1717 E. 18th St. Owners Inc. v New York Roofscapes, Inc.
2023 NY Slip Op 32055(U)
June 13, 2023
Supreme Court, Kings County
Docket Number: Index No. 527212/2022
Judge: Karen B. Rothenberg

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
1717 EAST 18TH STREET OWNERS INC.,

Plaintiff(s),

Index No: 527212/22

-against-

DECISION AND ORDER

NEW YORK ROOFSCAPES, INC., KIEFER & SCHUSTER ENGINEERING PLLC and BRADFORD T. KIEFER,,

Defendant(s),

x

Recitation as required by CPLR 2219(a), of the papers considered in this motion to dismiss the complaint.

Papers	NYSCEF Doc Nos.
Order to Show Cause/Motion and Affidavits Annexed.	4-8
Cross motion.....	
Answering Affidavits.....	22-25
Reply papers……..	26

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to recover damages for breach of contract, professional malpractice and negligence, the defendants Kiefer & Schuster Engineering PLLC and Bradford T. Kiefer [collectively the K&S defendants] move [seq. no. 1] pre-answer pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the plaintiff's complaint insofar as asserted against them.

In January 2021, plaintiff entered into a contract with defendant New York Roofscapes, Inc. [Roofscapes], to design and construct a recreational roof terrace for its residential building. As part of the agreement, and before any work was to begin, Roofscapes was required to retain a licensed engineer to determine the viability of the roof's structural capacity to support the proposed roof terrace, including both dead and live loads. Roofscapes entered into an agreement with the K&S defendants, an engineering firm, to perform a feasibility study for the proposed roof terrace. The study, as outlined in the proposal sent by the K&S defendants to Roofscapes dated February 24, 2021, would "determine the feasibility of supporting new pavers and planters on the existing roof structure as shown on [Roofscapes] drawing A201 dated 11/23/2020".

After the feasibility study was completed, the K&G defendants sent a letter to Roofscapes dated March 1, 2021, stating that their review of the existing roof structure indicates that it could "support the additional dead load of the new pavers and planters as shown on drawing A201." Based on this feasibility study, Roofscapes advised the plaintiff that the existing roof was able to support the terrace for its intended use and commenced construction in the spring of 2021. During the summer of 2021, plaintiff began to prepare house rules governing the use of the roof terrace by the residents, including the capacity limit on the number of person who could use the roof at one time. As the K&S defendants' report did not address the capacity limit, plaintiff attempted to reach out directly to the K&S defendants for this information. After the K&S defendants did not respond to plaintiff's several inquiries, plaintiff hired its own independent engineer to conduct another study. Plaintiff's engineering expert advised plaintiff that the K&S defendants' report did not consider both the dead and live load capacities of the roof structure. Plaintiff's expert then performed his own inspection and performed probes of the roof, and concluded that the roof structure would not support the live load of the proposed roof terrace. Based on its expert report, plaintiff determined that the roof terrace constructed by Roofscapes could not be used by its resident and had to be removed.

Plaintiff commenced this action against Roofscapes for breach of contract and breach of warranty, and against the K&S defendants for professional malpractice and negligence arising out of the report they made to determine the structural soundness of the roof. As to the K&S defendants, the complaint alleges that they were aware of the intended use of the roof as a recreation terrace based on Roofscapes plans and drawings, knew that they were engaged to determine the roof's capability to support the proposed roof terrace as a recreational area, and were aware that the plaintiff would rely on their engineering evaluation as to whether the roof could support the proposed terrace. The complaint further alleges that the K&S defendants prepared a deficient report in that it failed to include all information necessary to determine whether the roof terrace could be constructed safely on the building, including considering and accounting for the live loads associated with the intended use of the roof terrace.

The K&S defendants now moves to dismiss the complaint on the grounds that the action is barred by documentary evidence, and, also, for failure to state a cause of action as there is no contractual privity between the parties.

First, with respect to that portion of the K&S defendants' motion pursuant to CPLR 3211(a)(1) to dismiss on the grounds that the action is barred by documentary evidence, "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegation, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2022]). Here, the K&S defendants produce a copy of their proposal accepted by Roofscapes illustrating the work to be undertaken, and the terms and conditions of the

agreement. K&S argues that the proposal establishes that their work was limited to evaluating whether the existing roof was capable of supporting new pavers and planters as shown on Roofscapes drawing A201 dated November 23, 2020, and did not require that they evaluate for live loads.

The proposal, alone, however, does not bar plaintiffs' claims at this juncture, as it does not establish a defense as a matter law (*id*.). Missing from the K&S defendants' submissions is the accompanying drawing A201 dated November 23, 2020, which the proposal references. Without the drawing, it is impossible to know what is shown and whether it included notes as to live loads or other factors relevant to the requirements of the feasibility study. As such, the documentary evidence relied upon by the K&S defendants does not utterly refute plaintiff's allegations of malpractice or negligence or conclusively establish a defense as a matter of law (*see Biro v Roth*, 121 AD3d 7333 [2d Dept 2015]).

Further, to the extent that the K&S defendants submit an affidavit in support of their motion, such does not qualify as documentary evidence under CPLR 3211(a)(1) (*see Summer v Severance*, 85 AD3d 1011 [2d Dept 2011]).

With respect to the portion of the K&S defendants' motion pursuant to CPLR 3211(a)(7), the court in considering a motion to dismiss thereunder "must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see JDI Display America, Inc. v Jaco Electronics Inc*, 188 AD3d 844, 845 [2d Dept 2020]. When a court considers evidentiary material in determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether plaintiff states one (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). "[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Sokol* at 1182). "[A] motion to dismiss pursuant to CPLR 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*id*).

A viable cause of action alleging negligence or professional malpractice requires that the underlying relationship between the parties be one of privity of contract, or that the bond between them be so close as to be the functional equivalent of privity (*see Perfetto v CEA Engineers, P.C.*, 114 AD3d 835 [2d Dept 2014]). Where there is no actual privity, liability to a third party may attach if the following criteria are met: (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's

understanding of their reliance" (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989]).

Here, the facts alleged in plaintiff's pleadings satisfy these requirements. The complaint alleges a privity-like relationship between plaintiff and the K&S defendants in that it asserts that the K&S defendants' knew that plaintiff would rely on their study, and that they knew - based on their review of the terrace drawings prepared by Roofscapes, their meeting with representatives of the Co-op, and their inspection of the roof including probe studies - that the intended purpose of the study was to determine whether the existing roof structure would support a recreational roof terrace for its residents. It is further asserted that despite the K&S defendants' awareness of the purpose of the study and the intended use of the roof, the K&S defendants' report failed to include all information necessary to determine the structural safety of the proposed roof terrace including taking into account the live loads associated with the intended use of the roof terrace.

The K&S defendants' evidentiary submissions "[fail] to utterly refute the factual allegations supporting the plaintiff['s] contention that a relationship existed between [it] and [the K&S defendants] that was the functional equivalent of privity" (*Creative Restaurant, Inc. v Dyckman Plumbing and Heating, Inc*., 184 AD3d 803, 806 [2d Dept 2020]).

Based on the foregoing, the K&S defendants' motion to dismiss the complaint insofar as asserted against them is denied in its entirety.

This constitutes the decision/order of the court.

Dated: June 13, 2023

Enter,

Karen B. Rothenberg, J.S.C.