Board of Educ. of the Farmingdale Union Free School Dist. v Grillo

2012 NY Slip Op 31749(U)

June 20, 2012

Sup Ct, Nassau County

Docket Number: 002947/06

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

BOARD OF EDUCATION OF THE FARMINGDALE UNION FREE SCHOOL DISTRICT,

Plaintiff,

-against-

JOHN A. GRILLO, ARCHITECT, P.C., JOHN A. GRILLO, Individually, CHRISTOPHER HUNT, GREYHAWK NORTH AMERICA, L.L.C., IRWIN CONTRACTING, INC., JOHN C. IRWIN, Individually and KIRCO INDUSTRIES, CORP.,

Defendants.

INDEX No. 002947/06

MOTION DATE: April 11, 2012
Motion Sequence # 007, 008

The following papers read on this motion:

Notice of Motion.................................... XX
Affirmation in Opposition........................ X
Affidavit in Support................................. X
Reply Affidavit... X
Memorandum of Law................................ XXX
Reply Memorandum of Law...................... XX

Motion by defendants John A. Grillo, Architect, P.C., John A. Grillo, Individually, and Christopher Hunt (collectively referred to as herein as the "Grillo Defendants") [Mot. Seq. 007] for partial summary judgment dismissing plaintiff Board of Education of the Farmingdale Union Free School District's causes of action for fraud, breach of contract,

punitive damages, *res ipsa loquitur*, and negligence is **granted** in part and **denied** in part.

Motion by defendants Irwin Contracting, Inc. and John C. Irwin, Individually (collectively referred to herein as the "Irwin Defendants") [Mot. Seq. 008] for partial summary judgment dismissing plaintiff Board of Education of the Farmingdale Union Free School District's (hereinafter referred to as the "School District") seventh, eighth, eleventh, twelfth and thirteenth causes of action is **granted** in part and **denied** in part.

This action stems from the alleged improper construction of new additions at the W.E. Howitt Middle School ("Howitt") located in Farmingdale, New York. Specifically, the Howitt construction project consisted of a two story L-shaped classroom addition ("sixth grade wing") and a one story music addition, both with masonry exterior cavity walls and flat roofs.

On or about July 1, 1999, plaintiff entered into a written contract with the Grillo Defendants to provide architectural services to the plaintiff, including but not limited to, the preparation of designs, plans and specifications for the construction at Howitt. Subsequently, in June 2000, plaintiff entered into a written contract with defendant Greyhawk North America, LLC ("Greyhawk") to act as the Construction Manager for the School District. After conducting the required competitive bidding, in September 2001, plaintiff awarded the contract for the construction of the Howitt project to the Irwin Defendants as the General Contractor. Thereafter, in or about October 2001, defendant Kirco Industries, Corp. ("Kirco") was retained by the Irwin Defendants to act as the masonry subcontractor responsible for the construction of the interior walls and exterior cavity walls at Howitt.

Construction at Howitt began in or about November 2001 and ended in or about July 2003.

However, during construction, and after a rain event in October 2002, problems arose with the walls of the sixth grade wing; specifically, the walls thereat were noticed to be continuously moist. While plaintiff claims that the Grillo Defendants and the Irwin Defendants became aware of water infiltration to several areas of the newly constructed sixth grade wing including the north and east facing walls, Christopher Hunt, the project architect for the Howitt project, states that the problem was only limited to the north wall. Hunt states that the Grillo Defendants and the Irwin Defendants blamed each other for the problem and that the conflicting opinion between the Grillo Defendants and the Irwin Defendants as to

responsibility was never resolved. Defendants submit that despite several tests and probes into the moist walls, the cause of the moisture was never determined and the probes were all inconclusive.

Nonetheless, at some point following the tests and probes, it was proposed, and ultimately approved, that a sealant be placed on the north wall. The cost of the sealant was paid from the project allowances and with plaintiff, School District's approval. The sealant was applied to the north wall of the sixth grade wing in the late spring of 2003. In October 2005 however, after another heavy rainstorm, the classrooms on the sixth floor wing again leaked from the north side and the east side.

In bringing this action against the architects (the Grillo Defendants), the general contractor (the Irwin Defendants), the construction manager (Greyhawk) and the masonry subcontractor (Kirco), plaintiff claims that the cause of such water infiltration is a combination of architectural design defects and construction defects by all named parties.

