

**Board of Mgrs. of Fultonhaus Condominium v 119  
Fulton St. Realty, LLC**

2014 NY Slip Op 30248(U)

January 22, 2014

Supreme Court, New York County

Docket Number: 651576/2012

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Board of Managers of Fultonhaus

INDEX NO. 651576/2012

MOTION DATE 1/9/14

MOTION SEQ. NO. 2

MOTION CAL. NO.

- v -

119 Fulton Street Realty

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

104-123

137-146

150

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 1/22/14

SHIRLEY WERNER KORNREICH J.S.C.

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: PART 54

-----X

BOARD OF MANAGERS OF FULTONHAUS  
CONDOMINIUM,

Index No.: 651576/2012

**DECISION & ORDER**

Plaintiff,

-against-

119 FULTON STREET REALTY, LLC, DANIELL REAL  
ESTATE PROPERTIES, LLC, 119 FULTON STREET LLC,  
ISSAKHAR HACMUN, YOM TOV SAMIA, THE SHVO  
GROUP, LLC, TAUBE MANAGEMENT GROUP, HUSTVEDT  
CUTLER ARCHITECTS, GOLDSTEIN ASSOCIATES, PLLC,  
and I.V.L.N. CONSULTING ENGINEERS,

Defendants.

-----X

119 FULTON STREET REALTY, LLC, DANIELL REAL  
ESTATE PROPERTIES, LLC, 119 FULTON STREET LLC,  
ISSAKHAR HACMUN, and YOM TOV SAMIA,

Third-Party Plaintiffs,

-against-

NTD CONSTRUCTION CORP. and GACE CONSULTING  
ENGINEERS, P.C. f/k/a GOLDSTEIN ASSOCIATES, PLLC,

Third-Party Defendants.

-----X

HUSTVEDT CUTLER ARCHITECTS,

Second Third-Party Plaintiff,

-against-

GACE CONSULTING ENGINEERS, P.C. f/k/a GOLDSTEIN  
ASSOCIATES, PLLC, and NTD CONSTRUCTION CORP.,  
a/k/a EMERALD CONSTRUCTION GROUP a/k/a NEWTON  
CONSTRUCTION CORP.,

Second Third-Party Defendants.

-----X

NTD CONSTRUCTION CORP.,

Third Third-Party Plaintiff,

-against-

CASTLE RESTORATION AND CONSTRUCTION, INC.,  
DANICA GROUP, LLC, GGMG GROUP, JOLT ELECTRICAL  
CONTRACTING, INC., MILLENNIUM ELEVATOR, INC.,  
ROBBINS CONSTRUCTION CORP., ROKAH BENY,  
ROSS & ASSOCIATES, LLC, SPRAY TECH CORP., STREAM  
LINE WINDOWS, STUCCO SPECIALISTS, INC., and  
O'GRADY CONSTRUCTION CORP.,

Third Third-Party Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

GACE Consulting Engineers, P.C. f/k/a Goldstein Associates, PLLC (GACE), a defendant in the third-party and second third-party actions, moves to dismiss the claims asserted against it in such actions pursuant to CPLR 3211. GACE's motion is granted for the reasons that follow.

*I. Factual Background & Procedural History*

This case concerns a dispute over renovations performed on a building located at 119 Fulton Street in Manhattan (the Building). The court will not discuss the allegations in detail because such detail is irrelevant to this motion.

As the court discussed in its order dated April 11, 2013 (the April Order), GACE, a structural engineer, performed work on the Building between 2004 and 2006, pursuant to a contract with defendant/second third-party plaintiff Hustvedt Cutler Architects (HCA). Plaintiff commenced this action on May 10, 2012, asserting claims against defendants related to the renovations. Most of the defendants asserted cross-claims against each other for indemnification and contribution. In the April Order, the court dismissed the claims against GACE as time barred because GACE has not performed work on the building since 2006.

After the April Order was issued, three third-party actions were commenced, essentially bringing in all parties with any nexus to the subject renovations. GACE, however, is only a party to a single contract with HCA. The third-party claimants in this case, however, seek to assert myriad claims against GACE for indemnification and contribution, both equitably and under a theory that they are third-party beneficiaries to the HCA contract.

## II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a

matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The claims against GACE are defective on numerous grounds. For instance, GACE’s claimants improperly seek to impose contractual liability onto it for consequential economic damages. See *Rockefeller Univ. v Tishman Const. Corp. of N.Y.*, 232 AD2d 155 (1st Dept 1996), accord *Bd. of Ed. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28 (1987); see also *Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 233 (1st Dept 2007) (contribution “is not available for economic loss resulting exclusively from breach of contract”). Regardless, the claims against GACE can be easily disposed of for the same reason plaintiff’s claims against it were dismissed in the April Order – the statute of limitations.

Pursuant to CPLR 214(6), a cause of action sounding in malpractice is governed by a three-year statute of limitations “regardless of whether the underlying theory is based in contract or tort.” *In re R.M. Kliment & Frances Halsband, Architects*, 3 NY3d 538, 541 (2004). Here, the claim against GACE “is essentially that [GACE] failed to perform services in a professional, non-negligent manner.” See *Boslow Family Ltd. Partnership v Kaplan & Kaplan, PLLC*, 52 AD3d 417 (1st Dept 2008). Thus, all of the claims asserted against GACE, no matter how labeled, couched, or framed, are governed by a three-year statute of limitations that began to run when GACE completed the subject engineering services in 2006. See *Frank v Mazs Group, LLC*, 30 AD3d 369 (2d Dept 2006). Ergo, GACE cannot be held liable for damages arising from its work on the Building.<sup>1</sup> Accordingly, it is

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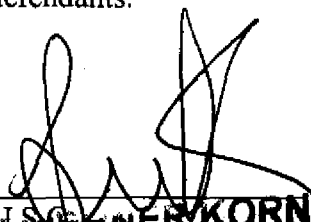
<sup>1</sup> The court need not reach the issue of which parties might be third-party beneficiaries of the HCA contract because, even if they are, they have “no greater rights or remedies than the direct parties to [a contract].” *AMBAC Assurance Corp. v EMC Mortg. LLC*, 39 Misc3d 1240(A), at

ORDERED that the motion to dismiss by GACE Consulting Engineers, P.C. f/k/a Goldstein Associates, PLLC (GACE) is granted, and the Clerk is directed to enter judgment dismissing the Third-Party Complaint and the Second Third-Party Complaint against GACE with prejudice; and it is further

ORDERED that the remaining claims in the main action and the three third-party actions are severed and shall continue against the remaining defendants.

Dated: January 22, 2014

ENTER:

  
SHIRLEY WERNER KORNREICH  
J.S.C.

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\*4-6 (Sup Ct, NY County 2013) (Ramos, J.); *Bail Banking Corp. v UPG, Inc.*, 985 F2d 685, 697 (2d Cir 1993), citing *Dunning v Leavitt*, 85 NY 30, 35 (1881) (“it would be contrary to justice or good sense to hold that [a third-party beneficiary] should acquire a better right against the promisor than the promisee himself had”). HCA’s claims are time barred, as are the claims of all purported third-party beneficiaries.