

27-10 37th Ave., LLC v LB Engg., P.C.

2026 NY Slip Op 30395(U)

January 29, 2026

Supreme Court, New York County

Docket Number: Index No. 650024/2023

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

27-10 37TH AVENUE, LLC

Plaintiff,

- v -

LB ENGINEERING, P.C.,

Defendant.

-----X

INDEX NO. 650024/2023

MOTION DATE 10/17/2025,
10/14/2025

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 98, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 95, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151

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

Upon the foregoing documents, motion 003 is granted in part and motion 004 is denied.

Background

27-10 37th Avenue, LLC (“Plaintiff”) is the owner of a piece of real property located in Long Island City. Plaintiff is wholly owned by Damien Smith, and the purpose of the entity is to develop and construct a mixed-use building on the Long Island City property. Mr. Smith is also the sole owner of several other companies, including non-party entity First Standard Construction (“FSC”). FSC was the general construction manager for the planned project. In April of 2019, FSC emailed LB Engineering, P.C. (“Defendant”), requesting a proposal for engineering services related to the project. Defendant issued two proposals in response, and they were engaged for the project. Defendant alleges that they were unaware of the involvement of

Plaintiff in the project until this instant action. Construction on the project commenced in January of 2020. All bills were sent to FSC, and while Defendant alleges that they were paid by FSC, Plaintiff alleges that when Mr. Smith paid the bills it was on behalf of the Plaintiff entity, not FSC.

In May of 2021, the Department of Buildings issued a violation and a stop work order related to missing structural details. DOB issued a second objection a year later, and FSC retained another engineering firm to correct the mechanical designs. Plaintiff filed this underlying action in January of 2023, asserting causes of action for breach of contract and professional negligence. Defendant has appeared and answered, and Plaintiff filed the Note of Issue in August of 2025. Both parties have moved for summary judgment in their favor.

Standard of Review

Under CPLR § 3212, a party may move for summary judgment and the motion “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 [2016]. The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

Discussion

In these motions, both parties seek summary judgment in their favor. In motion seq. 003, Defendant moves to dismiss the action based on Plaintiff’s lack of standing and privity. Plaintiff

in motion seq. 004 seeks summary judgment as to liability on both claims. Both motions are opposed. For the reasons that follow, Defendant's motion is granted as to the breach of contract cause of action but denied as to the professional malpractice claim, and Plaintiff's motion is denied.

Plaintiff's Breach of Contract Claim Fails to Establish Contractual Privity

In order to establish a prima facie claim for breach of contract, a party must show that the nonmovant breached "a binding agreement the parties" that caused damages to the movant. *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439,448 [2016]. Plaintiff claims that Defendant was obligated under an agreement between the parties to deliver plans that were compliant with New York City code, and that their failure to do so constitutes breach of contract. As an initial matter, Plaintiff has failed to establish that there exists a binding agreement between the parties. The proposals submitted by Defendant were sent to Mr. Smith as "President, First Standard Construction." To the extent that Plaintiff seeks to use these proposals as an agreement, Plaintiff is not a party to the agreement and therefore the prima facie case for breach of contract fails.

In reply on their motion, Plaintiff submits a document it calls an Amended Structural Agreement. This document purports to be a written contract between FSC and Defendant for the engineering services in question. The FSC name has been crossed out and Plaintiff's name handwritten next to it. Mr. Smith alleges that he was the one who made these alterations. This document fails to establish a prima facie entitlement to liability on the breach of contract for several reasons. First, evidence submitted on reply does not remedy errors in establishing a prima facie case. *See, e.g., Accardo v. Metro-North R.R.*, 103 A.D.3d 589, 589 [1st Dept. 2013]. Secondly, the document in question is only signed by Mr. Smith, and not the party that Plaintiff

seeks to bind. There is no indication in the record that Defendant was aware of the modifications Mr. Smith made to the party name, let alone that Defendant intended to be bound by the modifications. Mr. Smith even agrees in testimony that his email and signature block for the relevant documents were for FSC, claiming that this was for convenience and that he did not have a signature block for the Plaintiff entity. While Mr. Smith may have believed that any understanding was between Defendant and Plaintiff, there is no indication in the record that Plaintiff was a party to an agreement with Defendant. In essence, regardless of which hat Mr. Smith believed he was wearing in his interactions with Defendant, there must be evidence that *Defendant* understood him to be acting on behalf of Plaintiff, not FSC. Therefore, Plaintiff has failed to establish a prima facie entitlement to liability on the breach of contract claim.

