**Beck v Studio Kenji, Ltd.**

2011 NY Slip Op 33470(U)

December 21, 2011

Sup Ct, NY County

Docket Number: 108995/09

Judge: Louis B. York

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SCANNED ON 12/28/2011

[* 1]

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

PRESENT: LOUIS B. YORK J. Justice PART 22

Index Number : 108995/2009
BECK, ANDREW
VS.
STUDIO KENJI
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 27 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/21/11

J.S.C.
LOUIS B. YORK

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------X

**ANDREW BECK, III,**

Plaintiff,

Index No. 108995/09

-against-

**DECISION/ORDER**

**STUDIO KENJI, LTD., JUSTIN MIYAMOTO WEINER, AND ELLEN HONIGSTOCK,**

Defendants.

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**LOUIS B. YORK, J.S.C.:**

In this action, plaintiff Andrew Beck III (Beck) sues defendants Studio Kenji (Kenji), Justin Miyamoto Weiner (Weiner), and Ellen Honigstock (Honigstock), alleging eight causes of action including breach of contract, negligence, breach of fiduciary duty, and professional malpractice. Plaintiff states that as a result of defendants' gross mismanagement of its architectural and reconstruction project and corresponding failure to investigate New York City rules, regulations, and codes, plaintiff was forced to deconstruct nearly all work performed during defendants' three-plus years on the project, and rebuild large portions of the apartment to satisfy the requirements of the building code so the building could maintain its temporary certificate of occupancy.

The following facts of the case are undisputed: Plaintiff purchased Unit PH7/8N, one of two duplex penthouses occupying the existing seventh and newly-constructed

eighth and rooftop floors at 169 Hudson Street around August of 2004. Plaintiff retained Weiner on behalf of Kenji, a high–end Manhattan interior design and consulting firm, to plan and design the interior and various other elements of plaintiff's apartment, and to serve as manager, consultant, and designer for the apartment's construction.

Plaintiff and Weiner, on behalf of Kenji, subsequently agreed upon a comprehensive eight-page design and consulting agreement (the retainer agreement). The retainer agreement stated that Kenji and Weiner would design and prepare drawings and architectural plans, file the plans with the New York City Department of Buildings (DOB), and obtain all necessary approvals for the build out. The initial sketches included the removal of a section of the separation between the existing seventh and the newly constructed eighth floors to create a double-height space and the addition of a catwalk connecting both ends of the apartment. The final architectural plans, including the above elements, were filed with the DOB.

As indicated above, Weiner and Kenji were contractually obligated to file the plans with the DOB under the retainer agreement. However, they lacked the qualifications to do so themselves. Therefore, they retained Ellen Honigstock as the formal architect of record for applicable governmental filings. Among other things, Honigstock was to sign off on all plans and drawings submitted to the DOB and perform a final walkthrough to verify compliance of the plans with the New York City building code. Honigstock submitted formal plans that were prepared by Weiner and Studio K to the expediter for filing and certified that the plans were compliant with the building code and all other applicable laws and regulations.

From 2004 through early 2008, plaintiff alleges, he paid in excess of one million dollars to defendants in connection with their work on the project. On or about October of 2007, with work at a standstill, plaintiff's interior designer and his project contractor each advised him to retain a new, independent architect. Plaintiff hired a new architect to review the status of the project and formally terminated defendants in early 2008.

In March 2008, plaintiff's new architect inspected the construction that had occurred and determined that many aspects of the apartment's design, including but not limited to the double height space and the catwalk, failed to meet both the industry standards and the DOB fire and safety codes and regulations. The new architect created a plan to remedy the problems without deconstructing the original work. However, the DOB rejected the plan and, as a result, deconstruction of defendants' work was necessary. Subsequently, plaintiff commenced this action.

Currently, defendants move for summary judgment seeking dismissal of the complaint against Weiner in its entirety and dismissal of the claims of unjust enrichment, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and gross negligence against Kenji. Plaintiff opposes the motion as it applies to Weiner and argues that plaintiff may assert the above causes of action against Kenji simultaneously with its breach of contract claim.

Defendants' basis for dismissal of the claims asserted against Weiner is that the contract in question was with Kenji, not Weiner, and plaintiff retained Kenji to provide services regarding the interior spaces and roof decks for plaintiff's apartment, with Honigstock as the architect of record for the project. As defendants argue, under New

York law "persons may not be held liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts." *(Wiernik v. Kurth*, 59 A.D.3d 535, 537, 873 N.Y.S.2d 673, 675-76 [2nd Dept 2009]*)*. Here, Weiner signed the retainer agreement in his capacity as an officer of Studio Kenji (Plaintiff's exhibit C), rather than in his individual capacity. Nor does plaintiff raise an issue of fact as to whether Weiner held himself out as individually responsible for the work in question. Accordingly, as defendants assert, Weiner cannot be held liable for the alleged breach of contract.

