

**Mandracchia v Renovate-Create Sourcing & Procurement Corp.**

2021 NY Slip Op 30395(U)

February 9, 2021

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

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 44, 45, 49, 51, 52, 53, 54, 55, 56, 62

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, it is Upon the foregoing documents, it is hereby ordered that defendant's instant motion to dismiss is granted.

Background

On July 10, 2019, plaintiff, Martine Mandracchia ("Mandrachia") commenced the instant action against defendants, Renovate-Create Sourcing and Procurement Corp., Alan Friedberg, Imagen Architecture LLC ("Imagen"), Cutsogeorge Tooman & Allen Architects PC, Douglas Elliman Realty LLC, Doug[las] Elliman Property Management, 405/63 Owners Corp., and John and Jane Does 1-10, seeking to recover monetary damages as a result of a substandard renovation project. Mandracchia's first amended complaint alleges eight causes of action, to wit, (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 § 78 as against Doug Elliman Property Management, 405/63 Owners Corp., and Cutsogeorge Tooman & Allen Architects PC; (5) negligence as against Cutsogeorge Tooman & Allen Architects PC; (6) breach of fiduciary duty as against Doug Elliman Property Management, 405/63 Owners' Corp., and Cutsogeorge Tooman & Allen Architects PC; (7) breach of contract as against Imagen Architecture LLC; and (8) negligence as against Imagen Architecture LLC.

The first amended complaint alleges that defendants caused or allowed Mandracchia's apartment to be defectively renovated. As relevant here, in June 2013, Mandracchia retained Imagen to draw up architectural plans for the renovation. Upon recommendations from board members of

405/63 Owners Corp., Mandracchia retained Alan Friedberg and his company, Renovate-Create Sourcing and Procurement Corp., to work as the general contractor for the renovation. Mandracchia alleges that Friedberg and his company did a terrible job. Additionally, Mandracchia alleges that defendants, including Imagen, falsely signed off on the job with the Building Information System of the Department of Buildings even though the work was unfinished.

Imagen now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss, solely as against it, all causes of action in the first amended verified complaint.

#### Imagen's Arguments in Support of Motion

In support of its motion, Imagen asserts that the express terms of the parties' contract establish that Imagen was not contractually obligated to: (1) ensure that Friedberg's work was compliant; and/or (2) supervise or inspect the renovation. Imagen also argues that the negligence claim fails because it is duplicative of the breach of contract claim, as the negligence claim is based upon Imagen's alleged contractual obligations (i.e., Mandracchia failed to allege a violation of a legal duty independent of Imagen's contractual duties). Additionally, Imagen asserts that the negligence claim fails because Mandracchia failed to assert any allegations that would sustain a claim for professional negligence (i.e., any allegations that Imagen departed from accepted standards of practice etc.). Imagen also points out that the damages sought by Mandracchia, direct and consequential non-accidental economic loss, are not recoverable under a theory of negligence.

#### Mandracchia's Arguments in Opposition to Motion

In opposition to the instant motion, Mandracchia agrees that based upon the express language of the parties' contract, the seventh cause of action, for breach of contract, should be dismissed. As to the cause of action for negligence, Mandracchia argues that Imagen's liability derives not from the contract, but from Imagen's improper performance of an obligation undertaken by Imagen's work as a professional architect. Essentially, Mandracchia argues that Imagen undertook a duty to conduct a final inspection to certify to the Department of Buildings that the renovation work was performed properly. Also, although Imagen had no duty to conduct a final inspection, it did, and it should have known or realized that the renovation work that was done was not in compliance with the architectural plans, was not complete, and did not comply with various building codes and regulations. Additionally, Mandracchia argues that there are questions of fact relating to Imagen's final inspection of the renovation, questions that can be answered only after discovery.

#### Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1<sup>st</sup> Dept. 2013) (“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”). 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 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 proven and the material elements of a cause of action. CPLR 3013.

#### The Seventh Cause of Action, for Breach of Contract

To plead a breach of contract cause of action, the complaint must allege (1) the existence of a contract; (2) the plaintiff’s performance thereunder; (3) the defendant’s breach thereof; and (4) resulting damages. Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1<sup>st</sup> Dept. 2010).

Here, the contract between the parties, dated June 25, 2013, expressly states that Imagen was: not retained to perform any supervision services; not required to make exhaustive or continuous on-site inspections to check quality or quantity of the work; not responsible for compliance with state and local codes and applicable ordinances during construction; and not responsible for the actions of the contractor or any subcontractors etc. As the parties’ agreement presents an irrefutable defense to the breach of contract cause of action, this Court must dismiss said claim pursuant to CPLR 3211(a)(1).

#### The Eighth 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 (1<sup>st</sup> Dept. 1990).

As stated above, Imagen argues that this claim fails for two reasons: first, because it is duplicative of the breach of contract cause of action, and second, because the complaint fails to allege that Imagen departed from accepted standards of practice. Mandracchia argues that Imagen voluntarily assumed a duty to perform its work in a non-negligent manner when Imagen voluntarily conducted a final inspection of the work, and that Imagen breached its duty when it signed off on the job with the Department of Buildings even though it knew or should have known that the work was incomplete and failed to conform to the architectural and construction plans. In support of her argument, Mandracchia attaches copies of letters from the Department of Building addressed to Imagen that state that the renovation project is completed and has been signed off on in the Building Information System. The letter goes on to say that “the owner retained a registered professional engineer or registered architect, who certified that he/she inspected the work approved on this application and that it complies with the applicable laws, rules and regulations of the Department of Buildings.” (NYSCEF Doc. No. 55.)

This Court finds that the negligence cause of action must be dismissed for two independent reasons. First, it is duplicative of the breach of contract cause of action. The parties had a written contract that governs their legal relationship. Bd. of Mgrs. Of 100 Congress Condominium v SDS Congress, LLC, 152 AD3d 478, 481 (2d Dept. 2017) (“merely alleging that a party breached a contract because it failed to act with due care will not transform a strict breach of contract claim into a negligence claim.”) (quoting Verizon N.Y., Inc. v Optical Communications Group, Inc., 91 AD3d 176, 180 (1<sup>st</sup> Dept. 2011); Clark-Fitzpatrick, Inc. v Long

Island R. Co., 70 NY2d 382, 389 (1987) (plaintiff cannot sustain negligence claim against defendant by merely asserting breach of “duty of due care”). Second, the subject contract specifically states that Imagen is not responsible for and will not inspect the premises. In this Court’s view, you cannot recover against a person for what you consider to be a negligent act when the contract that governs the parties’ relations specifically says that that person is not obligated to perform that act.

Obviously, Mandracchia could have hired someone else to inspect the work and could not justifiably rely on anything Imagen did after drawing the architectural plans.

This Court has considered Mandracchia’s remaining arguments in opposition to the instant motion and finds them unavailing and/or non-dispositive.

Conclusion

Motion to dismiss granted. This Court hereby directs the Clerk to enter judgment dismissing the complaint only as against defendant Imagen Architecture LLC.

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2/9/2021  
DATE

ARTHUR F. ENGORON, 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"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE