SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31M**

Justice

----------X

STEPHANIE SCHULMAN,

Plaintiff,

- v -

GMG HOME SERVICE INC.,FRANK E HARPER, GMG HOME SERVICE INCORPORATED NY, GREENPOINT CONDOMNIUM LLC,RANDY TORRES, MACK PROPERTY MANAGEMENT L.P., MACK REAL ESTATE GROUP LLC,145 WEST STREET LLC,157-159 WEST STREET LLC,MP 145 WS OWNER LLC,19 INDIA FEE OWNER LLC,10 HURON FS CONDO LLC,MP 145 WS LESSEE LLC,ISMAEL LEYVA ARCHITECT, P.C.,HEADQUARTERS MECHANICAL INC.,WNW & SONS PLUMBING & HEATING, INC.,JOHN DOE 1-100, JANE DOE 1-100, AND XYZ BUSINESS ENTITY 1-100

Defendant.

----------X

INDEX NO. 652756/2024

MOTION DATE 11/11/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 44, 45, 46, 48, 49, 50, 51, 64

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and following on-the-record oral argument, the motion by defendant Ismael Leyva Architect, P.C. ("ILA"), for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the Complaint as to it, is granted.

Brief Background

This is a property damage case. On May 15, 2023, the residential apartment owned by plaintiff Stephanie Schulman ("Ms. Schulman"), Apartment 37F ("the Apartment"), in the mixed-use condominium building located at 21 India Street in Brooklyn ("the Condo"), sustained damages due to water infiltration when the Condo's fire suppression system became activated by, allegedly, negligent construction work being performed in another residential unit, Apartment 39A; specifically, it is alleged that the fire suppression system became activated by "the mishandling of" a "heat gun and/or heat producing instrumentality" near a sensor (Complaint ¶¶ 1, Second, Forty-Third through Fifty-Third).

The Complaint sounds in negligence, which is asserted in separate causes of action against: the contractor performing work in Apartment 39A (first cause of action); the owner of Apartment 39A (second cause of action); the condominium, its president, and managing agent (fourth cause of action); and the condominium's developers, contractors, and Architect – ILA (fifth cause of action) (*id.* at 10 – 16). The Complaint also asserts a cause of action for breach of the bylaws against the condominium, its president, and managing agent (third cause of action) (*id.* at 12 – 14). The damages sought on each cause of action are the same, to wit: $670,455.31 (*id*. at 16 – 17).

As to ILA's alleged negligence, the Complaint alleges that: ILA was obligated to comply with relevant Construction Codes governing "engineering and/or installing proper fireproofing and water sealing around plumbing," but failed to comply with such Codes, including but not limited to "the Building Code, the Plumbing Code, the Fire Code and/or the Mechanical Code" in that it failed to "ensure that materials used in the installation. . . were of suitable quality and met the required specifications. . . [and] adequately inspect, design, build and/or maintain the fireproofing and/or water sealing of the plumbing. . . " (*id.* ¶¶ Eighty-Sixth through Eighty-Eighth). The Complaint further alleges that ILA' alleged breach of the standard of care and negligence proximately caused Ms. Schulman's damages (*id.* Eighty-Ninth through Ninetieth).

ILA now moves to dismiss the Complaint as against it upon two grounds, each of which are based, largely if not wholly, on its October 31, 2014 architectural services contract with defendant MP 145 WS Owner, LLC ("the Owner"), pursuant to which ILA provided discrete architectural services solely for the Owner ("the Contract," NYSCEF Doc. No. 28). The Contract provides that ILA is to furnish "conceptual plans" and "preliminary specifications for construction, which complement the Design Development Documents and further describe" certain sub-trades, including fire protection (Contract ¶¶ 2.3, 2.4; *id.* at pp 8, 10, 11, 19). The Contract also expressly provides, in the main body, that it is "not and is not intended to confer any rights or remedies upon any person other than the parties and the Lender" (*id.* at 14.14), and, similarly, in Exhibit A thereto, that it "is not intended to create and does not create any rights in or benefits to any third party" (*id.* Exhibit A at No. 19).

Given the express terms of the Contract, ILA argues that the Complaint fails to state a negligence claim against it because it did not owe a duty of care to Ms. Schulman under *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002), as ILA had a contractual relationship with the Condo only, which does not give rise to tort liability to Ms. Schulman, and none of the three *Espinal* exceptions apply. ILA also argues that Ms. Schulman's negligence claim is barred because she seeks "economic loss" resulting from the activation of the fire suppression system, which is only available where there is privity of contract, citing *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 (1989).

Ms. Schulman opposes, arguing that *Espinal* does not bar her Complaint because ILA's failure to exercise reasonable care in its professional services directly contributed to the harm – property damage – she suffered, relying primarily on *Cubito v Kreisberg*, 69 AD2d 738 (2d Dept 1979). She rejects ILA's characterization of her damages as "economic loss," noting that she seeks to recover for "tangible property damage," not losses arising out of contractual expectancy.

Discussion

On a motion to dismiss under CPLR 3211(a)(1) based upon documentary evidence, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v Martinez*, 84 NY2d 83 [1994]). Dismissal under this statute is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*; citing *Heaney v Purdy*, 29 NY2d 157 [1971]). "An unambiguous contract provision may constitute documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)" (*Wilson v Poughkeepsie City Sch. Dist.*, 147 AD3d 1112, 1113 [2d Dept 2017]).

On a motion to dismiss under 3211(a)(7), the complaint is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference *(see e.g. M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if, from the four corners of the pleadings, "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v Better*

Homes Depot, 97 NY2d 46, 54 [2001] [internal quotation omitted]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Viewing the Complaint through the applicable lenses, and considering the unambiguous terms of the Contract between ILA and the Owner, the Complaint fails to state a negligence claim against ILA. As the Court of Appeals noted in 2002, it has long been well-settled that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138). In reiterating this principal, the Court cited Chief Judge Cardozo, who, in the 1928 case of *H.R. Moch Co. v Rensselaer Water Co.* (247 NY 160 [1928]) "stated that imposing liability under such circumstances could render the contracting parties liable in tort to "an indefinite number of potential beneficiaries'" (*id.* at 139). However, noting competing policy considerations, the Court did identify three distinct circumstances in which liability to a third-party, growing out of a contract, may be appropriate (*id.*). Those circumstances are:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

(*id.* at 140 [internal citations omitted]).

The allegations that ILA failed to comply with certain Construction Codes, and failed to adequately inspect, design, build and/or maintain the fireproofing and/or water sealing of the plumbing at the Condo, do not form the basis of a negligence claim against ILA. ILA contracted with the Owner, not Ms. Schulman (*id.*), and the Complaint does not allege the "functional equivalent of privity" (*Sutton Apartments Corp*, 107 AD3d 646, 648 [1st Dept 2013] ["tort claims against the architect fail for lack of contractual privity, or the functional equivalency of privity"]; *Melnick v Parlato*, 296 AD2d 443 [2d Dept 2002] [claim for architectural negligence fails where plaintiffs do not establish "the functional equivalent of privity of contract"]; *see also In re September 11 Property Damage*, 468 FSupp.2d 508, 531 [SDNY 2006] [architects owe duty of care to owner of building who engaged them, not to subsequent owners "absent a special relationship or a covenant providing for such liability"]).

None of the *Espinal* exceptions apply. First, the Complaint does not allege, nor can the allegations be liberally construed to allege, that ILA "launched a force or instrument of harm" that proximately caused Ms. Schulman's damages (*Espinal*, 98 NY2d at 140; *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928] ["The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."]). The Complaint fails to allege that ILA "negligently created or increased a dangerous condition by its own affirmative acts" (*Genen v Metro-N. Commuter R.R.*, 261 AD2d 211, 213 [1st Dept 1999] ["When a contractor is alleged to have negligently created or increased a dangerous condition by its own affirmative acts, such conduct unquestionably constitutes misfeasance rather than nonfeasance, and the scope of the defendant's duty should be determined under traditional negligence principles, without regard to any breach of contract theory."]). Indeed, apart from its obligation to furnish "conceptual plans" and "preliminary specifications for construction, which complement the Design Development Documents," ILA had no other obligation to take affirmative action related to the fire suppression system once the Condo was built.

Ms. Schulman's reliance on *Cubito v Kreisberg*, 69 AD2d 738 (2d Dept 1979) for the proposition that ILA may be held liable to Ms. Schulman for its failure to exercise "due care in preparing its plans and executing its professional responsibilities," is misplaced. *Cubito* addressed the statute of limitations to be applied to a simple negligence claim brought by an injured individual who is not in contract with, or does not have professional with, the architect, and is an Appellate Division, Second Department decision that pre-dates *Espinal* by twenty-three years.

For similar reasons, the Complaint fails under the second and third *Espinal* exceptions in that Ms. Schulman does not allege that she detrimentally relied on ILA's continued performance of its duties, as they ended upon completion of the Condo; or that ILA "has entirely displaced" the Condo's duty to inspect, maintain, and/or repair the fire suppression system (*Espinal*, 98 NY2d at 140).

Moreover, the "Construction Codes," to the extent they are identified – NYC Building Code 709 (fire partitions) and NYC Plumbing Codes 709 (fixture units), 802.1.5 (non-potable water-clear waste), and 802.2 (installation of indirect waste piping) – bear no relation to Ms. Schulman's damages caused by activation of the fire suppression system that resulted in water infiltration in her Apartment. Thus, they cannot form a basis for any negligence claim against ILA.

ILA's argument that the Complaint should be dismissed because Ms. Schulman seeks to recover for economic loss is without merit. Ms. Schulman is seeking $670,455 dollars representing the property damages she sustained by the water infiltration event allegedly caused by the defendants' negligence. She does not seek losses occasioned by the failure of a contract obligation.

Accordingly, it is hereby

ORDERED that the Complaint as asserted against ILA, is dismissed.

20251217145926KCWATERMAN29F2C6F1843FEB8F60E426527892D

12/17/2025
DATE

KATHLEEN WATERMAN-MARSHALL, 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**