Plaintiff Has Failed to Establish that They Are an Intended Third-Party Beneficiary

Plaintiff also argues that as owner of the property in question, they were an intended third-party beneficiary of the agreement between Defendant and FSC. They argue that because the planned construction was ultimately for the benefit of the property owner, and because Defendant was aware that Plaintiff was the registered owner, they have established contractual standing as an intended third-party beneficiary. The general rule is that “an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts.” *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 30 N.Y.3d 704, 710 [2018]. But for construction contracts in particular, given (as seen here) there “are often several contracts between various entities, with performance ultimately benefitting all of the entities involved”, the rule is that there must be “express contractual language stating that the contracting parties intended to benefit a third party.” *Id.*

Here, there is no such language in any of the documents in the record nor is there alleged to be express contractual language designating Plaintiff as an intended third-party beneficiary. The Court is not prepared to hold that in every construction related contract, the property owner is an intended third-party beneficiary with the standing to sue to enforce said contracts. Plaintiff cites to *Alfred Condo*, but that case is distinguishable. There, while there was no express language in the contract at issue stating that the co-op board was an intended third-party beneficiary, there were several related contracts with such express contractual language. *Board of Managers of the Alfred Condo. v. Carol Mgmt.*, 214 A.D.2d 380, 382 [1st Dept. 1995]. Plaintiff is at most an incidental beneficiary of any agreement between FSC and Defendant and therefore does not have standing to pursue a breach of contract claim. For that reason, Plaintiff's motion fails as to the first cause of action and Defendant's motion is granted as to the first cause of action.

Plaintiff Fails to Establish Prima Facie Entitlement to Summary Judgment on the Professional Negligence Claim

Plaintiff's second cause of action is for professional negligence. These claims can sound in breach of contract or tort, as "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals [...] may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties." *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 [1992]. Plaintiff alleges that they were owed a duty of care by Defendant and that their structural designs constituted professional negligence. A claim for professional negligence "requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury." *D.D. Hamilton Textiles, Inc. v. Estate of Mate*, 269 A.D.2d 214, 215 [1st Dept. 2000]. In support of

their argument that a failure to conform to city codes constitutes professional negligence, Plaintiff submits an affidavit from Mr. Smith, who is not an expert in this matter. Such conclusory allegations that the conduct alleged was a deviation from industry accepted standards of practice is insufficient to support summary judgment. *Id.* Plaintiff did submit an affidavit from a licensed professional engineer on reply, but as addressed above, when introduced on reply the affidavit cannot support a claim for summary judgment. Therefore, Plaintiff failed to establish a prima facie case for summary judgment on the professional negligence claim.

There Are Issues of Fact and Credibility Going to the Matter of the Functional Equivalent of Privity

In opposition to this claim and in support of their own motion for summary judgment, Defendant argues that Plaintiff lacks the functional equivalent of privity needed in order to create a duty of care. A “relationship approaching privity” is required in order to withstand a claim for professional malpractice, as opposed to general negligence. *905 5th Assoc., Inc. v. Weintraub*, 85 A.D.3d 667, 668 [1st Dept. 2011]. In order to show that there was the functional equivalent of privity for an engineering professional malpractice claim, a plaintiff must show the three *Credit Alliance* factors: “(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*, 73 N.Y.2d 417, 425 [1989]. Defendant argues that Plaintiff has failed to introduce evidence that links Defendant to Plaintiff, as opposed to FSC, or evidence showing that Defendant understood Plaintiff to be relying on their services. While this would suffice to defeat Plaintiff’s motion for summary

judgment on this cause of action, that is not enough to grant Defendant summary judgment dismissing the claim.

Plaintiff argues that there is the functional equivalent of privity here because as the owner, Defendant would have been aware that Plaintiff intended to rely on their services. As with the breach of contract claim addressed above, Plaintiff has not cited binding case law to support such a proposition, and the Court is not inclined to find that all subcontractors on a construction project have the functional equivalent of privity with a property owner as a matter of law. *See, e.g., Tutor Perini Bldg. Corp. v. Port Auth. of N.Y. & N.J.*, 191 A.D.3d 569, 570 [1st Dept. 2021] (declining to find near privity between a property owner and subcontractor even when the owner interacted extensively with the subcontractor and exercised control over the project). But while Plaintiff has not established a prima facie entitlement to summary judgment, there are issues of fact and credibility here related to what extent Defendant knew that they were interacting with Mr. Smith in his role as member of Plaintiff, as opposed to FSC, and to what extent Defendant understood Plaintiff rather than FSC to be relying on their services. For instance, payment checks that were sent to Defendant were ordered by Mr. Smith using an FSC signature block but paid out of Plaintiff's bank account. Therefore, the professional malpractice claim cannot be dismissed based on a lack of near privity.

Defendant also argues that the professional malpractice cause of action is barred due to the economic loss doctrine. Generally speaking, a party may not pursue a tort claim unless a legal duty independent of a contractual duty has been violated. *Khadem v. Stonehill & Taylor Architects, P.C.*, 234 A.D.3d 595, 595 [1st Dept. 2025]. Defendant argues that there is no independent duty owed to Plaintiff, but as addressed above there are issues of fact and credibility

going to the matter of near privity. Therefore, the professional negligence claim cannot at this stage be dismissed due to the lack of an independent duty. Accordingly, it is hereby

ADJUDGED that motion sequence 003 is granted in part; and it is further

ADJUDGED that the second cause of action for breach of contract is dismissed; and it is further

ADJUDGED that motion sequence 004 is denied.

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1/29/2026
DATE

LYLE E. FRANK, 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