Village Joint, Inc. v Berzak Assoc. Architects, P.C.

2012 NY Slip Op 30647(U)

March 16, 2012

Supreme Court, New York County

Docket Number: 105646/2007

Judge: Saliann Scarpulla

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SCANNED ON 3/16/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA J.S.C. Justice

PART 19

Index Number : 105646/2007
VILLAGE JOINT
vs.
BERZAK ASSOCIATES ARCHITECTS
SEQUENCE NUMBER : ~~004~~ 3 and 4
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 3 and 4

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 3/15/12
which disposes of motion sequence(s) no.

FILED
MAR 16 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/15/12

Saliann Scarpulla J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---------- X

THE VILLAGE JOINT, INC. and
STEPHEN CHOI,

Plaintiffs,

- against-

Index No.: 105646/2007
Submission Date: 01/25/2012

BERZAK ASSOCIATES ARCHITECTS, P.C.
and MICHAEL DAVID BERZAK,

Defendants.

---------- X

For Plaintiffs:
Sabharwal, Nordin & Finkel
350 Fifth Avenue, 59th Floor
New York, NY 10118

For Defendants:
Morris Duffy Alonso & Faley
2 Rector Street, 22nd Floor
New York, NY 10006

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MAR 16 2012
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NEW YORK

Papers considered in review of this motion for summary judgment:

Plaintiffs' Notice of Motion 1
Plaintiffs' Mem of Law in
Support of Motion. 2
Aff in Opposition. 3
Reply Aff 4
Defendants' Aff in Support
of Motion 5
Mem of Law in Opposition
to Defendants' Motion 6
Reply Aff 7

PRESENT: HON. SALIANN SCARPULLA, J.:

In this action for professional negligence and breach of contract, plaintiffs The Village Joint, Inc. ("VJ") and Stephen Choi ("Choi) (collectively "plaintiffs") move for summary judgment pursuant to CPLR § 3212 (motion sequence no. 3). Defendants Berzak Associates Architects, P.C. ("Berzak Associates") and Michael David Berzak ("Berzak") (collectively "defendants") separately move for summary judgment dismissing

the complaint (motion sequence no. 4). Motion sequence nos. 3 and 4 are consolidated for disposition.

This action arises out of a letter agreement dated March 21, 2006 (the "agreement") whereby Choi retained defendants to provide architectural services for a renovation project (the "project") at 531 East 13th Street in Manhattan (the "premises"). Choi intended to open a restaurant with live musical performances at the premises.

The agreement included a list of services defendants would provide. This list included the following:

> File and obtain approval of Alteration Type 1 application as applicant for new use and occupancy of Eating and Drinking Establishment, UG 6, with occupancy of 200 persons on first floor, used in conjunction with storage and accessory uses in cellar and on mezzanine.

Choi attests that he needed a location with a maximum capacity of no less than 200 persons, and after receiving assurances from defendants that they would obtain approval for this capacity, Choi formed VJ and entered into a lease for the premises. Thereafter, defendants provided Choi with architectural plans for the renovations. Defendants subsequently submitted these plans to the Department of Buildings ("DOB").

In a letter dated July 14, 2006, the DOB notified defendants that it intended to revoke their work permit for the project because of code violations in the architectural plans and designs. The DOB also directed defendants to request a meeting with a DOB Plan Examiner to discuss these objections and avoid revocation.

Berzak testified at his deposition that defendants attempted to schedule a meeting with the DOB to discuss the objections, but were unable to do so because Choi had an outstanding fine from a previous DOB violation. Choi paid the outstanding fine in early August, and Berzak testified that defendants contacted DOB within a day of the payment to schedule the meeting.

Choi attests that on or about August 18, 2006, defendants instructed him to continue the renovation project according to the original plans. According to Choi, "[d]efendants assured him that the DOB's objections were incorrect and that they would be resolved without making any changes to the Initial Plans."

On August 25, 2006, before defendants met with the DOB, the DOB issued another stop work order because the DOB had not received a sufficient response on its previous objections. Berzak testified that after DOB issued this stop work order, his expediter met with a DOB plan examiner to go over the objections set forth in the DOB's July 14, 2006 letter. According to Berzak, Choi did not want to contest the DOB objections, but instead directed defendants to revise the initial architectural plans to expedite re-approval.

On September 12, 2006, defendants submitted a post-approval amendment to the initial plans. The maximum occupancy on the revised plans was reduced from 200 persons to 180 persons, with an allowance of 135 persons on the first floor. On September 13, 2006, the DOB rescinded and lifted the August 25, 2006 stop work order.

Choi attests that he was forced to demolish all construction performed before the August 25, 2006 stop work order because of the revisions. According to Choi, he never would have formed VJ or executed the lease to the premises if he had known that the maximum capacity of the premises would only be 180 persons.

