

<b>Privilege Underwriters Reciprocal Exch. v Ferguson &amp; Shamamian Architects, LLP</b>
2023 NY Slip Op 30233(U)
January 23, 2023
Supreme Court, New York County
Docket Number: Index No. 160174/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 160174/2020

PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE
A/S/O SUSAN TISCH ALLEN AND JEFF ALLEN,

MOTION DATE 08/04/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

FERGUSON & SHAMAMIAN ARCHITECTS, LLP, PETER
COSOLA, INC.,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15,
16, 17, 19, 20, 21, 22

were read on this motion to/for DISMISS

Plaintiff Underwriters Reciprocal Exchange (as a subrogee and assignee of Susan and
Jeff Allen) commenced the instant action against defendants Ferguson & Shamamian Architects,
LLP (hereinafter "F&S") and Peter Cosola, Inc. ("Cosola") alleging negligence causes of action
against each for their respective roles in a renovation work performed at 480 Park Ave, NY, New
York (the "premise"). In Motion Sequence 001, F&S moves pursuant to CPLR 3211 (a) (7),
3211 (h), and 214 (6) for orders dismissing the complaint against it. For the following reasons,
F&S's motion is granted.

FACTUAL BACKGROUND

In 2006, Jay and Erika Abramson hired F&S (as their architect) and Cosola (as their
general contractor) to perform a renovation project in their apartment unit 12B. That project
included work on the unit's HVAC system. F&S's design for the HVAC project received
approval from the City and included locating a waste receptor inside a closet, behind an access
door. (NYSCEF doc no. 5 at ¶16, complaint.) There is no dispute that F&S and Cosola
completed the project.

On July 21, 2019, the waste receptor overflowed, causing property damage to Susan and
Jeff Allen's newly renovated apartment unit 11B. As the Allens' insurer, Privilege Underwriters
paid insurance benefits in the amount of \$585,156.98. After providing both F&S and Cosola with
a notice of claim (NYSCEF doc. no. 1) pursuant to CPLR 214-d in November 2020, Privilege
Underwriters commenced the instant action in May 2022 for negligence against both parties. As
against F&S, Privilege Underwriters asserts that F&S's design for the project breached a duty
owed to the Allens. Specifically, F&S knew or should have known that it was creating a

foreseeable risk of harm by (1) designing a waste receptor hidden by other construction; (2) designing a waste receptor that allowed for more than one emptying line from the HVAC; (3) designing a plan for the project without including a specific location for the waste receptor; and (4) failing to fully inform the Abramson's on the upkeep needed for the waste receptor. (See NYSCEF doc. no 5 at ¶¶28-39.)

On this motion, F&S seeks the dismissal of the complaint under CPLR 214 (6) for bringing a cause of action after the expiration of the applicable statute of limitations; under CPLR 3211 (h) for Privilege Underwriter's failure to plead that specific conduct on the part of L&S, as licensed architects, was the proximate cause of Allen's injuries; and under CPLR 3211 (a) (1) and (7), for failing to demonstrate F&S owed the Allens a duty of care. Privilege Underwriters opposes the motion in its entirety. For the following reasons, F&S's motion is granted as to CPLR 3211 (h).

## DISCUSSION

### *Motion to Dismiss Under CPLR 214 (6)—Statute of Limitations*

CPLR 214 (6) establishes a three-year statute of limitations for actions to recover damages for the professional malpractice of architectural firms. (See CPLR 214 [6].) Given such a statute of limitations, and that it begins to accrue “upon the completion of performance and the subsequent termination of the parties’ professional relationship” (*Napoli v Moisan Architects*, 77 AD3d 895, 895 [2d Dept 2010]; *City Sch. Dist. V Hugh Stubbins & Assocs.*, 85 NY2d 535, 538 [1995]), F&S asserts that the time period in which Privilege Underwriters had to bring a cause of action lapsed in 2009 (or three years after it completed the renovation project).

The Court disagrees. While there is no dispute that the subject of Privilege Underwriter's action is those acts and omissions that F&S performed in the context of one of its architectural contracts, this is not a professional malpractice action. Such actions require privity of contract between the client who contracted for the professional expertise/advice, and the professional entity itself. (See *905 5<sup>th</sup> Assoc., Inc. v Weintraub*, 85 AD3d 667,667-668 [1st Dept 2011] [“In the absence of a relationship approach privity, plaintiff's claim against [defendant] for architectural malpractice was properly dismissed”]; *All Craft Fabricators, Inc. v Syska Hennessy Group, Inc.*, 144 AD3d 435 [1st Dept 20016] [“Because the parties have no contractual relationship with each other, the claims must be viewed in terms of simple negligence...rather than professional negligence”].)

Here, there is no privity between F&S and the Allens; nor does F&S allege that the Allens were not “stranger[s] to the contract” between F&S and the Abramsons such that there is the “functional equivalent of privity.” (*Town of Oyster Bay v Lizza Indus., Inc.* 22 NY3d 1024, 1030 [2013].) For this same reason, F&S's citation are inapposite here. (See *Gelwicks v Campbell*, 257 AD2d [2d Dept 1999] [Dismissing cause of action where the plaintiff, who contracted with professional engineering firm to construct a septic system on their property, brought the action more than three years after completion of project].) Where the wrongful conduct of a professional in rendering services to their client results in injury to a party outside the contract, the cause of action is for simple negligence. (*Cubito v Kreisberg*, 69 AD2d 738, 742

[2d Dept]; (*905 5th Assoc., Inc.*, 85 AD3d at 667 [“the lack of privity does not affect plaintiff’s ability to bring a general negligence claim against the architect for property damaged”].) The immediate consequence is that the statute of limitations accrues not from the completion of the work but from the date of injury. (See *All Craft Fabricators, Inc.*, 144 AD3d at 436; *Town of Oyster Bay*, 22 NY3d at 1031 [“An action to recover damages for injury to property must be commenced within three years of the date of injury”].) *Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287 (1936), which F&S cites in support of the proposition that a “cause of action accrues only when the forces are wrongfully put in motion produce injury” (see NYSCEF doc. no. 22 at 9, def. reply memo of law), relates to injuries caused by latent exposure to substances as governed by CPLR 214-c. Given the different contexts, *Schmidt* does not affect the Court’s conclusion that Privilege Underwriters timely commenced this action within three years from the date of injury to the Allens’ property damage.

A secondary implication from *Cubito*, *905 5th Assoc.*, and *All Craft Fabricators* is that, contrary to F&S’s assertion, Privilege Underwriters has standing to assert a cause of action for simple negligence against a third-party with whom it is not in privity of contract. F&S also suggests that it owed no duty to the Allens because it did not have a contractual right to control or supervise the installation. Based on this, it contends Privilege Underwriters cannot plead all the elements of a negligence cause of action. This suggestion is without merit, not only for the same reasons stated above but also because it misreads the premise of Privilege Underwriters’ causes of action. These causes of action are not based onpremise liability and violations of Labor Law Sections 240 and 241 (as is the authority on which F&S bases this contention) but on F&S’s alleged design failures. Thus, *Davis v Lenox School* (151 AD2d 230 [1st Dept 1989]) is inapplicable here.

#### *Motion to Dismiss Under CPLR 3211—Substantial-Cause Pleadings*

Titled “Standards for Motions to Dismiss in Certain Cases Involving Licensed Architects...”, CPLR 3211 (h) states that, where a licensed architect is entitled to a notice of claim under CPLR 214-d, the party opposing dismissal must demonstrate that “a substantial basis in law exists to believe that the performance, conduct, or omissions complained of was negligence and that such performance...was a proximate cause of personal injury, wrongful death or property damage.” (See CPLR 3211 (h); *Castle Vil. Owners Corp. v Greater NY Mut. Ins. Co.*, 58 AD3d 178 [1st Dept 2008].) Added to the CPLR in 1996, the purpose of both CPLR 214-d and 3211 (h) was to make it easier to dismiss causes of action against design professionals where more than ten years had elapsed between the completion of the work and injury to the plaintiff. (*Castle Vil. Owners Corp.*, 58 AD3d at 182-183.) Because both parties acknowledge that the instant action required Privilege Underwriters to provide a notice of claim to F&S, CPLR 3211 (h)’s heightened pleading standard applies here.

Instead of determining whether the allegations of a complaint fall within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), a court reviewing the sufficiency of a complaint under CPLR 3211 (h) must look beyond the facts of the pleadings to determine whether the claim is supported by “such relevant proof as a reasonable mind may accept to adequately support a conclusion or ultimate fact.” (*Castle Vil. Owners Corp.*, 58 AD3d at 183.) The proof, when viewed as the cause of action’s starting premise, should be of such quality and

quantity that permits a reasonable mind to draw the plaintiff's desired conclusion. (*Id.*) Here, Privilege Underwriters has not supported its cause of action with sufficient proof to demonstrate there is a substantial basis to believe F&S's conduct caused the alleged property damage.

Privilege Underwriters' allegations lack the factual foundation needed to survive under CPLR 3211 (h)'s heightened pleading standard. As to the design of the HVAC system, the complaint does not detail the professional standard of care required. There is no evidence that a different professional architect, adhering to the industry's standard of care in these circumstances, would limit the HVAC to one emptying line to the waste receptor as Privilege Underwriter's allege. Similarly, the complaint is silent as to what the standard of care requires when planning the location of the HVAC and waste receptor and whether placing the HVAC system behind a closet has any bearing on its functionality.

Privilege Underwriters submitted an expert affidavit in its opposition (NYSCEF doc. no. 20, aff. of Frank Gatlin), but the conclusions drawn therein are no less conclusory than in the complaint itself. The affidavit fails to provide an expert opinion as to whether the design of the HVAC system—with two lines, not one running to the waste receptor—conformed to professional standards or whether professional standards require the architect to determine the location of an HVAC system. And neither the complaint nor the expert affidavit refers to any applicable building code, statute, or industry standard with which F&S failed to comply. (*See Murphy v GHD, Inc.*, 2019 NY Slip Op 33476 [U] at \*3-4 [Sup. Ct. NY County 2019].) While Privilege Underwriter's expert does conclude that there is a reasonable basis to believe F&S did not properly observe the construction of the HVAC system, he did so based on a preliminary review and without describing professional standards in the industry or pointing to such an obligation in the F&S's contract. (*Id.*) Put simply, there is no evidence from which this Court or any reasonable mind could conclude there is a "substantial basis" in law that F&S knew or should have known that its design would create a foreseeable risk of harm to neighboring properties.

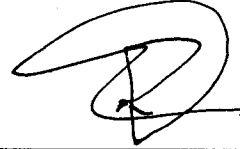
Given the Court's determination that Privilege Underwriters has not sufficiently pled a cause of action against F&S under the heightened pleading standard of 3211 (h), the Court need not address F&S's contentions under CPLR 3211 (a) (1) and (7).

Accordingly, it is hereby

ORDERED that defendant Ferguson & Shamamian Architects, LLP's motion to dismiss under CPLR 3211 (h) is granted; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, along with a notice of entry, on all parties within ten (10) days of this order.

This constitutes the decision and order of the Court.



1/23/2023

DATE

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DAKOTA D. RAMSEUR, J.S.C.

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: