

Mandracchia v Renovate-Create Sourcing & Procurement Corp.
2020 NY Slip Op 32160(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 653953/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON **PART IAS MOTION 37EFM**

Justice

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MARTINE MANDRACCHIA,

Plaintiff,

- v -

RENOVATE-CREATE SOURCING AND PROCUREMENT
CORP., ALAN FRIEDBERG, IMAGEN ARCHITECTURE
LLC, CUTSOGEOGE TOOMAN & ALLEN ARCHITECTS
PC, DOUGLAS ELLIMAN REALTY LLC, DOUG ELLIMAN
PROPERTY MANAGEMENT, 405/63 OWNERS CORP,
JOHN AND JANE DOES 1-10,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to

DISMISS

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss is granted
in part and denied in part for the reasons set forth herein.

On July 10, 2019, plaintiff, Martine Mandracchia ("Mandrachia") commenced this action
against defendants Renovate-Create Sourcing and Procurement Corp., Alan Friedberg, Imagen
Architecture LLC, Cutsogeoorge Tooman & Allen Architects PC, Douglas Elliman Realty LLC,
Doug Elliman Property Management, 405/63 Owners Corp., and John and Jane Does 1-10,
seeking to recover monetary damages resulting from a renovation project gone bad. On or about
October 17, 2019, Mandracchia filed her first amended verified complaint, alleging causes of
action for: (1) breach of contract as against Alan Friedberg and Renovate-Create Sourcing and
Procurement Corp.; (2) breach of the implied covenant of good faith and fair dealing as against
Alan Friedberg and Renovate-Create Sourcing and Procurement Corp.; (3) negligence as against
Alan Friedberg and Renovate-Create Sourcing and Procurement Corp.; (4) violation of Multiple
Dwelling Law ("MDL") § 78 as against Doug Elliman Property Management, 405/63 Owners
Corp., and Cutsogeoorge Tooman & Allen Architects PC; (5) negligence as against Cutsogeoorge
Tooman & Allen Architects PC; (6) breach of fiduciary duty as against Doug Elliman Property
Management, 405/63 Owners' Corp., and Cutsogeoorge Tooman & Allen Architects PC; (7)
breach of contract as against Imagen Architecture LLC; and (8) negligence as against Imagen
Architecture LLC.

The complaint alleges that defendants, in essence, caused or allowed Mandracchia's apartment to
be defectively renovated. As relevant to this motion, defendant 405/63 Owners Corp., the
cooperative corporation that owns the building, and/or Doug Elliman Property Management, the

managing agent for 405/63 Owners Corp., retained defendant Cutsogeorge Tooman & Allen Architects PC (“CTA”) to act as architects on behalf of 405/63 Owners Corp. Pursuant to the by-laws and house rules of the cooperative corporation, Mandracchia was required to submit the architectural plans for the renovation to 405/63 Owners Corp. to be reviewed and approved by CTA. Mandracchia alleges that it was CTA’s duty to 405/63 Owners Corp. to ensure the health and safety of building residents as to any and all building renovations. Mandracchia further alleges that CTA performed a full compliance review of the architectural plans, which they ultimately signed off on, and that they conducted multiple inspections of the construction work being performed. Additionally, Mandracchia alleges that CTA falsely signed off on the job with the Building Information System of the Department of Buildings when in reality the work was unfinished.

CTA now moves, pursuant to CPLR 3211(a)(7), to dismiss all causes of action in the first amended verified complaint asserted against it.

CTA’s Arguments in Support of Motion

In support of its motion, CTA argues that Mandracchia has no viable negligence or breach of fiduciary duty claim against it. CTA asserts that such claims require the existence of a professional relationship, privity of contract or a relationship approaching privity between the parties. Here, CTA asserts that no such relationship existed and that Mandracchia has not plead that any such relationship existed. CTA also argues that Mandracchia has failed to plead any misconduct by CTA and thus Mandracchia cannot establish that CTA directly caused any damages to Mandracchia. In addition, CTA argues that the negligence claim must be dismissed because the only damages sought are not recoverable in this type of action. CTA also asserts that Mandracchia’s claim for breach of fiduciary duty does not comply with the heightened pleading requirements (i.e., particularized allegations) of CPLR 3016(b). As to the cause of action for violating MDL § 78, CTA argues that the Court must dismiss this claim, as there is no evidence that CTA either caused or created the conditions alleged or had notice of their existence.

Mandracchia’s Arguments in Opposition to Motion

In opposition to the instant motion, Mandracchia asserts that she has sufficiently pleaded all the causes of actions she has interposed against CTA. Mandracchia argues that it is not necessary for a third-party agent, such as CTA, to be in privity with a plaintiff to be held liable for negligence or to be found liable under MDL § 78. Mandracchia argues that agents of owners can have both direct and vicarious liability for acts that occur at the premises, and, using summary judgment language, that a question of fact exists as to whether CTA exercised any kind of control over the work site such that CTA had notice of or contributed to the negligent condition. Mandracchia asserts that CTA did in fact have at least some control over the work site as she was required to submit her architectural plans to CTA for approval. As to the cause of action sounding in breach of fiduciary duty, Mandracchia argues that where an agent of a building owner aids the owner in violating its fiduciary duty to a cooperative stockholder, the agent may also be held liable to the stockholder for a violation of the duty. Thus, CTA, as agent for 405/63 Owners Corp., can be found liable for breach of 405/63 Owners Corp’s fiduciary duty.