Defendants next state that this Court should dismiss plaintiff's third, fourth, fifth, and seventh causes of actions for unjust enrichment, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and gross negligence, respectively, against Studio Kenji. Defendants first argue that to recover for unjust enrichment plaintiff must demonstrate services were performed for the defendant resulting in unjust enrichment and that such a claim is not viable. Plaintiff counters that an unjust enrichment claim may be maintained simultaneously with breach of express contract claim. The court concludes that the unjust enrichment claim must be dismissed.

Recovery in quasi-contract ordinarily is precluded "when a valid and enforceable written contract" governs the specific subject matter (*Clark-Fitzpatrick, Inc. v. Long Island R. Co.,* 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 656 [1987](*Clark-Fitzpatrick*)). Only where there is no express contract or where the validity of the contract is at issue is a quasi-contract theory possible. If there is no contract or an unenforceable agreement, the Court may find that a quasi-contact exists to prevent unjust enrichment (*Clark-*

*Fitzpatrick,*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 656 [1987]). Here, neither party questions that a contract exists. Moreover, plaintiff bases his unjust enrichment claim on the contract itself. Therefore, an independent quasi-contract claim cannot exist and the claim is not legally viable.

Plaintiff relies on *Joseph Steinber Inc. v. Walker 36th Street Assocs.*, 187 A.D.2d 225, 228, 594 N.Y.S.2d 144, 146 [1st Dept 1993]("*Steinber*")) to support his contention that a case may be submitted to a jury on both the theory of breach of express contract and recovery under quasi-contract. However, that case is distinguishable because in *Steinber* "there was a bona fide dispute as to the existence of a contract" and as to whether the contract covered the dispute (*Joseph Sternberg, Inc. v. Walber 36th Street Associates,* 187 A.D.2d 225, 228, 594 N.Y.S.2d 144, 146 [1st Dept 1993]). Here, on the other hand, neither party challenges the authenticity of the underlying business agreement.

Next, defendants state that the fourth cause of action for breach of implied covenant of good faith and fair dealing is not viable against Studio Kenji because it is based on the same facts as the breach of contract claim. Defendants are correct. Under New York law, parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract (*Panasia Estates, Inc. v. Hudson Ins. Co.*, 68 A.D.3d 530, 530, 889 N.Y.S.2d 452, 453 [1st Dept 2009]). Accordingly, a claim for breach of the implied covenant is dismissible as redundant if it arises under the same facts which form the basis for the breach of contract claim

(*Canstar v. J.A. Jones Const. Co.*, 212 A.D.2d 452, 453, 622 N.Y.S.2d 730, 731 [1st Dept 1995]). The court therefore dismisses the fourth cause of action as well.

Turning to the fifth cause of action for breach of fiduciary duty, defendants argue that the claim is redundant of the malpractice claim and therefore they seek the same relief. Defendants are correct when they state that the claims are duplicative. New York courts have consistently held that a breach of fiduciary duty claim that is premised on the same facts as the legal malpractice cause of action, is redundant and should be dismissed (*E.g., Murray Hill Investments, Inc. v. Parker Chapin Flattau & Klimpl, LLP* 305 A.D.2d 228, 229, 759 N.Y.S.2d 463, 464 [1st Dept 2003]; *Turk v. Angel,* 293 A.D.2d 284, 284, 740 N.Y.S.2d 50, 58 [1st Dept 2002]).

*Kurman v. Schnapp*, 73 A.D.3d 435, 901 N.Y.S.2d 17 (1st Dept 2010), upon which plaintiff relies, is distinguishable because in *Kurman* the plaintiff's breach of fiduciary duty cause of action arose out of facts that occurred separate from and during a wholly different time period than his legal malpractice cause of action, and each set of facts supported a different legal theory (*Id.*). Here, the underlying facts are the same for each theory, which can be seen in the very similar statements of fact set forth for each of these causes of action in the complaint. The Court finds that plaintiff's reliance on other cases are misplaced as well, and rejects these arguments with due consideration.

Finally, defendants argue that the this Court should dismiss the cause of action, for gross negligence. Gross negligence, as both parties state, is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing," (*Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554, 583 N.Y.S.2d 957, 593 N.E.2d

1365). "It is conduct that evinces a reckless indifference to the rights of others," (*id.*). Whether defendants' conduct rises to this level of culpability is a question of fact. The failure to meet applicable building and fire safety codes, as well as DOB rules and regulations during construction could arguably constitute gross negligence in light of the potentially serious consequences thereof, both financially and in creating a risk of injury to plaintiff and other residents of the building. This is a question to be resolved by a jury and it would therefor be inappropriate to dismiss the cause of action.

For the reasons above, it is

ORDERED that defendants' motion is granted in part and denied in part; and it is further

ORDERED that the prong of defendants' motion seeking to dismiss all claims against defendant Weiner is granted and the complaint as against Weiner are severed and dismissed; and it is further

ORDERED that the portion of defendant's motion seeking to dismiss claims asserted against Studio Kenji is granted to the extent of severing and dismissing the third, fourth, and fifth causes of action as against defendant Studio Kenji.

ENTER:

Dated: 12/21/11

Louis B. York, J.S.C.

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