Plaintiff asserts 13 causes of action in its complaint, as follows: (1) against Grillo Defendants for negligence; (2) against Grillo Defendants for breach of contract; (3) against John A. Grillo, Architect P.C. and John A. Grillo, individually, for negligence as a School District Architect; (4) against John A. Grillo, Architect P.C. and John A. Grillo, individually, for breach of contract as School District Architect; (5) against defendant Greyhawk for negligence; (6) against defendant Greyhawk for breach of contract; (7) against the Irwin Defendants for negligence; (8) against the Irwin Defendants for breach of contract; (9) against Kirco for negligence; (10) against Kirco for breach of contract; (11) against all defendants for *res ipsa loquitur* and negligence *per se*; (12) against all defendants for fraudulent concealment and misrepresentation; and (13) against all defendants for punitive damages.

Upon the instant motions, the Grillo Defendants and the Irwin Defendants both seek summary judgment dismissal of the claims asserted against them.

Specifically, in support of their motion, the Grillo Defendants assert five bases for their entitlement to summary judgment.

First, plaintiff's claims for fraud based upon the application of the sealant and the use of allowances must be dismissed because the fraud allegations sound in contract and malpractice and plaintiff has failed to present clear and convincing evidence that would

establish a misrepresentation of a material fact, falsity, scienter or reliance. Second, plaintiff's cause of action for breach of contract based upon the use of allowances to pay for certain work must be dismissed because said practice was part of the course of conduct acknowledged and approved by the plaintiff's employees. Third, the record is devoid of evidence that support an award of punitive damages and said damages may not be awarded in actions for breach of contract. Fourth, plaintiff's damages must be limited by the economic loss doctrine such that the plaintiff must be prohibited from recovering for costs to tear down and replace walls that are not leaking. Lastly, New York law does not recognize an independent cause of action for *res ipsa loquitur* or punitive damages.

Similarly, the Irwin Defendants assert four bases for their entitlement to summary judgment.

First, John Irwin, the President of Irwin Contracting Inc., is not a party to any contract with the School District and he does not owe any contractual or legal obligations to the plaintiff. Second, the Irwin Defendants substantially completed their work in accordance with the contract documents and are not responsible for any damage or defects that may exist in the exterior walls of the project.

Third, the fraud claim is factually and legally insufficient as a matter of law because: they seek solely to enforce the separate contractual obligations of the Grillo Defendants, Greyhawk and the Irwin Defendants and do not support or give rise to a cause of action for fraud; the School District did not rely on the Irwin Defendants to prepare the contract plans and specifications for the Howitt Project or to determine whether the contract work was performed and completed in accordance with the contract plans, specifications and contract documents; and any allegations that the Irwin Defendants did not fully disclose its concerns about the wet north wall condition that occurred in late 2002 and that the Irwin Defendants knew or should have known that the application of the water repellant product on the north wall would not remediate water infiltration at that location are refuted by the evidence which establishes that Edward Cullen, as the Director of Facilities for the plaintiff School District who was responsible for, *inter alia*, attending project meetings and reviewing payment applications after architect and construction manager approval, participated in ongoing discussions and meetings concerning the wet north wall as well as the extensive tests, inspections and examinations of the north wall. Defendants argue that the fraud claim also fails because the application of the silicone product fully remediated the north wall.

Lastly, the Irwin Defendants maintain that there is no basis on which to predicate a

claim for punitive damages.

Notably, in support of their motion for summary judgment, the Grillo Defendants rely upon the affidavit of their expert, Mark Ellis, R.A., a licensed architect, who states, in pertinent part, as follows:

***

4. For the reasons set forth below, based upon good and accepted architectural and investigative principles and practices, there is no evidentiary or investigative basis to conclude that the brick wall along the west side of sixth grade wing at Howitt is not preventing water penetration or is not draining as intended. Therefore, there is no basis to conclude within a professional degree of certainty that exterior walls along the west side of sixth grade wing must be replaced.

***

6. In the course of the probes, I examined the exterior brick wall at the west side of the sixth grade wing where no leaks have been reported. My employees examined the same between the [concrete masonry unit] and brick walls. They reported that there was no visible evidence of deterioration of the [concrete masonry unit] or brick wall, nor visible evidence to suggest that water that entered the cavity did not drain as intended. There was no evidence that water had become trapped in the cavity. This information was confirmed by photographs of that area that I have reviewed.

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11. Because there is no objective evidence of damages to the [concrete masonry unit] or brick walls and no testing to prove that water is entering the cavity and is not draining as intended, there is no basis for a design professional to conclude within a reasonable degree of certainty that the walls are deteriorating due to water infiltration and that repairs are therefore required to the west side of the sixth grade classroom addition where no leaks have been reported.

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Incidentally, while the evidence submitted herein consistently refers to leaks and defects in the north and east walls at Howitt's new additions, the Grillo Defendants expert appears to have explored only the west walls. This is wholly insufficient.

Mark Ellis does not appear to have made any assessments as to the north or the east

walls at the sixth grade wing at Howitt. Notably, it is the north and the east walls that are the offending walls and form the primary basis of this action by the School District. Having failed to examine and assess the offending walls, the Ellis affidavit is rejected as lacking proper foundation (***Vasquez v. JRG Realty Corp.***, 81 AD3d 555 [1st Dept. 2011]; ***Azzaro v. Super 8 Motels, Inc.***, 62 AD3d 525 [1st Dept. 2009]). Further, Ellis fails to recite the manner in which he came to his conclusions (***Ioffe v. Hampshire House Apt. Corp.***, 21 AD3d 930 [2nd Dept. 2005]; ***Krash v. Bishop–Sanzari, J.V.***, 309 AD2d 788 [2nd Dept. 2003]). Therefore, since the affidavit fails to deal fully with the claims raised in the action, this Court finds that Ellis's affidavit lacks probative value with respect to the defendants' liability on the theories alleged.

The Irwin Defendants do not reply upon any expert in support of their motion.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the issue is "arguable" (***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404 [1957]). Indeed, in determining a motion for summary judgment, this Court's function is not to resolve issues of fact or to determine matters of credibility but to determine whether issues of fact exist precluding summary judgment (***Roth v. Barreto***, 289 AD2d 557, 558 [2nd Dept. 2001]).

Viewing the evidence in the light most favorable to the non-moving party, the plaintiff, and giving the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence herein (***Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.***, 7 NY3d 96, 105-106 [2006]; ***Haymon v. Pettit***, 9 NY3d 324 [2007]), this Court determines the Grillo Defendants and the Irwin Defendants' motions as herein below.

In it's claim for breach of contract against the architects, the School District claims that the Grillo defendants were obligated to provide architectural services in connection with the Howitt project and exercise the duty of care of an architect with a high level of experience and expertise required of architects in the same or similar circumstances. The School District claims that the Grillo Defendants breached their contract with the plaintiff when they failed to, *inter alia*, prepare sufficient and proper designs, plans, specifications, drawing and instructions; properly supervise the construction and/or installation at Howitt; provide, procure, design and/or obtain sufficient repairs, resolutions, solutions, and or replacement of the interior and/or exterior walls of Howitt. Plaintiff also claims that the Grillo Defendants breached their contractual obligation to properly advise the plaintiff regarding the defects and deficiencies in the walls at Howitt, before, during and after construction and that they failed to discover the defects and/or deficiencies in the designs,

plans, specifications, drawings, instructions, and/or construction of the walls at Howitt.

The School District maintains that because it is wholly untrained in matters connected with architectural design and/or construction, it reasonably relied upon the Grillo Defendants' recommendations, representations, expertise and advice when it accepted Howitt in its substantially completed state and that as a direct and proximate result of the defendants' breach of the contract, it has sustained extensive damage.

Initially, it is noted that the Grillo Defendants do not seek summary judgment dismissal of this cause of action in its entirety; rather, the Grillo Defendants only seek to dismiss those claims that are predicated upon their alleged use of allowances to pay for certain work and their failure to report a design error. Indeed, the Grillo Defendants do not dispute that, as the architects on the Howitt Project, they had contractually agreed to review work and to approve contractor payments (Memo of Law, p. 9). Yet, their argument is that they did not breach this duty. In the absence of any evidence to substantiate their claim, this Court disagrees with the Grillo Defendants.

That is, while the documentary evidence confirms that the School District ultimately approved the use of the allowances to pay for the sealant, it cannot be overlooked that said approval was only granted once the Grillo Defendants and the Irwin Defendants had *first* approved the invoices for payments and had provided certain assurances to the School District. Indeed, the record demonstrates that all payments authorized by the plaintiff were made pursuant to Application for Payment documents requested by the Irwin Defendants and containing assurances by the Contractor that "to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payment received from the Owner, and that current payment shown herein is now due" (See e.g, Irwin Payment Application No. 10 dated November 18, 2002, Ex. 39; Irwin Payment Application No. 11, dated January 17, 2003, Ex. 50).

Further, as to the payment of the sealant, the documentary evidence herein again confirms that the Irwin Defendants requested payment by Potential Change Order No. 48 dated December 16, 2002 as well as Additional Work Authorization from John Irwin dated December 16, 2002, Ex. 43). That is, the record demonstrates that in submitting an approving the invoices for payments, both, the Grillo Defendants and the Irwin Defendants affirmatively represented to the School District that the moisture concerns at Howitt were the

result of unforseen construction conditions and not as a result of design and/or construction defects and that Christopher Hunt had authorized the use of a water repellant sealant as part of the solution for the water infiltration at the north wall.

In seeking summary dismissal of the plaintiff's breach of contract claims, the Grillo Defendants, as the movant herein, are charged with the burden of establishing that they did not improperly approve Irwin's work and payment requests in direct violation of their responsibilities under the contract with the School District. This they have failed to do.

Inasmuch as the Grillo Defendants maintain that the plaintiff's employees also had knowledge of and approved the use of the budget allowances to pay for the sealant, this argument is entirely meritless in light of the documents cited above and the written assurances that both, the Irwin Defendants and the Grillo Defendants provided to the School District.

Equally meritless is the defendants' claim that the plaintiff's course of conduct established that it had developed the use of allowances for payment of additional work not contained in the original scope of the contract. First, there is no factual evidence discernable to this Court which substantiates the Grillo Defendants' claim. Equally unfounded in the record is the Grillo Defendants' claim that plaintiff had waived the requirement of written change orders for any extra work that needed to be done by expressly approving the work and payments.

Further, in moving for summary judgment dismissal of the plaintiff's breach of contract claim, the Grillo Defendants must also establish that they did not breach their duty by failing to report a design error in breach of their contract with the School District. They have failed to establish this as well. The evidence demonstrates that the defendants' first knowledge of the water infiltration occurred in October 2002 when, after several days of rain, the several areas of the newly constructed sixth grade wing, including the north wall of the sixth grade wing, the east facing first floor classroom walls were infiltrated with water. Specifically, in a letter dated October 14, 2002, Samuel Wright of Irwin Contracting, Inc. wrote to Kirco Industries and Nationwide Restoration (the roofing contractor at Howitt), in pertinent part, as follows:

> "Upon completion of wall construction, we have noticed some moisture penetrating the walls in several areas...Over this past weekend, we had several days of raining starting on 10-10-02 and continuing through 10-13-02. Over the course of this period

> of rain, we noticed several areas throughout the building, which were accumulating moisture inside the block walls...particularly...on the north and east elevations...What we will require is a thorough inspection of your completed work, i.e., flashing, weep holes, jointing, etc. to ensure that the items are functioning properly and to rule them out as a cause for this problem..."
> (Plaintiff's Aff. In Opp., Ex. 23).

In response thereto, on October 22, 2002, Kirco prepared a response to the Irwin Defendants where Kirco (via its president, Jeffrey Kirchner) memorialized an October 18, 2002 walk through with Samuel Wright of the Irwin Defendants which Kirchner states verified "that all flashing, weep holes and workmanship was performed as per plans and specifications" and further informed the Irwin Defendants of his opinion that the infiltration at Howitt was due to "no cavity" between the brick and block, i.e., a design defect on the part of the Grillo Defendants. That is, Kirchner attributed the cause of the water infiltration to the inadequate cavity size. Specifically, Jeffrey Kirchner, in his October 22, 2002 letter to Irwin Contracting Inc. wrote, in pertinent part as follows:

> Basically, the north wall seemed to be saturated and partial areas on the east wall. I walked the job and investigated weather [sic] our weep holes were installed or not. All weep holes appeared to be present. On the north wall and areas where there aren't windows there are only weep holes on the bottom of the wall as per plans and specifications...From past experiences and the way the wall is wet from the top of the wall the rain is penetrating the brick and creeping to the block due to no cavity between the two before the water can get to the weep holes at the bottom. I have experienced these same problems at other jobs...where this no cavity between the block and brick. It is my opinion that all flashings, weep holes and workmanship was performed as per plans and specifications.
> (Plaintiff's Aff. In Opp., Ex. 24).

Thus, knowing that the mason had claimed that a design defect was to blame for the water infiltration, and acknowledging that they had a contractual duty to, *inter alia*, report any design defects, the Grillo Defendants' claim that they did not breach the contract with the School District when they failed to report this finding, is entirely meritless.

As such, the Grillo Defendants' motion for summary judgment dismissing the plaintiff's breach of contract claim is **denied**.

In it's claim for breach of contract against the general contractor, the Irwin Defendants, the School District claims that the defendants were obligated to provide general contractor services and exercise the duty of care of a general contractor with a high level of experience and expertise in the same or similar circumstances. The School District claims that the Irwin Defendants breached their contract with the School District when they failed to, *inter alia*: properly review designs, plans, specifications, drawings and/or instructions; properly supervise the construction and/or installation of the interior and/or exterior walls of Howitt; properly construct the interior and exterior walls of Howitt; properly select qualified sub contractors including Kirco; ensure the interior and/or exterior walls at Howitt were properly prepared and constructed and could properly and adequately prevent water and/or moisture from entering the building; properly and/or fully advise and/or notify the plaintiff during the course of construction of Howitt or thereafter or concerns, defects and/or deficiencies relating to moisture and/or water leaks in the walls at Howitt; and properly perform the general contractor services with respect to Howitt in conformity with the terms of the general contractor contract.

Plaintiff claims that as a direct and proximate result of the Irwin Defendants' breach of the contract, it has sustained extensive damage.

In seeking summary dismissal of the plaintiff's breach of contract claim, the Irwin Defendants argue that they constructed the exterior walls of Howitt in accordance with the contract plans and specifications that were developed, prepared and issued by the School District and its design and construction representatives, the Grillo Defendants and Greyhawk. The Irwin Defendants also submit that since the School District's representative, Edward Cullen, and their architectural and engineering representatives, Grillo Defendants and Greyhawk, monitored, supervised and inspected the contract work completed by the Irwin Defendants, and approved and accepted the work in all respects, their claim for breach of contract fails.

Plaintiff's reliance on the expert affidavit of architect Jan Kalas who, in February 2006, conducted a forensic review of Howitt in order to determine the cause of the water infiltration at the building falls short of presenting a triable issue of fact as against the Irwin Defendants. Kalas' expert affidavit establishes that the probes and observations at the building disclosed, *inter alia*, construction and supervisory defects including mortar filled weep tubes, mortar lodged in the drainage cavity, intermittent weep tube spacing, weep holes above the bottom of the drainage cavity, end dam flashing not installed, brick ties not fully engaged, open/cracked brick mortar joints throughout the wall and open roofing seams along

perimeter of the roof above the exterior walls with reported water infiltration. However, there is no statement by Kalas, or any other evidence for that matter, that establishes that these defects are so glaring or out of the ordinary that would render the Irwin Defendants liable for improper construction.

The Court of Appeals in the seminal decision in ***Ryan v. Feeney & Sheehand Building Co.***, 239 NY43, 46 [1924] stated the following:

> A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.

There is no evidence that the contractors were not using ordinary care or should have known that the construction of the additions in the manner prescribed by the architectural plans and designs would be dangerous and unsafe. The fact that plaintiff's expert now, in hindsight and upon examination, finds the construction improper and insufficient is not enough to hold the Irwin defendants liable, especially where the plaintiff's expert fails to state that the defects were so readily apparent that the contractor should have known that the building would be defectively constructed (*Id*).

That being said, the plaintiff's breach of contract claim nonetheless stands against the Irwin Defendants insofar as plaintiff claims that the defendants failed to properly and fully advise and notify the plaintiff during the course of construction of Howitt or thereafter of concerns, defects and deficiencies relating to moisture and water leaks in the walls at Howitt. Clearly, the defendants had agreed to keep the plaintiff apprised of such issues and other progress at Howitt and there is no support for their claim that they failed to discharge this burden. The defendants have not established that they did not breach that duty, and clearly the breach caused the plaintiff damage. Thus, plaintiff's claims against the Irwin Defendants for breach of their duty of supervision is legally sufficient.

Plaintiff's twelfth cause of action for fraudulent concealment and misrepresentation however fails.