Essentially, Mandracchia asserts that CTA, as the architects hired by 405/63 Owners Corp., the cooperative corporation building owner, who signed off on the architectural plans and ultimately

signed off to the Department of Buildings that the renovation was complete, was responsible to oversee the proper renovation of the apartment.

Discussion

Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) (“[w]hether a [counterclaim] plaintiff can ultimately establish its allegations is not part of the calculus” in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties “notice” of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

The Fourth Cause of Action, for Violation of MDL § 78

MDL § 78(1) states,

Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest. Any such persons who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four.

In this Court’s considered view, the subject statute does not apply to CTA. The language in the statute that “[a]ny such persons who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties ...” refers to owners, tenants, tenant’s family members, or any guest. If the legislature had intended that “any person” could be liable it would not have used the word “such.” Furthermore, the statute seems intended to ensure that owners and occupants keep apartments safe, not to establish a wider ambit of possible liability.

Accordingly, the fourth cause of action is subject to dismissal as against CTA.

The Fifth Cause of Action, for Negligence

To plead a negligence cause of action, the complaint must allege: (1) the existence of a duty; (2) a breach of the duty; (3) proximate cause; and (4) damages. Febesh v Elcejay, 157 AD2d 102, 104 (1st Dep’t 1990).

To the extent the complaint pleads a cause of action against CTA for “negligence,” CTA is correct that in the absence of a relationship approaching privity, a claim for “architectural malpractice” should be dismissed. 905 5th Assoc., Inc. v Weintraub, 85 AD3d 667, 668 (1st Dep’t 2011) (“In the absence of a relationship approaching privity, plaintiffs’ claim ... for architectural malpractice was properly dismissed.”).

However, “lack of privity does not affect plaintiffs’ ability to bring a general negligence claim against the architect for property damage sustained by them.” *Id.* In this Court’s view, CTA owed a duty to whomever CTA could reasonably foresee could be damaged by its failure to exercise ordinary care. Furthermore, Mandracchia has alleged that CTA breached its duty by approving the renovation work despite the obvious deficiencies; caused the injuries alleged by approving the completed renovation work and by failing to advise Mandracchia that the contractor she hired was not licensed to act as a general contractor in New York; and damages. Moreover, Mandracchia alleges that CTA directed or controlled the work that supposedly caused the subject damages, and thus, this Court should not dismiss this cause of action.

CTA argues that this claim must be dismissed because the only damages Mandracchia is seeking, economic damages, are not recoverable in an action for professional negligence. However, this Court believes that Mandracchia’s claim is not for “economic damage” per se.

Accordingly, the fifth cause of action is not subject to dismissal.

The Sixth Cause of Action, for Breach of Fiduciary Duty

To plead a breach of fiduciary duty cause of action, the complaint must allege (1) the existence of a fiduciary relationship; (2) misconduct by defendant; and (3) damages caused by that misconduct. *Burry v Madison Park Owner LLC*, 924 NYS2d 77, 78 (1st Dept 2011). “A fiduciary relationship ‘exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.’ Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions.” *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (Ct App 2005) (citing Restatement [Second] of Torts § 74, comment a).

Here, the complaint fails to allege facts sufficient to create a fiduciary duty. Specifically, the complaint fails to set forth the requisite element of the existence of a fiduciary relationship between Mandracchia and CTA. It is clear from the record that CTA did not have a contractual relationship with Mandracchia, thus no express fiduciary relationship was created between them. Moreover, Mandracchia has failed to allege anything more than a standard relationship in the relevant commercial marketplace.

Accordingly, the sixth cause of action is subject to dismissal as to CTA.

The Court has considered CTA’s other arguments in support of the instant motion and finds them unavailing and/or non-dispositive.

This Court strongly encourages all parties to participate in a settlement conference, virtually or in person. An email to the Court with a copy to all parties can get the ball rolling.

Conclusion

Motion to dismiss the fourth cause of action, for violation of MDL § 78, as to CTA is granted; motion to dismiss the fifth cause of action, for negligence, as to CTA is denied; and motion to

dismiss the sixth cause of action, for breach of fiduciary duty, as to CTA is granted. CTA's answer to the first amended verified complaint (negligence) to be served within thirty days of today.

Additionally, this matter is scheduled for a virtual preliminary conference on July 14, 2020 at 11:00 a.m. Parties should email chambers at argreenf@nycourts.gov for further information.



<u>6/26/2020</u>		<u>ARTHUR F. ENGORON, J.S.C.</u>	
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE