SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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BRIDGETON 396 BROADWAY FEE, LLC

Plaintiff,

- v -

HIRISE ENGINEERING P.C.,

Defendant.

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INDEX NO. 652458/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff, the owner of real property located at 396 Broadway, New York, New York (Subject Premises), commenced this action seeking damages against defendant for breach of contract and malpractice regarding the conversion of the property from an office building to ahotel.

PENDING MOTION

On December 18th, 2020, defendant moved for summary judgment and dismissal of the action. NYSCEF indicates the motion was fully briefed as of October 20, 2021. Recently counsel reached out to the court to advise that no decision had ever been issued.[1] After

[1] This Court took over Part 57 in January 2022.

confirming that the motion had been fully briefed, the court marked the motion submitted and reserved decision.

For the reasons set forth below the motion is denied.

ALLEGED FACTS

In or about January 2015, plaintiff undertook a construction project for the renovation and conversion of an existing office building to a hotel located at the Subject Premises. In furtherance of the project, in or about February 2015, plaintiff retained and entered into a construction management agreement (the "ASD Contract") with Atlantic State Development Corp. ("ASD"). Al Rajhi Hospitality ("ARH") was the construction lender that provided financing for the Project.

On or about July 30, 2015, defendant entered into a contract with ARH for the provision of certain engineering and supervision services relative to the project. ARH subsequently assigned the contract to plaintiff.

Defendant's specialty is Construction Monitoring, and its primary clientele are banks and private lenders. Defendant's primary function on construction projects is to be the eyes and ears in the field for its clients. Defendants perform due diligence and provide monthly narrative and progress reports, which include an assessment of the work in place compared to the budget, and information as to whether all aspects of the project are in accordance with industry standards. Defendant acts to protect its clients' financial interest by identifying risks associated with a project and providing information to allow clients to determine whether to fund project-related payments.

The contract at issue in this action sets out two types of services to be performed by defendant, preparation of a Plan & Cost Review report (the "Plan-Cost Report") and preparation

of Construction Progress Reports ("CPRs"). Defendant agreed to monitor and comment on budgetary issues or concerns regarding the amount funded as against completion of work.

Plaintiff alleges defendant deviated from its own standards by failing to obtain or verify documents pertaining to costs such as invoices and proof of payments, prior to recommending that plaintiff approve payments request from its contractor.

Plaintiff further alleges that defendant failed to advise that certain request for payment, in particular, ASD's request for $1,247,939.29 in deposit payments was excessive, atypical, and not in accordance with industry standards.

Plaintiff asserts that the construction reports issued by defendant contained inaccurate representations.

On or about April 1, 2016, plaintiff hired Conor O'Bryrne, a civil engineer, to serve as its representative with the express mandate to complete the project as per plans and specifications. Mr. O'Bryne asserts that he quickly learned that the project was well behind schedule and had serious economic issues that emanated from a lack of proper management, oversight and/or reporting. [2] Mr. O'Bryne asserts that the percentage of completion as reflected by the ASD invoices was totally inconsistent with the actual work in place, and that ASD had blatantly overbilled the owner by at least $1.5 million. Mr. O'Bryne also asserts he learned that though the subcontracts he reviewed were not executed, had no contract values, and did not call for prepayments for materials, defendant recommended funding for $1 million in deposits for said subcontracts.

[2] Defendant argues the court should not consider the affidavit as it fails to comply with CPLR §2309(c) however, the court finds that such affidavit is admissible despite lacking a certificate of conformity. (*Ruchames v. New York & Presbyterian Hospital*, 176 A.D.3d 602 (1st Dep't 2019).

On or about April 13, 2016, defendant was notified by plaintiff that it was switching construction lenders and that defendant's services would no longer be needed.

On July 19, 2016, plaintiff issued a Notice of Termination of the Construction Management Agreement to ASD, asserting ASD was in breach of its contract.

After defendant left the project, in or about the Summer of 2016, plaintiff retained CBRE IVI (CBRE) to evaluate the work performed at the project to that point and to prepare a report of its findings (the "CBRE Report"). CBRE found that the representations made and information contained in defendant's reports regarding the dollar value of the work completed, the percentage of the work completed, and the cost to complete the project work were all inaccurate.

DISCUSSION

"A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this showing has been made, the burden 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 [1st Dept 2006]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The court finds that defendant has failed to make a *prima facie* case entitling it to dismissal of either the cause of action for breach of contract or the cause of action malpractice.

Cause of Action for Breach of Contract

As to the breach of contract claim, plaintiff alleges that defendant repeatedly breached the contract by failing to properly and adequately supervise ASD's performance, particularly by certifying ASD's percentages of work completed in amounts far beyond what was actually completed, and deposits paid to subcontractors that were not actually paid or warranted. In seeking dismissal of this claim, defendant primarily relies upon disclaimer language in the contract and the CPRs.

The disclaimer language in the contract provides:

> HiRise Engineering, P.C. is not responsible for the work performed by or malfeasance of the general contractor or subcontractors, errors and/or omissions by the Professional Architect/Engineers of Record, nor responsible for any other provider of product and/or services in connection with this project. HiRise Engineering, P.C. is not responsible for technical inspection of the project as these are the responsibility of the professionals of record tied to the project along with the general contractor/subcontractors engaged to perform the construction. Due to our limited observations on site, HiRise Engineering, P.C. cannot ensure code compliance required by the governing municipality. All items relating to the above statement shall be the responsibility of the Professionals of Record tied to the project.

However, where breach of contract claims asserted are based on alleged failure of the engineer to perform non-construction duties, disclaimer provisions such as those in this case do not bar a breach of contract claim.

In *Diocese of Rochester, New York v. R-Monde Contractors, Inc.*, 148 Misc.2d 926 (1989), the court addressed this issue holding:

> This case presents an issue of apparent first impression in this State; whether an architect, who allegedly failed to make adequate periodic inspections during construction and thereby failed to learn of defects in the work, is immune from liability by virtue of a contract provision stating that he will not be responsible for the contractor's acts or omissions.

Id. at 927.

In that case, the plaintiff, a church owner, commenced actions against its general contractor, architect and several subcontractors to recover damages sustained at the church after a fire which, it is claimed, was caused by the faulty installation of insulation around light fixtures. The complaint against the architect, as here, alleged causes of action for breach of contract and negligence based upon allegations that the architect failed to adequately supervise and inspect such installations, failed to ensure adherence with all industry and trade standards involving such installations, and failed to undertake sufficient on site observations of the work and keep plaintiffs informed of the progress. The architect sought summary judgment dismissing the plaintiff's claims based on exculpatory language analogous to the language relied upon by defendant here.

In rejecting the architect's contentions, the court focused on the independent, non-construction duties owed by the architect to the owner under their contract. The court held:

> The Architect's contention that its contract did not impose a duty to inspect is contrary to the express language of its agreement. Although the Architect was not obliged to supervise the construction work or to make exhaustive or continuous on-site inspections, it was, nevertheless, required to visit the site periodically in order to be familiar with the progress and quality of the work, to determine generally if the work was proceeding in accordance with the contract documents, to keep plaintiffs informed about the progress and quality of the work, and to guard the plaintiffs against defects in the work. The Architect's obligation to issue certificates of payment required him to be familiar with both the quantity and quality of the work done. Generally, the primary object of these provisions is "to impose the duty or obligation on the architects to insure to the owner that before final acceptance of the work the building would be completed in accordance with the plans and specifications...." (*Welch v. Grant Dev. Co.*, 120 Misc.2d 493, 498, 466 N.Y.S.2d 112, *quoting Day v. National U.S. Radiator Corp.*, 241 La. 288, 304, 128 So.2d 660, 666).
>
> The exculpatory provision ... excusing the Architect from responsibility for construction methods or for the acts or omissions of the contractor, does not immunize the Architect from liability flowing from a breach of its duties to plaintiffs. Although no New York case has been found, in *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933 [Ct. of Apps.Tex.], a case involving the identical contract provisions at issue here, it was there held that, where liability is predicated on a breach of the duties the architect owes to the owner, the exculpatory language does not absolve an architect from liability for a

> contractor's failure to carry out the work in accordance with the contract documents. The exculpatory provision is "nothing other than an agreement that the architect is not the insurer or guarantor of the general contractor's obligation to carry out the work in accordance with the contract documents" (739 S.W.2d, *supra*, at 937). It does not diminish the Architect's "non-construction responsibility ... to visit, to familiarize, to determine, to inform and to endeavor to guard" (*ibid.*; *see also, Shepard v. City of Palatka*, 414 So.2d 1977, 1978 [Dist.Ct. of App.Fla.]).

The court in *Diocese of Rochester* also noted that any claim by the architect that it had no actual knowledge of defects was unavailing. The court found "... regardless of whether or not the [a]rchitect had actual knowledge, questions of fact exist as to whether the [a]rchitect failed to fulfill its obligation to inspect and, if so, whether such omission was a proximate cause" of the defect. *Id.* at 932, 597.

The case of *Capstone Enterprises of Port Chester. Inc. v. Bd. of Educ. Irvington Union Free Sch. Dist.* 106 A.D.3d 856, 858-59 (2d Dept. 2013) is analogous. There, the owner asserted breach of contract and architectura1malpractice claims based on allegations that the architect failed to perform its contractual responsibilities pertaining to the contractor's work, including the responsibility to endeavor to guard the owner against defects and deficiencies in the work and to make sure the work generally conformed to contract documents. The owner further alleged that the architect breached its contract by issuing certifications of payment to the contractor for defective and incomplete work, failing to properly review and approve submissions made by or on behalf of contractor, and failing to ensure that contractor's work was free from defects and completed in a skillful, timely, and workmanlike manner.

The architect moved for summary judgment based on similar exculpatory language as in the case at bar. The trial court denied the and the Second Department affirmed holding:

> The Supreme Court properly denied that branch of PGA's motion which was for summary judgment dismissing the third-party complaint insofar as asserted against it. PGA's contract provides that it shall not be responsible for construction means, methods, techniques, sequences, or procedures, or a contractor's failure to carry out its work in

> accordance with the contract documents. However, the District alleged breaches of PGA's own contractual duties. While PGA is not an insurer of Capstone's work, PGA may be liable to the District if it breached its own duties regarding inspection, payment certifications, and review of submissions Thus, PGA failed to meet its prima facie burden of demonstrating its entitlement to judgment as a matter of law dismissing the third-party complaint insofar as asserted against it, and, therefore, that branch of the motion was properly denied.

Capstone Enterprises of Port Chester, Inc. v. Bd. of Educ. Irvington Union Free Sch. Dist., 106 A.D.3d 856, 858-59 (2013).

Other courts have made similar rulings. [*see eg Bd. of Managers of Trump Palace Condo. v. Feld Kaminetzky & Cohen, P.C.*, 24 Misc. 3d 1203(A), 889 N.Y.S.2d 881 (Sup. Ct. 2009)(*notwithstanding exculpatory provision contract imposed obligations to monitor work and report as to deficiencies*); *Cent. Sch. Dist. No. 2 of Town of Oyster Bay. Nassau Cty. v. Flintkote Co.*, 56 A.D.2d 642 (2d Dept. 1977) (*architect cannot escape liability for failing to perform its own independent contractual obligations simply because another party had overlapping duties*).

Based on the foregoing the motion to dismiss the cause of action for breach of contract is denied.

Cause of Action for Malpractice

Plaintiff alleges that pursuant to the contract, defendant was under the duty to use reasonable care to see that the work complied with the various code provisions and the plans and specifications, as well as ensuring that the work was done in a good and workmanlike manner through inspections at the site and being present to oversee such portions of construction as a reasonably prudent engineer would do. Plaintiff further asserts that defendant failed to adequately perform its construction supervision services by failing to use the degree of care that a reasonably prudent engineer would use under the same circumstances, and that such failure constitutes engineering malpractice.

Plaintiff argues that this portion of defendant's motion must be denied as a matter of law because defendant provided no expert testimony that it did not depart from accepted standards or engineering practice. [*see eg Thomas J. McAdam Liauors. Inc. v. Senior Living Options. Inc*, 2008 NY Slip Op 31566(U)(*to meet summary judgment burden defendant was required to establish through expert evidence that it did not depart from accepted professional standards*)]. Defendant, in its reply, argues that the affidavit of Joseph Celentano, P.E. submitted in support of its motion is sufficient to meet this burden and that plaintiff's failure to submit an expert affidavit in opposition requires that the motion be granted.

The court does not agree. Having reviewed the affidavit of Mr. Celentano, the court finds its is primarily submitted as an affidavit of facts and in no way opines as to whether defendant departed from acceptable professional standards in performing its obligations. Based on the foregoing, defendant has failed to meet its burden in seeking summary judgment and dismissal of the action and the motion is denied.

WHEREFORE it is hereby:

ORDERED that defendant's motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties appear virtually for a pre-trial conference on June 27, 2023, at 3pm, at which time a trial date will be set; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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6/8/2023
DATE

SABRINA KRAUS, 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**