Plaintiffs commenced this action in April 2007, asserting causes of action for professional negligence and breach of contract. In the cause of action for professional negligence, plaintiffs allege that defendants provided architectural designs that violated numerous codes and regulations, ignored DOB directives to remedy these violations, and instructed plaintiffs to continue work on the project despite these violations. In their breach of contract cause of action, plaintiffs allege that defendants failed to perform their obligations under the letter agreement, including obtaining approval of an architectural design with a capacity of 200 persons on the premises' first floor.

Plaintiffs now move for summary judgment, arguing that defendants are liable for professional negligence because they miscalculated the maximum occupancy of the premises and failed to respond to DOB objections in a timely manner. Plaintiffs also contend that defendants materially breached the contract because defendants failed to obtain approval of an application for an Eating and Drinking Establishment with a maximum occupancy of 200 persons on the first floor.

In opposition to plaintiff's summary judgment motion, and in support of their own motion for summary judgment, defendants argue that there is no evidence to support the

professional negligence claim because plaintiffs have failed to provide a proper expert affidavit. Defendants further maintain that the breach of contract cause of action should be dismissed because, in the agreement, they did not guarantee that they would obtain approval of the application for an establishment with a 200 person maximum capacity.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

To make a *prima facie* showing of professional negligence, a plaintiff must present "credible expert testimony that defendants deviated from locally prevailing standards of practice." *Talon Air Servs. LLC v. CMA Design Studio, P.C.*, 86 A.D.3d 511, 515 (1st Dept. 2011). Here, plaintiffs submit an affidavit from Vijay Kumar ("Kumar"), a licenced professional engineer, which incorporates by reference an attached Expert Report. Though the Expert Report lists various deficiencies in defendants' work on the project, it never attests to "the standard of professional care and skill [defendants] allegedly failed to meet," *Thaler & Thaler v. Gupta*, 208 A.D.2d 1130, 1132 (3d Dept. 1994), nor does it state specifically that defendants deviated from the norms of their

profession. Thus, plaintiffs have failed show entitlement to summary judgment on the professional negligence cause of action. *See Suppiah v. Kalish*, 76 A.D.3d 829, 832 (1st Dept. 2010).

Moreover, material issues of fact preclude summary judgment on defendants' motion to dismiss the professional negligence cause of action. In support of their motion, defendants present an expert affidavit from Denise Bekaert ("Bekaert"). Bekaert attests in her affidavit that defendants "did not deviate from accepted standards within the architectural profession," and that the stop work orders and objections DOB issued during the course of the project are common for these types of renovation projects.

In their opposition papers, plaintiffs submit a second affidavit from Kumar. In this affidavit, Kumar attests that defendants "materially deviated from the ordinary and reasonable skill usually exercised by one in the architectural profession" by, *inter alia*, failing to take any measurements before determining the maximum possible occupancy for the premises. The Court finds that plaintiffs' and defendants' dueling expert affidavits are sufficient to raise an issue of fact as to whether defendants are liable for professional negligence. *See Frye v. Montefiore Med. Ctr.*, 70 A.D.3d 15, 26 (1st Dept. 2009).

Triable issues of fact also preclude summary judgment for either party on the breach of contract cause of action. Breach of contract actions arising out of professional malpractice only lie "where a specific result is guaranteed by the terms of the agreement .

. . ." *530 East 89 Corp v. Unger*, 54 A.D.2d 848, 849 (1st Dept. 1976), quoting *Carr v. Lipshie*, 8 A.D.2d 330, 332 (1st Dept. 1959).

Defendants argue that they are entitled to summary judgment on plaintiffs' breach of contract cause of action because the agreement did not guarantee a specific result. However, pursuant to the plain language of the agreement, defendants agreed to "[f]ile *and obtain approval* of Alteration Type 1 application as applicant for new use and occupancy of Eating and Drinking Establishment, UG 6, with occupancy of 200 persons on first floor." (Emphasis supplied.) Further, defendants do not contest that they failed to obtain this result, as the final approved plan had a maximum capacity of 180 persons in total, and 135 persons in the first floor.

Nevertheless, there are issues of fact as to whether plaintiffs waived the requirement that the approved renovation plan application have an occupancy maximum of 200 persons. "Waiver is the intentional relinquishment of a known right," and whether a party intended to relinquish that right is generally a question of fact for a jury to resolve. *Fundamental Portfolio Advisors v. Tocqueville Asset Management*, 22 A.D.3d 204, 209 (1st Dept. 2005). Here, Berzak testified that, even though he wanted to dispute the DOB objections to the original renovation plan, Choi directed him to make revisions to the initial renovation plan to expedite re-approval. Accordingly, an issue of fact remains as to whether Choi knowingly relinquished defendants' compliance with this section of the agreement.

In accordance with the foregoing, it is hereby

ORDERED that the summary judgment motion by plaintiffs The Village Joint, Inc. and Stephen Choi is denied; and it is further

ORDERED that the summary judgment motion by defendants Berzak Associates Architects, P.C. and Michael David Berzak, R.A., is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 16, 2012

ENTER:

Saliann Scarpulla, J.S.C.

FILED
MAR 16 2012
COUNTY CLERK'S OFFICE
NEW YORK