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

PRESENT: CHARLES E. RAMOS PART 53
Justice

Oppenheim

- v -

Mojo-Stumer Assoc.

INDEX NO. 602408/2006

MOTION DATE

MOTION SEQ. NO. 22

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☐ No

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

Motion is decided in accordance with accompanying Memorandum Decision

FILED

JUL 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/23/12

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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AVIVITH OPPENHEIM and WILLIAM OPPENHEIM,

Plaintiffs,

Index No. 602408/2006

-against-

MOJO-STUMER ASSOCIATES ARCHITECTS, P.C. d/b/a MOJO-STUMER ASSOCIATES, P.C., MARK STUMER, and JOSEPH VISCUSO,

Defendants.

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Charles Edward Ramos, J.S.C.

In motion sequence 022, defendants Mark Stumer ("Stumer") and Mojo-Stumer Associates Architects, P.C. ("MSA") (together, the "Defendants") move this Court for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiffs Avivith and William Oppenheim's (the "Oppenheims") first, fourth, fifth, and sixth causes of action, and granting Defendants partial summary judgment on their third and forth counterclaims.

The Oppenheims cross-move for an order pursuant to CPLR 3211(a)(2) and 3212(e) granting them partial summary judgment dismissing the third and forth counterclaims.

Background

This case arises out of the failed renovation (the "Project") of a cooperative apartment (the "Apartment") located at 860 Fifth Avenue, New York, New York. Avivith Oppenheim is the tenant-shareholder and leases the Apartment from 860 Fifth Avenue Corporation (the "Co-Op").

On May 1, 2003, the Oppenheims entered into an agreement (the "Agreement") with MSA to design the Project. Defendant Mark Stumer is an architect duly licenced by the State of New York and serves as the president and chief executive of MSA. The Agreement provides that in addition to preparing plans and designs for the Project, MSA would "coordinate the necessary plumbing, electrical and HVAC layouts[,] . . . prepare contract documents (working drawings and specifications) for competitive bidding and construction and assist [the Oppenheims] in [their] bidding packages, negotiations and final securing of the general contractor," and "periodically visit the site to inspect the quality of the construction only to see that it meets our design aesthetic and quality standards" (Stumer Aff. Ex. A). The Agreement also contains an exculpatory clause that states "[MSA is] not responsible for the means, methods and/or schedules of construction" (*id.*).

In exchange for these services, the Oppenheims agreed to pay an architect fee totaling 15% of the Project construction costs and an interior services fee equal to the combined total of 20% of the cost of all "built-ins" and 25% of the cost of all items purchased through MSA. Payments to MSA were to be made on a periodic basis tied to the percentage of the Project completed. The Agreement also contains a section titled "Ownership and Use of Documents" that addresses copyright and use of all documents

produced by MSA under the Agreement, but these provisions were stricken and denoted "NA" by Stumer (*Id.*).

Subsequent to execution of the Agreement, various contractors submitted bids for the Project. Though they were not the lowest bidder, the Oppenheims selected V.I.S.T.A. of New York Inc. ("Vista") on MSA's recommendation to complete the Project (A. Oppenheim Aff. ¶ 10-11). Defendant Joseph Viscuso ("Viscuso") was Vista's principal. On February 11, 2004, the Oppenheims entered into an agreement with Vista (the "Vista Agreement") which provided that the Project would be substantially complete by July 16, 2004 and fixed the total cost at $760,110. Pursuant to the Vista Agreement, the Oppenheims would make periodic payments to Vista based on the percentage of work completed. Work on the Apartment began around May 2004. As part of the scope of services provided for in the Agreement, MSA reviewed Vista's applications for payment during the course of the Project and certified the percentage of work completed for the purposes of payment under the Vista Agreement (Stumer Aff. ¶ 7).

Despite construction delays and issues with change orders, the Oppenheims submitted payments to Vista between May 2004 and October 14, 2004 totaling approximately $302,299.06 (A. Oppenheim Aff. ¶ 14-17). In fall 2004, the Oppenheims grew concerned about delays with the Project and retained Edward T. Braverman, Esq. ("Braverman") as legal counsel to communicate with MSA and

address their concerns with the Project (A. Oppenheim Aff. ¶ 7; Stumer Aff. ¶ 11).

At or around the same time, the Oppenheims retained FSI Architecture ("FSI") to inspect and report on the progress of the Project. In December 2004, FSI reviewed the Project plans and specifications, examined the Apartment, and issued a report finding that the applications for payment sought payment for work that had not yet been completed. For example, FSI reported that the fifth application for payment from Vista and approved by MSA stated that the Project was 57% complete, but FSI observed that only about 25 to 30% of the work had actually been performed (Cicalo Aff.). FSI also reported that there were numerous problems with the work that had been completed.