In addition to the traditional elements of fraud and misrepresentation, i.e., scienter, reliance, and damages (***Small v. Lorillard Tobacco Co., Inc.***, 94 NY2d 43 [1999]), a plaintiff alleging fraud based upon fraudulent concealment must also establish that the defendants had

a duty to disclose material information (***Spencer v. Green***, 42 AD3d 521, 522 [2nd Dept. 2007]; ***P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.***, 301 AD2d 373 [1st Dept. 2003]). The duty must be based upon some special relationship between the parties (***National Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Group***, 273 AD2d 140 [1st Dept. 2000]). "In the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such a relationship, there is no duty to disclose" (***900 Unlimited, Inc. v. MCI Telecom. Corp.***, 215 AD2d 227 [1st Dept. 1995]; ***Auchincloss v. Allen***, 211 AD2d 417 [1st Dept. 1995]).

Here, plaintiff claims that the defendants all made certain representations to the plaintiff that, due to their special expertise, they knew or should have known were false at the time. Plaintiff claims that the defendants made said representations and non-disclosures with the intent to induce plaintiff's reliance thereon, and that as a direct and proximate result of the improper and inadequately performed defective work by the defendants and the intentional and/or negligent misrepresentations made by the defendants, the plaintiff has sustained damages.

Specifically, plaintiff predicates it's fraudulent concealment cause of action upon the allegations that the defendants failed to notify, advise or otherwise inform it of the defects and deficiencies that it discovered or should have discovered in the design, plan, structure, installation, and/or construction of the interior and/or exterior walls at Howitt. The School District claims that the defendants fraudulently concealed, *inter alia*, the following: that the contract documents that were issued for the project, including the architectural plans and designs, were deficient and contained substantial defects and deficiencies with regard to the waterproofing system of the exterior walls; that the defendants had failed to perform their contract work and were not entitled to receive contract payments for their work; that the defendants had concerns regarding existing water leaks in the walls, which included moisture and water infiltration into the north wall; and that the Irwin Defendants did not complete the walls in accordance with the contract plans, specifications and construction documents.

Plaintiff claims that the defendants are liable to it for fraud, largely because the defendants collectively failed to perform their respective contractual duties and obligations to the School District and failed to disclose their breaches of the contract to the School District. Plaintiff claims that the defendants misled the School District into believing that the project was being properly supervised and administered; that the Irwin Defendants were properly performing the construction work in accordance with the contract documents; that the contract designs, specifications, drawings and instruction issued by the Grillo Defendants

and Greyhawk complied with the applicable contract terms and standards; that the Howitt Project was substantially completed in or about April 2003; and that the Irwin Defendants were entitled to receive payments under the construction contract including the final payment. The School District further alleges that it relied upon "the services, acts, recommendations, representations, certifications, assurances, expertise and/or advice" of the Defendants, including the Irwin Defendants, in accepting the Howitt Project. The School District also alleges that in 2002, the defendants became concerned about the moisture and the water leaks in the exterior walls of the project but failed to fully advise the School District of their concerns.

Again, in seeking summary dismissal, the Grillo Defendants argue that plaintiff's fraud claim based upon the application of the water sealant to the walls and the use of allowances to pay for certain work must be dismissed because there is no clear and convincing evidence substantiating this claim. Indeed the Grillo Defendants submit that the plaintiff's employees and construction manager knew about the dispute between the contractor and the architect over the cause and responsibility for the moisture condition that resulted in the use of the sealant, knew that the dispute between the contractor and the architect as to the responsibility for moisture was never resolved, agreed to accept the application of sealant as a way to resolve the impasse and approved the payment of the sealant by the plaintiff. Similarly, the Grillo Defendants argue that plaintiff's claim for fraud based on the use of allowances to pay for certain work, must be dismissed because the plaintiff's employees and construction manager knew of the reallocation of allowances and approved the expenditures.

It is well established that a claim of fraud may not be maintained where the only fraud claimed relates to an alleged breach of contract (***Benedict Realty Co. v. City of New York***, 45 AD3d 713 [2nd Dept. 2007]; ***Lee v. Matarrese***, 17 AD3d 539 [2nd Dept. 2005]). Merely alleging scienter in a cause of action to recover for breach of contract, unless the representations alleged to be false are collateral or extraneous to the agreement, does not convert a breach of contract cause of action into one sounding in fraud (***Lo v. Curis***, 29 AD3d 525 [2nd Dept. 2006]). Thus, where, as in this case, the evidence is clear that the only fraud relates to breach of contractual agreements and that also form the basis of a breach of contract claim, *supra*, plaintiff is not permitted to recast its breach of contract claim as a fraud claim (***Weitz v. Smith***, 231 AD2d 518 [2nd Dept. 1996]).

