| **14 LLC v J & R 240 LLC** |
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| 2020 NY Slip Op 31528(U) |
| May 20, 2020 |
| Supreme Court, New York County |
| Docket Number: 653063/2019 |
| Judge: Andrea Masley |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM
*Justice*

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14 LLC,

Plaintiff,

- v -

J & R 240 LLC A/K/A J&R 240 LLC, 240-242 LLC, JR FAMILY LLC, HERSNAG LLC, WILLIAM RADMIN, MILROSE CONSULTANTS, INC.,

Defendants.

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INDEX NO. 653063/2019

MOTION DATE

MOTION SEQ. NO. 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43

were read on this motion to/for DISMISSAL.

In motion sequence number 001, defendant Milrose Consultants, Inc. (Milrose) moves, pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the claims against it.

**Background**

The following facts are alleged in the complaint, unless otherwise noted, and for the purposes of this motion to dismiss, are accepted as true.

Plaintiff owns the properties located at 244 and 248 14th Street in New York, New York (Block 618, Lots 10 & 9) (Developer's Lot) (NYSCEF Doc. No. 18, Summons and Complaint ¶12). Defendants J&R 240 LLC (J&R) and 240-242 LLC (240-242), as tenants-in-common, each owned 50% of the properties located at 240 and 242 on 14th Street New York, New York (Block 618, Lots 13 & 12) (Owner's Lot) (*id.* ¶14). In early 2013, plaintiff sought to develop beyond its own zoning area, which lead to discussions with defendants J&R, 240-242, JR Family LLC, and Hersnag LLC (collectively, Sellers)

and defendant William Radmin,[1] regarding a possible sale of the Sellers' transferrable development rights, also known as air rights (TDRs or Air Rights) (*id.* ¶¶7, 19-20). Plaintiff alleges that "the law allows the Developer's Lot and Owner's Lot, as contiguous lots, to be considered a single zoning lot via agreement of the respective owners, and in turn, the parties can agree to assign the rights to develop within the combined zoning lot however they see fit" (*id.* ¶19).

On June 3, 2014, in anticipation of this sale, plaintiff retained defendant Milrose to perform "zoning consulting" services (*id.* ¶¶21, 23). "Milrose [was to] perform an analysis on the Developer's Lot (Buyer's property) with a specific eye towards purchasing Air Rights from neighbors both to the west and to the east" (*id.* ¶21). On June 4, 2013, Adam Nagin, on behalf of plaintiff, entered into a contract with Milrose (Consulting Agreement) (NYSCEF 20, Consulting Agreement). Specifically, the Consulting Agreement provides,

> "Milrose Consultants will provide zoning consulting services to assist in determining zoning development potential for 244-246 West 14th Street (Block 618, Lot 10) and 248 West 14th Street (Block 618, Lot 9). Milrose will be available to review drawings, answer questions and/or participate in conference calls as required. Upon completion of our zoning study, we will prepare a written report of our findings and recommendations based on research and analysis of information for purchasing air rights, window rights, and to cantilever to max out bulk from either:
> a) West Neighbor (250-252 West 14th Street)
> b) East Neighbor (240-2 West 14th Street)/ or
> c) Neither
> Compensation: $ 6,250.00 (25 @ $250.00 per hour)"

(*id.* at 3).

[1] William Radmin is a real estate broker with nonparty Friedman Roth Realty Services LLC (Friedman Roth and the Seller's agent in connection with the transaction at issue (NYSCEF 18, Complaint ¶¶15, 77).

Plaintiff communicated to Milrose that the analysis was for the purpose of determining what Air Rights were available to purchase from the Sellers (NYSCEF 18, Complaint ¶22).

On July 29, 2013, Milrose delivered its "Zoning Analysis Report" (Report) (id ¶24; NYSCEF 35, Report). The Report states,

> "The zoning analysis was performed to determine the potential maximum bulk allowances for the proposed mixed use new building for residential (zoning use group 2) and commercial (zoning use group 6) uses at tax lots 9 and 10. As well as the aforementioned tax lots in question, the unused development rights pertaining to adjacent neighboring tax lots 1, 8, 12, and 13, also known as 'air rights' have been *evaluated and estimated* so they may be transferred to lots 9 and 10"

(NYSCEF 35, Report at 2 [emphasis added]). In its Report, Milrose determined that the Owner's Lot had a combined 22,622 square feet available in "unused development rights floor area"; the property located at 240 West 14th Street had a net "unused development rights floor area" of 14,100 square feet, while the property located at 242 West 14th Street had 8,522 square feet available to sell (NYSCEF 18, Complaint ¶¶28-30; NYSCEF 35, Report at 7-8). The Report states that the entirety of the Owner's Lot was in "zoning district C6-2A" (*id.* ¶26; *see* NYSCEF 35, Report at 2).

In the summer of 2013, plaintiff provided the Report to the Sellers (*id.* ¶31). In subsequent months, the Report was used in negotiations between plaintiff and Sellers (*id.* ¶¶33-38). After several months of negotiations, on November 19, 2013, plaintiff and defendants J&R and 240-242 entered into an Option Agreement (Option) (*id.* ¶45).[2] Section 3.2 of the Option required plaintiff to provide a survey confirming the TDRs that were available for the Sellers to transfer (*id.* ¶59). "The Option states in regard to

[2] At this time, defendants JR Family LLC and Hersnag LLC did not own an interest in the Owner's Lot (NYSCEF 18, Complaint ¶45).

'development rights that the rights 'shall be determined by [Plaintiff's] independent survey and architectural review and *shall be confirmed by [Sellers] prior to closing*" (*id.* ¶51).

After entering into the Option, "plaintiff retained non-party Haynes Land Surveyors (Haynes) to perform the next step of determining what Air Rights would be purchasable from Owner's Lot by assisting Milrose in measuring metes and bounds of Owner's Lot, and determining what square footage the present structures on Owner's Lot occupied" (*id.* ¶74). Haynes completed the first draft of the survey (Draft) which was forwarded to the Sellers on February 19, 2014 (*id.* ¶¶74, 77). After the Sellers' architect reviewed the Draft, Radmin informed plaintiff that the Sellers' architect requested reductions of the measurements of existing buildings, which according to plaintiff would "increase the square feet of TDRs available to sell on a per-square-foot basis" (*id.* ¶79). Plaintiff's agent then forwarded Radmin's reduction request to Haynes.

On March 20, 2014, Haynes sent plaintiff an updated survey, which included Milrose's calculations (Survey) (*id.* ¶83). The Survey was forwarded to the Sellers (*id.*). The Survey represented the following total figures for the Owner's Lot: "'Max allowable buildable area' of 34,859 square feet"; "Total existing built floor area' of 17,208.5 square feet"; "'Net available area' (what could ultimately be sold) as 17,650.5 square feet" (*id.* ¶91).

Haynes collaborated with Milrose in connection with both the Draft and Survey (*id.* ¶¶74, 81). Plaintiffs allege that Milrose either provided or approved of the final numbers in both the Draft and Survey (*id.* ¶81). Haynes and plaintiff allegedly relied on Milrose's analysis as to what zoning district applied to the Owner's Lot (*id.* ¶82). The zoning analysis, including designation of zoning district and allowable floor area ratio,

"which is used to 'calculate the max allowable area', calculation of 'max allowable buildable area', and final measurement of 'net available area' were the exclusive work product of Milrose" (*id.* ¶92).

On March 31, 2014, Radmin emailed plaintiff's agent stating "we are satisfied with the numbers" (*id.* ¶98). On November 12, 2014, plaintiff sent the Sellers an "Election Notice to Exercise Option to Purchase Air Rights" (Election Notice) (*id.* ¶100). "The Election Notice specifically stated that 'the Haynes Survey dated December 2nd, 2013 previously supplied to you [Sellers], certified 11,870 net square feet for 242 West 14th and 5,780 square feet for 240 West 14th Street currently available. The gross square footage available for purchase for both properties is 17,650 square feet. The applicable purchase price is $335.00 per square foot, times 17,650 square feet, for a total option purchase price of $5,912,750.00'" (*id.* ¶101). There was no objection to the numbers contained in the Election Notice (id. ¶103).

