

<b>Mathias v Fiskaa Eng'g, LLP</b>
2021 NY Slip Op 31746(U)
April 18, 2021
Supreme Court, New York County
Docket Number: 655516/2017
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X  
ELLEN MATHIAS, ENRICO DEALESSANDRINI,

INDEX NO. 655516/2017

Plaintiff,

MOTION DATE 01/07/2021

- v -

MOTION SEQ. NO. 005

FISKAA ENGINEERING, LLP, FISKAA, LLC, JK  
CONSTRUCTING SERVICES, INC., JOZEF KUZDZAL,

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X  
HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is

This matter arises from the renovation of a penthouse condominium unit. Plaintiffs Ellen Mathias and Enrico Dealessandrini allege that the wine room constructed as part of the renovation failed to maintain an adequate temperature to maintain the storage of wine. Defendant Fiskaa Engineering, LLP (“Fiskaa”) moves for summary judgment dismissing the Plaintiffs’ Third Amended Complaint contending that its professional engineering services were within the locally accepted standard of care, that it properly calculated the heat load for the wine room, and selected a wine cooler with sufficient capacity to cool the wine room to the objective temperature of 55 degrees. Fiskaa alleges that the purported failure of the wine room to maintain the desired objective temperature was caused by construction issues for which Fiskaa was not responsible as it was not the special inspector for this matter.

### Analysis

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 [1<sup>st</sup> Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In support of its motion, Fiskaa submits the affidavit of Stephen Papadakis, a partner and licensed engineer at Fiskaa. Papadakis states that Fiskaa drafted plans and specifications only for the procurement and installation of the wine room AC unit and associated air ducts for the wine room AC unit and was not responsible for the design, architectural work or the special inspections. Fiskaa also submits the parties’ contract, “Proposal for Engineering Services,” dated August 22, 2014.

Specifically, Fiskaa states that it properly determined the heat load of the subject wine room and determined that the wine room AC unit needed to have capacity to remove 2,353 British Thermal Units per hour (BTUH) of heat from the wine room, and that Fiskaa also determined that the wine room AC unit would need to possess the capacity to remove this

amount of heat from the wine room through the air circulating in the air ducts – a “fully ducted” system. Fiskaa contends that it specified a WhisperKOOL Model 3500tiR Extreme Fully Ducted AC unit and provided specifications for Model 3500tiR, which stated that such system had a rated capacity of 2,688 BTUH for a room size of 800 cu. ft. Such unit if installed in a wine room as specified in the architectural plans and manufacturer’s specifications, and operated pursuant to manufacturer’s specifications should be able to maintain an interior wine room temperature of 55°F to 60°F. Further, Fiskaa argues that it specified the wine room AC unit with the understanding that the contractor would install the wine room AC unit in conformance with the manufacturer’s specifications.

In opposition, Plaintiffs offer the deposition testimony of Ms. Denise Rotondi, a cooler installer, the affidavit of plaintiff Enrico de Alessandrini, and verified business records from the Whisper Kool Corporation. Plaintiff also offers an Affidavit of Mr. Locicero, PE, who identifies himself as a professional engineer, although he does not actually attest that he possesses a license to practice as a professional engineer in New York.

Plaintiffs contend that Fiskaa was responsible under the contract for determining the necessary heat-removal specifications to chill the Wine Room to the required temperature and for selecting a specific cooling unit that had the capacity to chill the space to the appropriate temperature. Plaintiffs state that Fiskaa designed a dysfunctional wine room and miscalculated the cooling specifications, which led to the selection of an undersized cooling unit.

Although Fiskaa met their burden for summary judgment, Plaintiffs successfully raised material questions of fact as to whether Fiskaa accurately calculated the heat load of the subject wine room and selected the appropriate cooling unit to maintain a temperature of 55 degrees in the wine room. Accordingly, Fiskaa’s motion for summary judgment is denied.

It is hereby,

ORDERED that Fiskaa's motion for summary judgment is denied.

4/18/2021

DATE



SHAWN TIMOTHY KELLY, J.S.C.

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