a builder upon completion of construction", (City Dist. of City of Newburgh v Hugh Stubbins & Associates, Inc., 85 NY2d 535, 537 [1995]; see also 797 Broadway Group, LLC v Sracher Roth Gilmore Architects, 123 AD3d 1250, 1252 [3d Dept. 2014] ["'a claim for (negligence) against an engineer or architect accrues upon the completion of the performance under the contract and the consequent termination of the parties' professional relationship'" [citations omitted]).

In its opposing affidavit, plaintiff states that the its relationship with defendant architects and engineer ended on or about February 4, 2015. Thus, at minimum plaintiff has raised

issues of fact as to whether the complaint served on defendant architects on July 12, 2016 and the first amended complaint served on defendant engineers on December 16, 2017 were timely.

9/24/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE