SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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249 E. 62 ST., LLC

Plaintiff,

- v -

RAFAEL VINOLY ARCHITECTS, P.C.,

Defendant.

INDEX NO. 655469/2020

MOTION DATE 02/21/2025

MOTION SEQ. NO. 002

AMENDED DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65
were read on this motion for SUMMARY JUDGMENT.

Defendant Rafael Vinoly Architects, P.C. ("RVA" or "Defendant") moves for summary judgment dismissing Plaintiff 249 E. 62 St. LLC's ("Plaintiff" or "E 62") claims against it for breach of contract, professional malpractice/negligence, and negligent misrepresentation.

Upon the foregoing documents and for the reasons stated on the record following oral argument on July 18, 2025, and as discussed below, Defendant's motion is **DENIED**.

BACKGROUND[1]

In 2016, Plaintiff retained Defendant to render architectural services in connection with Plaintiff's planned development of a new mixed-use building at East 62nd Street and Second Avenue in Manhattan (NYSCEF 58 [Plaintiff's Response to Defendants Statement of Material Facts] ¶ 1). The New York City Department of Buildings ("DOB") approved RVA's design for the project "Under Directive 2 of 1975" in 2019 (*id.* ¶ 2; NYSCEF 49). DOB's "Directive 2"

[1] The facts recited herein are undisputed unless noted otherwise.

provides that "[i]n order to minimize delays in approval of applications for building permits…examination of new…applications shall be limited to…compliance with the Zoning Resolution and with the requirements of the building laws relating to egress and fire protection and with administrative requirements of the laws" (NYSCEF 57 [Directive 2]). "Such plans may be accepted as in compliance with law, subject only to random, occasional spot checks after approval by examiners of the Building Department" (*id.*). Despite obtaining approval for RVA's plans, Plaintiff terminated the parties' agreement, stating that it had consulted with "code specialists" who advised that RVA's plans were not in compliance with NYC Zoning Resolution 23-692 (the "Sliver Law") (NYSCEF 58 ¶ 2; NYSCEF 50 [Termination Letter]). RVA and E 62's agreement provides that it may be terminated by E 62 "without cause for Client's convenience upon thirty (30) calendar days' written notice to [RVA]" (NYSCEF 48 [Agreement] at 38, § 9.2).[2]

Plaintiff now brings claims for breach of contract, professional malpractice, and negligent misrepresentation arising out of RVA's alleged failure to produce an architectural design in accordance with applicable zoning requirements (*see generally* NYSCEF 2 [Complaint]). As noted above, RVA moves for summary judgment dismissing Plaintiff's claims.

[2] This Court previously issued a decision and order on this motion that quoted the original language of § 9.2, which provided that E 62 may terminate the agreement "upon thirty (30) calendar days' written notice to [RVA] for [E 62]'s convenience, with or without cause" (NYSCEF 64, quoting NYSCEF 48 at 13, § 9.2). The parties subsequently modified this language in a rider to state that E 62 may terminate the agreement "without cause for Client's convenience upon thirty (30) calendar days' written notice to [RVA]" (NYSCEF 48 at 38, § 9.2). The parties brought this discrepancy to the Court's attention and agree that the difference in language between the two provisions is of no consequence to this decision (NYSCEF 65). The Court concurs. For the avoidance of doubt, this amended decision and order corrects this discrepancy and is otherwise identical to the prior decision and order.

DISCUSSION

Summary judgment will be granted only when the movant has established that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law based on evidentiary proof in admissible form (*id.*; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). Only if the moving party meets its burden must the opposing party "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562; *Alvarez*, 68 NY2d at 324).

Defendant's sole argument for dismissal is that Plaintiff failed to exhaust its administrative remedies with the DOB prior to bringing suit. Defendant, however, points to no contractual or other obligation for Plaintiff to do so. Indeed, given that DOB never withdrew its approval of RVA's design—which was never implemented—it is unclear what Defendant expects Plaintiff to "exhaust" before DOB. While Defendant cites a number of decisions for the proposition that "one who objects to the act of an administrative agency such as the DOB must exhaust available administrative remedies before being permitted to litigate in a court of law" (NYSCEF 51 [Defendant's Memorandum in Support] at 5), all but one of those decisions dealt with challenges to administrative actions in the context of an Article 78 proceeding.[3] Here, there

[3] Defendant cites one non-Article 78 case, *Lesron Junior, Inc. v Feinberg* (13 AD2d 90 [2d Dept 1961]), in which the plaintiff sought to enjoin the defendant from proceeding with construction due to alleged zoning violations. Likewise, this is not applicable.

is no adverse DOB decision to appeal. It was simply a decision by the owner to pursue a different plan based on its determination that the existing plan developed by Defendant was non-compliant. Defendant remains free to contest that determination in this action.

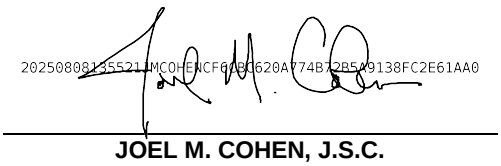
In short, the principle of administrative exhaustion is inapposite here. Having advanced no other basis to dismiss Plaintiff's claims, Defendant has not met its burden to establish a prima facie case for judgment in its favor as a matter of law.

Therefore, it is

ORDERED that Defendant's motion for summary judgment is **DENIED**; and it is further

ORDERED that the parties appear for an initial pre-trial conference via Teams on **August 13, 2025 at 4:00 p.m.** to discuss scheduling and logistics for trial.

This constitutes the decision and order of the Court.



8/8/2025
DATE

JOEL M. COHEN, J.S.C.

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