Although a misrepresentation of a material fact which is collateral to the contract but served as an inducement to enter into it is sufficient to support a fraud claim (***Mendelovitz***

v. Cohen, 37 AD3d 670 [2nd Dept. 2007]), here there is no evidence of such a misrepresentation. In this case, there is no question that the School District's alleged fraudulent concealment claim is predicated upon the defendants' failure to perform its work in accordance with the contract documents and it's purported concealment of its improper performance and alleged contract failures under the contract.

Thus, based upon the papers submitted herein, this Court finds that the plaintiff's fraudulent concealment cause of action/fraud cause of action, seeks to do no more than enforce the bargain that the parties' struck (***Carle Place Union Free School Dist. v. Bat-Jac Const., Inc.***, 28 AD3d 596 [2nd Dept. 2006]). Accordingly, the Grillo Defendants and the Irwin Defendants' separate motions seeking summary dismissal of the plaintiff's fraud/fraudulent concealment and misrepresentation action are **granted**.

Plaintiff's claims for negligence are also **dismissed**.

Plaintiff claims that the Grillo and Irwin Defendants agreed to provide architectural and general contractor services, respectively, and were obligated to exercise ordinary and reasonable care and skill exercised by architects and general contractors in providing those services. However, plaintiff claims that the defendants violated their duty to the plaintiff and were consequently negligent. Plaintiff claims that as a direct and proximate result of the negligence and carelessness of the defendants, the walls and waterproofing system at Howitt contained and/or developed deficiencies causing the plaintiff damages.

As stated above, these claims are also a predicate for the plaintiff's breach of contract claims against said defendants, which, as determined above, withstand their motions for summary judgment.

A breach of contract claim does not give rise to a separate cause of action in tort unless the Defendant breached a legal duty that is separate and apart from the Defendants contractual obligations (***Old Republic National Title Ins. Co. v. Cardinal Abstract Corp.***, 14 AD3d 678 [2nd Dept. 2005]; ***Muldoon v. Blue Water Pool Services, Inc.***, 7 AD3d 496 [2nd Dept. 2004]). The relationship and the legal obligations between the School District and the architects (the Grillo Defendants) and the general contractor (the Irwin Defendants) is contractual. The obligations of the defendants to the School District is established by their respective contracts and agreements.

Therefore, in the absence of any evidence that the defendants breached a duty other

than one imposed by the contracts with the School District, the Grillo Defendants and the Irwin Defendants' motions for summary judgment dismissal of the negligence causes of action as asserted against them are **granted**.

Similarly, plaintiff's eleventh cause of action for *res ipsa loquitur* and negligence *per se* is also **dismissed**.

Res ipsa loquitur is an evidentiary rule and does not constitute a separate cause of action (***Abbott v. Page Airways***, 23 NY2d 502, 512 [1969]; ***Frew v. Hospital of Albert Einstein Coll. of Medicine Div. Of Montefiore Hosp. & Med. Ctr.***, 76 AD2d 826 [2nd Dept. 1980]). The principle does not state a separate theory on which a plaintiff may recover for injury. Furthermore, without a cause of action for negligence there is no viable cause of action to which to apply the doctrine of *res ipsa loquitur* (***Abbott v. Page Airways***, **supra**).

Negligence *per se* is limited to claims based upon a "violation of a State statute that imposes a specific duty" (***Elliott v. City of New York***, 95 NY2d 730, 734 [2001]) that is more than "a standard of reasonableness." Here, plaintiff's allegation that the defendants had a duty to comply with all necessary laws, codes, and regulations fails to meet that mark.

Plaintiff's claim that the defendants violated the New York State Building Code §§ 1403.2, 2109.6.3.1.1, 1404.2, 1405.3 and 2105.1 and are therefore negligent *per se* is unavailing. Said regulations, albeit at the State level, do not carry the weight of a statute such that their violation would constitute negligence *per se* (***Elliott v. City of New York***, supra). Generally, the violation of a rule of an administrative agency such as the Department of State lacks the force and effect of a substantive legislative enactment and therefore does not establish negligence *per se*; at best, a violation thereof is simply some evidence of negligence (***Long v. Forest-Fehlhaber***, 55 NY2d 154 [1982]; ***Mikel v. Flatbush General Hospital***, 49 AD2d 581 [2nd Dept. 1975]).

Accordingly, the Grillo Defendants and the Irwin Defendants' motion for summary judgment dismissing the plaintiff's eleventh cause of action is also **granted** and the cause of action is **dismissed**.

Plaintiff's claim for punitive damages also fails.

"[R]ecovery of exemplary damages in an action for breach of contract is not authorized where only a private wrong and not a public right is involved" (***Cross v. Zyburo***,

185 AD2d 967, 968 [2nd Dept. 1992]). Although involving a public entity, namely, the School District, the transaction at issue here was merely a private one between the School District and the defendants. "Allegations of breach of a private agreement, even a breach committed willfully and without justification, do not establish such willful fraud or other morally culpable behavior to a degree sufficient to justify a recovery of punitive damages" (*Id*). There must be proof of more than a mere private wrong (***Merrick v. Four Star Stage Lighting, Inc.***, 60 AD2d 806 [1st Dept. 1978]).

There is no evidence that the defendants engaged in such fraudulent, criminal or dishonest acts concerning or affecting the general public, such that the plaintiff would be permitted to recover punitive damages.

This action is founded solely upon a private breach of contract. Further, since all of plaintiff's claims arise from breach of contract, *supra*, and in the absence of any evidence of a fraud committed against the public at large, the plaintiff's claim for punitive damages is herewith **dismissed**.

Plaintiff's reliance upon ***Williamson, Picket, Gross, Inc. v. Hirschfeld***, 92 AD2d 289 [1st Dept. 1983] for the proposition that a wrong against the general public is not a required element of a claim for punitive damages in breach of contract actions in New York is misplaced because the First Department abandoned the holding of ***Williamson, Picket*** in 1986 in ***Jacobson v. New York Property Ins. Underwriting Ass'n.***, 120 AD2d 433 [1st Dept. 1986]. In ***Jacobson***, the First Department explicitly held that punitive damages are available in breach of contract actions only if the allegations support a conclusion that a fraud "upon the public" is involved (*Id.* at 435). Indeed, the First Department in ***Williamson, Picket*** itself acknowledged the prevailing New York rule that "punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved" (***Williamson, Picket, Gross, Inc. v. Hirschfeld***, **supra** at 294).

Similarly, plaintiff's reliance upon ***New York University v. Continental Ins. Co.***, 87 NY2d 308 [1995] is also misplaced. There, the Court of Appeals denied punitive damages because the action was grounded on a breach of contract and the plaintiff failed to state any tort outside of the contract (*Id.* at 321). In arriving at this conclusion, the Court stated: "Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract" (*Id.* at 316). The Court further noted that "[a] defendant may be liable in tort when it has breached a duty of

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reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*Id*). As established above, legally this case is no different.

Accordingly, the Grillo Defendants and the Irwin Defendants' motions for summary judgment dismissing plaintiff's punitive damages cause of action are **granted**. The punitive damages claim is **dismissed**.

Finally, plaintiff's separate causes of action against John A. Grillo, Architect P.C. and John A. Grillo, Individually as School District Architect for negligence and breach of contract, are also **dismissed**.

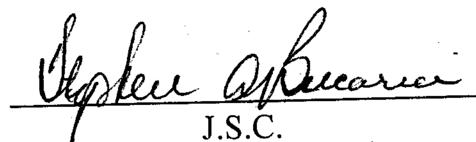
Notably, plaintiff's first and second causes of action are advanced against the Grillo Defendants including the individual Christopher Hunt. Plaintiff's third and fourth causes of action on the other hand simply assert the same claims against the John A. Grillo, Architect P.C. and John A. Grillo, Individually as School District Architect; that is, the third and fourth causes of action are not advanced against Christopher Hunt. However, insofar as the claims are the same, the causes of action arise from the same facts and allege the same damages, and the parties are the same, plaintiff's third and fourth causes of action are herewith dismissed as duplicative (***Bruno v. Trus Joist a Weyerhaeuser Bus.***, 87 AD3d 670 [2nd Dept. 2011]; ***Alizio v. Feldman***, 82 AD3d 804 [2nd Dept. 2011]).

The parties' remaining contentions have been considered and do not warrant discussion.

All applications not specifically addressed are herewith **denied**.

This shall constitute the decision and order of this Court.

Dated JUN 20 2012



J.S.C.

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JUN 22 2012
NASSAU COUNTY
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