On December 11, 2014, plaintiff and the Sellers[3] closed on plaintiff's purchase of the Sellers' Air Rights (Transaction) (*id.* ¶104). After the Transaction, plaintiff allegedly continued to retain Milrose to assist with the project of developing its property with the new 17,650 square feet acquired, but did not immediately seek to develop its rights (*id.* ¶¶152-53). In 2018, a nonparty consultant working on plaintiff's behalf noticed a possible inconsistency with the zoning districts with respect to the Owner's Lot (*id.* ¶154). On December 4, 2018, plaintiff informed Milrose of the possible inconsistency (*id.* ¶155).

On January 3, 2019, Kathleen d'Erizans of Milrose responded in an email,

[3] Simultaneously to the Transaction, Hersnag and JR Family received a 25% interest as tenants-in-common in the Owner's Lot (NYSCEF 18, Complaint ¶105).

> "[p]lease see the revised zoning study as requested. We have updated any information that may have changed since 2013. In addition to the zoning district boundary we discussed previously, we found a difference in the floor area of 2,000 sf for Lot 12 between the approved plan set we used and the ZOLA, City Planning zoning database that was not available in 2013. ZOLA's floor area numbers are often an estimate, but we wanted to give all of the information currently available"

(*id.* ¶156). On January 8, 2019, Diane Luebs of Milrose confirmed, via email, that the Original Report and Survey overestimated the total available TDRs by 3,000 square feet and attached a "revised memo" (Corrected Report) (*id.* ¶¶ 157, 160).

The Corrected Report contains several material changes, which plaintiff alleges should have been provided to it prior to the Transaction (*id.* ¶161). The Corrected Report states that the Owner's Lot was not exclusively within zoning district C6-2A, but had portions located within zoning districts C1-6 and R6 (*id.* ¶162; NYSCEF 37, Correct Report at 2 ["properties are mainly located in C6-2A; there are also portions of Lot 12 located in an R6 and C1-6 district"]). Further, the Corrected Report calculates the combined total Air Rights available for sale at 14,635.5 square feet, rather than the 17,650 square feet provided for in the Survey and agreed upon in the Transaction (*id.* ¶168).

Plaintiff alleges that, as a result of the discrepancies, it overpaid the Sellers by $1,009,857.50 for 3,014.5 square feet of non-existent Air Rights (*id.* ¶169). The Sellers have refused to return the over-payment despite requests by plaintiff (*id.* ¶170).

On May 22, 2019, plaintiff commenced this action against the Sellers, Radmin, and Milrose. Plaintiff brings causes of action for grossly negligent professional malpractice, professional malpractice, breach of contract, and negligent misrepresentation against Milrose. Milrose now moves to dismiss the claims against it.

**Discussion**

In considering a CPLR 3211(a) (7) motion to dismiss, the court is to determine whether the pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-52 [2002]). The pleadings are afforded a liberal construction, and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, when the movant seeks dismissal pursuant to CPLR 3211(a) (1), and offers evidentiary or documentary material, the court must determine whether the complaint has a cause of action, not whether it has stated one (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408 [2d Dept 2005]).

On a motion to dismiss based on CPLR 3211(a) (5), the defendant must establish a prima facie case that the plaintiff's time to commence an action has expired; then the burden shifts to the plaintiff to raise a question of fact as to whether it commenced the action within the applicable limitations period or whether an exception or tolling applies (*Williams v City of Yonkers*, 160 AD3d 1017, 1019 [2d Dept 2018]).

Malpractice Claims

In order to maintain a claim for professional malpractice, defendant must be a professional (*See Busker on the Roof Partnership v Warrington*, 283 AD2d 376 [1st Dept 2001]). To determine whether a group or individual is a professional for purposes of a professional malpractice claim, courts must look for shared qualities, including "extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted

in the marketplace and a system of discipline for violation of those standards" (*Chase Scientific Research v NIA Group*, 96 NY2d 20, 29 [2001] [citation omitted]). "Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients" (*id.* [citation omitted]).

For the purposes of the malpractice claims, Milrose is not a professional. Plaintiff alleges that Milrose provided "professional engineering, architectural, and consulting services" (NYSCEF 18, Complaint ¶368). Plaintiff further alleges that "[s]pecifically, Milrose was to perform an initial analysis of the zoning districts at Owner's Lot, and then, when provided measurements of metes and bounds and the present buildings of Sellers by Haynes, to calculate the total Air Rights available at the Owner's Lot, as well as the free-to sell Air Rights available after subtracting the measurement of the present buildings" (*id.* ¶370). The Consulting Agreement provides that contracted-for services were "zoning consulting services to assist in zoning development potential" (NYSCEF 20, Consulting Agreement).

