

163 Chrystie Realty LLC v DRK Chrystie LLC

2024 NY Slip Op 30866(U)

March 11, 2024

Supreme Court, New York County

Docket Number: Index No. 656239/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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163 CHRYSTIE REALTY LLC,

Plaintiff,

- v -

DRK CHRYSTIE LLC, NEXUS BUILDING DEVELOPMENT
GROUP, INC.,

Defendant.

INDEX NO. 656239/2018

MOTION DATE 03/02/2023,
03/02/2023

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

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NEXUS BUILDING DEVELOPMENT GROUP, INC., DRK
CHRYSTIE LLC

Plaintiff,

-against-

J.C. CONTRACTING OF WOODSIDE CORP., KINETIC
DESIGN CONSULTANT LLC

Defendant.

Third-Party
Index No. 565701/2019

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DRK CHRYSTIE LLC, NEXUS BUILDING DEVELOPMENT
GROUP, INC.

Plaintiff,

-against-

RCM TECHNOLOGIES, INC., BGA, LLC, BRUCE I.
GOLDMAN, P.E., K-SQUARE DEVELOPERS, INC.

Defendant.

Second Third-Party
Index No. 595577/2021

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 168, 169, 170, 171,
172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 208, 210, 211, 212, 213, 214,
215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 234, 235, 236, 237, 242, 243

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 209, 226, 227, 228, 229, 230, 231, 232, 233, 238, 239, 240, 241, 244

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 3.8.24), Second Third Party Defendants RCM Technologies, Inc. and BGA, LLC, (collectively, **RCMT**)’s motion for summary judgment (Mtn. Seq. No. 004) is granted solely to the extent that the claim predicated on RCMT’s failure to procure the required insurance is dismissed.

Previously, by Decision and Order dated July 12, 2022, the Court dismissed DRK’s claim against RCMT for failing to procure insurance to the extent that the claim included the years 2013-2014 and 2020-2021 because it found RCMT provided evidence of maintaining the requisite insurance during those years, but did not dismiss the claim as to the years 2014-2020 and 2021-2022 (NYSCEF Doc. No. 127 at 3-4). Now, in support of its motion for summary judgment, RCMT adduces evidence of the requisite insurance for these years and DRK does not raise an issue of material fact in its opposition papers (NYSCEF Doc. No. 171), DRK’s fourth cause of action for failure to procure required insurance is dismissed.

RCMT is not however entitled to dismissal of the other claims asserted against it. In order to succeed on a claim for professional malpractice, a plaintiff must demonstrate a departure from accepted standards of practice and that the departure was the proximate cause of injury (*Travelers Indem. Co. v Zeff Design*, 60 AD3d 453, 455 [1st Dept 2009]). Sustaining a malpractice claim against a professional engineer requires expert testimony (*id.*). There are no material issues of fact that RCMT entered into a valid and enforceable contract with DRK to

provide certain engineering services (the **Contract**; NYSCEF Doc. No. 170) **and that those services were not limited to solely delivering drawings:**

- Identify boring and geotechnical report requirements
- Preparation of structural calculations for the design of the buildings
- Preparation of construction drawings for the reinforced concrete installations including plans, sections and details
- Preparation of specification sections or notes for concrete and the structural systems
- **Coordination of work with other disciplines**
- Review of concrete shop drawings, concrete mix design and material specifications
- Review of testing performed by a certified testing laboratory
- **Responding to questions during construction**
- Signing DOB forms and drawings for submittal to the DOB. including designated required structural Special Inspections (TR-1)
- **Up to two site visits to support construction**

(NYSCEF Doc. No. 170 at 2 [emphasis added]).

On the record before the Court, there are material issues of fact as to whether RCMT failed to meet the standard of care required of that of a professional engineer. To wit, according to James McLoughlin's report, RCMT's Bruce Goldman, the engineer of record on the job, failed to, among other things, ensure that the contractor or subcontractor responsible for the underpinning work (i) had completed at least five underpinning project of comparable size and have at least five years' experience in such work (as Mr. Goldman's own plans required) and (ii) understood the sequencing that was shown on the plan, and that such failures "contributed to the error that created the settlement" (NYSCEF Doc. No. 182 at 12-13).

In his affidavit in opposition to RCMT's motion for summary judgment, Mr. McLoughlin again asserts:

15. However, based on my review of all available documents, **there is no evidence indicating that Mr. Goldman ever had a pre-construction meeting with J.C. Contracting or even a pre-construction conversation with J.C. Contracting to**

verify that J.C. Contracting understood the underpinning plans and sequence or how to execute the plans.

16. In my opinion to a reasonable degree of engineering certainty, **this was a major error on behalf of RCM/BGA and their employee Mr. Goldman that directly led to the settlement and resulting damage of Plaintiff's Building.** In the notes on sheet SOE-100.00, **Mr. Goldman specifically states** regarding the contractor performing the work that, **"The contractor and/or subcontractor(s) shall have completed no less than five (5) underpinning projects of a comparable size and type to this project and must have at least five years of experience in the work and/or applicable trade."** **Mr. Goldman's failure to verify this information during a pre-construction meeting directly led to their errors and omissions**

(NYSCEF Doc. No. 210 ¶¶ 15-16 [emphasis added]).

Thus, it is simply incorrect that RCMT is entitled to dismissal based on the fact that the drawings were in fact correct because RCMT's role was not limited to providing drawings. It also does not matter that a special inspector – Kinetic Design Consulting LLC – was hired because this did not relieve RCMT of its responsibilities. In fact, according to Mr. McLoughlin, Mr. Goldman did in fact visit the site on November 29, 2016, December 1, 2016 and December 9, 2016 (*id.* ¶ 17). Having done this and failed to (i) properly verify that appropriate contractors were performing the work, (ii) coordinate the work and (iii) ensure that the work was being performed in accordance with his drawings, he cannot simply disclaim liability based on his argument that his drawings were correct as the contract required more than just that and he otherwise undertook more than that.

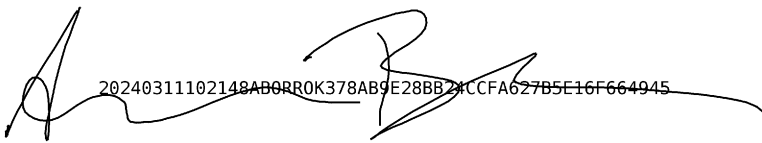
Finally, the Court notes that it is simply false that Mr. McLoughlin makes new arguments in his reply affirmation not previously identified in his report. Thus, RCMT's motion is otherwise denied.

Plaintiff 163 Chrystie Realty, LLC’s motion for summary judgment (Mtn. Seq. No. 005) was withdrawn (tr. 3.8.24) without prejudice.

The Court has considered the parties’ remaining arguments and found them unavailing.

Accordingly, it is hereby

ORDERED that RCMT’s motion for summary judgment (Mtn. Seq. No. 004) is granted solely to the extent of dismissing DRK’s claim for failure to procure insurance.


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ANDREW BORROK, J.S.C.

3/11/2024
DATE

CHECK ONE: **CASE DISPOSED** **DENIED** **NON-FINAL DISPOSITION**
 GRANTED **GRANTED IN PART** **OTHER**
APPLICATION: **SETTLE ORDER** **SUBMIT ORDER**
CHECK IF APPROPRIATE: **INCLUDES TRANSFER/REASSIGN** **FIDUCIARY APPOINTMENT** **REFERENCE**