In January 2005, the Oppenheims were informed that liens had been filed against the Apartment by subcontractors alleging that Vista had failed to pay them. On February 9, 2005, the Oppenheims, Braverman, and FSI met with Stumer to discuss their concerns with the Project. At the meeting, Stumer refused to participate without counsel present and the parties were unable to resolve their differences. MSA and VISTA did not return to the Project after this meeting. Following their departure, the Oppenheims retained a new contractor and later a third contractor to complete the Project. Vista later declared bankruptcy.

The Defendants have submitted affidavit testimony from

Ronnette Riley ("Riley), a architect registered in New York that indicates the Oppenheims made a number of changes to the design of the Apartment after MSA and Viscuso's departure from the Project including changes to the plans for the study and maid's room, additions to the lighting and electrical work, and the addition of soffit and other work. The Oppenheims contend that these changes were within the scope of the Agreement. Riley also indicates that there were several construction delays arising from the respective tenures of the second and third contractors.

On July 7, 2006, the Oppenheims initiated this case by filing a summons and verified complaint. During the course of the litigation, Stumer provided deposition testimony that between July 2003 and December 2004, Vista made several payments to MSA as "thank you for introductions to projects" (A. Oppenheim Aff. Ex. C at 43, 59-61.). Payments were made on account of ten projects, including approximately $8,000 to $10,000 on account of the Project (A. Oppenheim Aff. Ex. C at 133-134). In August 2007, Viscuso pled guilty to misdemeanor commercial bribery in the second degree for a crime related to payments made to MSA between May 1, 2003 and January 10, 2005. On October 27, 2007, this Court granted the Oppenheims leave to amend their complaint to plead a bribery-based RICO cause of action.

In September 2008, the Defendants made a motion for spoliation sanctions to preclude the Oppenheims from submitting

expert testimony and to strike the complaint on the grounds that the Oppenheims had destroyed evidence by completing the renovation without notice to the Defendants or affording their expert access to the Apartment.

On April 20, 2009, this Court issued an order that granted the Defendants's motion to preclude the expert testimony, allowing the Oppenheims expert to testify only as a fact witness, but denied the motion to strike the complaint (2009 NY Slip Op 30939[U][Sup Ct, NY County 2009]["The defendants' motion to exclude testimony is granted, in part to the extent that the plaintiffs . . . shall be precluded from presenting expert testimony on the amount of work completed, the alleged deficiencies in the work performed, and the costs of completing the renovation"], *affd* 69 AD3d 407 [1st Dept 2010]). The Oppenheims appealed and the First Department affirmed this Court's decision, holding that the "[p]laintiffs spoliated evidence central to their claim that renovations on their apartment . . . were not complete when they invited a new contractor to perform substantial additional work without first permitting defendants to verify the need for such additions, warranting a sanction" (*Oppenheim v Mojo-Stumer Assoc. Architects, P.C.*, 69 AD3d 407 (1st Dept 2010).

On September 10, 2010, this Court issued an order granting the Oppenheims leave to file the Fourth Amended Verified

Complaint (the "Complaint") for the purpose of adding details to the existing claim of bribery under the RICO statute.

In their amended Complaint, the Oppenheims seek to recover costs expended to complete the Project, to repair alleged deficiencies, and for loss of use of the property.

Discussion

A grant of summary judgment is appropriate where the Court determines that there are no material triable issues of fact (NY CPLR 3212[b]). The proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. NYU Med Center*, 64 NY2d 851, 853 [1985]). To defeat a motion for summary judgment, the party opposing the motion must come forward with proof establishing the existence of triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the party opposing the motion cannot present evidentiary proof in admissible form, he or she must come forward with an acceptable excuse for his or her failure to present evidence in an admissible form. (*Id.*) "A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Velasquez v. Gomez*, 44 AD3d 669, 650-51 [2d Dept 2007]). A motion for summary judgment should be denied if the court has any doubt as to the

existence of a triable issue of fact (*Freese v Schwartz*, 203 AD2d513 (2nd Dept 1994).

The Defendants seek summary judgment dismissing the Oppenheims claims under the RICO Act ("RICO"), breach of contract, professional malpractice, misrepresentation, and on Defendants' counterclaims for copyright infringement. The Oppenheims cross-move for summary judgment seeking dismissal of the counterclaims for copyright infringement.

A. First Cause of Action

To sustain a RICO claim, a plaintiff must allege:

> "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce" (*Moss v Morgan Stanley, Inc.*, 719 F2d 5, 17 [2d Cir 1983], *cert denied* 465 US 1025 [1984]).

The RICO statute defines a "pattern of racketeering" as requiring at least two predicate acts of racketeering activity that occurred within 10 years of each other (18 USC § 1961[5]). In addition, a plaintiff must show both that the alleged predicate acts are related and that they are continuous (*East 32nd St. Assoc. v Jones Lang Wooten USA*, 191 AD2d 68, 73 [1st Dept 1993]). In seeking to satisfy the element of continuity, a plaintiff must show that the defendant's activities are neither isolated or sporadic (*GICC Capital Corp. v Technology Finance Group, Inc.*, 67 F3d 463, 469 [2d Cir 1995]). Nonetheless, the acts may be closed-

ended, posing a threat of related predicate acts extending over a substantial period of time in the past, or open-ended, posing a threat of continuing criminal conduct beyond the period during which the predicate acts were performed (*H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 239-243 [1989]).

This Court previously determined that Vista's bankruptcy eliminated the possibility of an open-ended pattern of racketeering activity (*See* September 15, 2009 Order at 10). This issue will not be revisited.

To determine whether a sufficient closed-ended pattern exists, courts rely on a number of factors, including: (1) the length of time over which the alleged predicate acts took place; (2) the number of predicate acts; (3) the nature and variety of acts; (4) the number of participants; (4) the number of victims; and (5) the presence of separate schemes (*GICC Capital*, 67 F3d at 467).

The Oppenheims allege that, over a period of eighteen months, they and nine other victims were defrauded in a scheme whereby Stumer made oral representations to them that he would oversee the Project without disclosing that he was receiving "kickbacks" from Vista if it was chosen as the contractor (Fourth Amend. Compl. ¶ 149). According to the Oppenheims, these "kickbacks" were financed by MSA and Vista through the practice of improperly and fraudulently inflating the price of contracts,

subcontracts and change orders, and then by MSA improperly certifying that payment was due for more construction work than was actually performed (Complaint ¶ 157). They further allege that they and the nine other construction project owners were injured, damaged, and deprived of competitive pricing on project work and were overcharged for work actually performed by MSA and Vista (Complaint ¶ 158).

With respect to closed-ended continuity, the Second Circuit "has never found a closed-ended pattern where the predicate acts spanned fewer than two years (*First Capital Asset Management, Inc. v Satinwood, Inc.*, 385 F3d 159 [2d Cir 2004]). *Drinkwine*, cited by the Plaintiffs in support of their contention that eighteen months is sufficient to establish closed-ended continuity, is not dispositive. In *Drinkwine*, the District Court held that seventeen months was sufficient to satisfy the temporal requirement for closed-ended continuity only where the acts involving the named plaintiff combined with allegations of essentially the same scheme perpetrated on unnamed parties exceeded the requisite two-year threshold (*id.*).

In a previous decision, this Court examined these factors in and concluded the following:

> "[T]he Complaint alleges only the single, non-complex scheme in which, MSA induced homeowners to retain Vista in order to receive kickback payments and then failed to alert the homeowners that Vista was overcharging them or performing substandard work. The Oppenheims have failed to make any allegations that

> could reasonably be interpreted as establishing a multi-faceted scheme to defraud. Where a RICO claim is based on acts narrowly directed toward a single fraudulent end with a limited goal, the claim will usually fail . . . Courts in the Second Circuit have generally held that where the conduct at issue involves a limited number of perpetrators and victims and a limited goal, the conduct is lacking in closed-ended continuity. . . Thus, the limited duration of the alleged pattern of racketeering, coupled with the Oppenheims' failure to allege the other non-temporal aspects of a RICO pattern of racketeering, demonstrates that the allegations contained in the Complaint are insufficient to establish closed-ended continuity"

(*Oppenheim v Mojo-Stumer Assoc. Architects, P.C.*, 25 Misc 3d 1222[A] [Sup Ct, New York County 2009, Ramos, C.][internal citations omitted]). These factors remain unchanged. The continuity element of the RICO test remains unsatisfied. Therefore, this claim fails as a matter of law.

B. Breach of Contract

The Defendants argue that the Oppenheims breach of contract claim should be dismissed because it is duplicative of the malpractice claim. Under New York law, "[a]n allegation that a party failed in the proper performance of services related primarily to its profession is a claim for professional malpractice" (*Travelers Indem. Co. V Zeff Design*, 60 AD3d 453, 455 [2009]) regardless of whether the underlying theory is based in contract or tort (*In re R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 541 [2004]).

Nonetheless, "claims for professional malpractice and breach of contract may co-exist, even though both arise out of the

professional's contractual obligations" (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]) where the plaintiff alleges a failure to provide a "particular bargained-for result" (*Kliment* 3 NY3d at 542-3). The bargained-for result must be "above and beyond that which [the architect] might be expected to accomplish using due care" (*Id.*). Furthermore, courts have typically dismissed as duplicative claims that arise from the same factual allegations and seek the same measure of damages (*Zeff*, 60 AD3d at 455).

The Oppenheims contend that MSA failed to "achieve a particular promised result" by failing to properly supervise and inspect Vista's work (Oppenheim Mem. At 10). Although the Agreement provides that MSA would inspect Vista's work "only to see that it meets our design aesthetic and quality standards," the record indicates that Stumer or MSA inspected Vista's work product and certified Vista's payment applications. Nevertheless, the record does not indicate that MSA or Stumer agreed to provide service above and beyond the due care arising from its professional obligation. Furthermore, the two causes of action are based on the same allegations and the Oppenheims failed to demonstrate any difference between the two sets of damages. Therefore, the breach of contract claim and malpractice claims cannot co-exist.

C. Malpractice

"A claim of professional malpractice requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury" *Talon Air Services LLC v. CMA Design Studio, P.C.*, 86 AD3d 511, 515 [1st Dept 2011]). The Defendants argue that the Oppenheims' cannot prove professional malpractice as a matter of law absent expert testimony. "It is incumbent upon the plaintiff to present expert testimony to support allegations of malpractice . . . except where the alleged act of malpractice falls within the competence of a lay jury to evaluate" *530 E. 89 Corp. v Unger*, 43 N.Y.2d 776 (1977).

While the Defendants correctly note that some of the alleged acts of malpractice are beyond the competence of the lay juror, many of the myriad allegations are not. For example, MSA approved pay applications that stated 50% of wood flooring was installed, but the Oppenheims claim that there was no wood flooring installed. Whether there was any wood flooring installed is a fact easily discernable by a lay jury. Therefore, there are issues of fact that preclude summary judgment on the issue of professional malpractice.

Furthermore, despite the Defendants' insistence to the contrary, it is not the law in New York that proximate cause in a professional malpractice case must be proven by expert

testimony.[1] To the extent that the Oppenheims have not presented proof of proximate cause, these are questions of fact to be determined at trial.

D. Misrepresentation

The Defendants allege that the Oppenheims' claim for misrepresentation was dismissed at a previous hearing and never reinstated. The Oppenheims have presented no evidence to refute this claim. Therefore, this claim remains dismissed.

E. Counterclaims

The Defendants allege that the Oppenheims infringed on their intellectual property rights by utilizing and altering, without consent, the architectural designs and plans for the Apartment after MSA and Stumer's exit from the Project. This Court lacks subject matter jurisdiction over the Defendants' counterclaims for copyright infringement as they fall under the exclusive jurisdiction of the federal courts (17 USC § 301 [a]). The Defendants' attempt, made in a footnote on the second page of their opposition brief, to withdraw their claims arising from federal law and assert only breach of contract and unjust enrichment, does not alter this result.

If the Defendants withdraw the portion of their counterclaims limited to copyright infringement, they fail to

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[1] To prove this point, the Defendants cite a string of inapposite cases including several that fail to mention the word "expert" at all.

state a claim for either breach of contract or unjust enrichment. Aside from language that was clearly stricken by Stumer, the Agreement contains no licensing or copyright provisions. Therefore, the counterclaims cannot survive as a claim for breach of contract as there is no applicable contract provision. Furthermore, the unjust enrichment claim hinges on the existence of a valid copyright, a determination that this Court does not have the jurisdiction to make.

Accordingly, it is

ORDERED that the Defendants Mojo-Stumer Associates Architects, P.C. and Mark Stumer's motion for summary judgment is granted in part, thereby dismissing the plaintiffs Avivith and William Oppenheims' first, fourth, and sixth causes of action and denied in part with respect to the third and fourth counterclaims; and it is further

ORDERED that the plaintiffs Avivith and William Oppenheim's cross claim for summary judgment is granted, thereby dismissing the third and fourth counterclaims; and it is further

ORDERED that counsel for all parties shall attend a status conference on August 7, 2010 at 10:00 a.m. at 60 Centre Street, New York, NY 10007, Courtroom 238.

Dated: July 23, 2012

ENTER:

J.S.C.