Besides plaintiff's conclusory allegation that Milrose provided engineering and architect services, there is no specific allegation or evidence that Milrose is a licensed engineer or architect, groups that would fall under the ambit of a professional (*see Travelers Indem. Co. v Zeff Design*, 60 AD3d 453 [1st Dept 2009] [engineer malpractice]; *Frank v Mazs Group, LLC*, 30 AD3d 369 [2d Dept 2006] [architect malpractice]). Rather, the complaint and the Consulting Agree are clear that Milrose was hired to perform consulting services on zoning issues.

Reviewing the criteria above, a zoning consultant does not fall within the ambit of a professional (*see e.g. Busker on the Roof Partnership v Warrington*, 283 AD2d 376 [1st Dept 2001] [insurance brokers and agents are not professionals for purposes of

professional malpractice]; *Leather v. US Trust Co. of New York*, 279 AD2d 311 [1st Dept. 2001] [financial planners are not professionals for the purpose of professional malpractice]; *Vista Food Exchange, Inc. v. BenefitMall*, 138 AD3d 535 [1st Dept. 2016] [HR consulting specialists are not professionals for purpose of professional malpractice]; *Castle Oil Corp. v Thompson Pension Emple. Plans, Inc.*, 299 AD2d 513 [2d Dept 2002] [actuaries are not professionals for malpractice purposes]; *NY & Presbyt. Hosp. v Tishman Constr. Co.*, 180 Misc 2d 193 [Sup Ct, NY County 1999] [construction consultant is not a professional for malpractice purposes]).

To the extent that plaintiff alleges "gross negligent malpractice," the court notes that the conduct alleged does not "smack of intentional wrongdoing" and does is not "conduct that evinces a reckless indifference to the rights of others" (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 [1992]). Plaintiff's allegation that Milrose failed to correctly determine the zoning district of the Owner's Lot, at most, would amount to an ordinary negligence claim (*see Hauser & Wirth Inc. v Fresh Direct, Inc.*, 2019 NY Slip Op 30435[U], *3 [Sup Ct, NY County 2019]).

Thus, plaintiff's claims for gross negligent malpractice and malpractice are dismissed.

Negligent Misrepresentation Claim

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

"It is a well-established principle 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" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). "[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort. Plaintiff's subjective claims of reliance on defendants' expertise do not give rise to a confidential relationship whose requisite high degree of dominance and reliance existed prior to the alleged" (*Waterscape Resort LLC v McGovern*, 107 AD3d 571, 571 [1st Dept 2013] [internal quotation marks and citations omitted]). "A special relationship of trust and confidence does not merely arise from an arm's-length business transaction. (*id.* [citation omitted]).

Plaintiff has not alleged a legal duty separate from Milrose's contractual obligations. Plaintiff's conclusory allegation that a special relationship was formed, imposing a duty, upon whose expertise plaintiff relied is not sufficient (*Waterscape Resort LLC,* 107 AD3d at 571). Thus, this cause of action is dismissed.

Breach of Contract

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [citation omitted]).

There is no dispute that plaintiff and Milrose entered into the Consulting Agreement in June 2013. However, plaintiff concedes in the complaint that Milrose *did not breach* its obligations under that agreement (NYSCEF 18, Complaint ¶380 [emphasis added]). Rather, plaintiff alleges that Milrose "has breached *this* contract by failing to deliver an accurate zoning study of Owner's Lot" (*id.* ¶381). These allegations

are conflicting and the complaint does not allege any other agreement besides the Consulting Agreement. It is not clear from the pleading what "this" agreement that was allegedly breached is (*see id.* ¶381). The court believes ¶380 of the complaint might contain a typographical error but cannot sustain a claim on an assumption. Thus, this claim is dismissed with leave to replead.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Milrose (sequence number 001) is granted and the complaint is dismissed against defendant Milrose; and it is further

ORDERED that plaintiff 14 LLC is granted leave to replead its claim for breach of contract only within 20 days of this court uploading the decision onto NYSCEF.

5/20/2020
DATE

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