| **Bose v Think Constr. LLC** |
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| 2017 NY Slip Op 30944(U) |
| May 4, 2017 |
| Supreme Court, New York County |
| Docket Number: 154628/2015 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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ARANI BOSE, SHUMITA BOSE,

Plaintiffs,

**DECISION/ORDER**
**Index No. 154628/2015**

-against-

THINK CONSTRUCTION LLC, TIMOTHY MOSS, MURPHY AND DINE, LLC, DINERSAN, INC., NICK DINE, MELTZER/COSTA & ASSOCIATES, ARCHITECTURE & ENGINEERING, LLP, HARRY MELTZER, PENNMAX ENGINEERING, PLLC, JOHN PENSIERO

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiffs Arani Bose and Shumita Bose commenced the instant action seeking to recover damages arising out of construction performed at their residence. Defendants Pennmax Engineering, PLLC ("Pennmax") and John Peter Pensiero ("Pensiero") (hereinafter collectively referred to as the "moving defendants") now move for an Order pursuant to CPLR § 3211(a)(5) and (7) dismissing the complaint. For the reasons set forth below, the moving defendants' motion is granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. In August 2009, the plaintiffs and defendant Think Construction LLC ("Think") entered into a contract for Think, as the general contractor, to perform construction work at the plaintiffs' townhouse located at 322 East 18th Street, New York, New York ("plaintiffs' property") (hereinafter referred to as the "Project"). The plaintiffs also retained Nick Dine ("Dine") and his firm Murphy and Dine, LLC ("MAD") (hereinafter referred to as the "Dine Defendants") to serve as the architect on the Project. Plaintiffs allege that the Dine Defendants needed "an architect of record" to sign-off on their work and hired defendant Meltzer/Costa & Associates, Architecture & Engineering, LLP ("Meltzer"). In or around July 2009, MAD retained Pennmax to perform certain structural engineering services on the Project.

Demolition on the Project began in or around September 2009 during which time the Dine Defendants allegedly discovered issues with the existing conditions of the plaintiffs' home thereby prompting the plaintiffs to expand the scope of the Project to a "full renovation." As part of the revised scope of the Project, plaintiffs decided to lower the cellar floor requiring underpinning of the party wall between the plaintiffs' property and the neighboring property located at 320 East 18th Street, New York, New York which is owned by Brian Harris and Fukuko Yahagi-Harris (the "Harris neighbors") (hereinafter referred to as the "Harris Home"). MAD allegedly retained the moving defendants to design the underpinning which plaintiffs allege was performed in error.

The Project allegedly caused the Harris Home to sustain damages, including, *inter alia*, cracks in the façade. Thereafter, in or around March 2012, the Harris neighbors commenced an action against the plaintiffs in this action as well as Think (the "Harris lawsuit"). Think commenced a third-party action against Pennmax and other entities involved with the Project. Thereafter, the Harris neighbors amended their complaint to include such third-party defendants as direct defendants. In or around June 2013, Everest National Insurance Company ("Everest"), first-party insurer and subrogee of the Harris neighbors, commenced a lawsuit seeking to recover the funds it expended to settle the Harris neighbors' insurance claim (the "Everest lawsuit"). Everest named plaintiffs and Think as defendants and later amended the lawsuit to include the third-party defendants. The Everest lawsuit was then consolidated with the Harris lawsuit in or around October 2013.

In or around May 2015, plaintiffs commenced the instant action to recover Project-related damages against Think and Think's owner, Timothy Moss ("Moss"), the Dine Defendants, Dinersan, Inc., Meltzer and Meltzer's owner, Harry Alex Meltzer and the moving defendants. In or around July 2015, the moving defendants moved to dismiss the complaint. Defendants Think and Moss also moved to dismiss the complaint as to defendant Moss and moved to compel arbitration and stay the action as to defendant Think pending the completion of the arbitration between plaintiff and Think.

In a decision dated December 8, 2015, this court granted Think's motion for an order compelling arbitration and staying the action against Think and Moss. Also on December 8, 2015, the parties stipulated

that the moving defendants would withdraw their motion to dismiss with leave to renew after completion of the arbitration between plaintiff and Think. During the summer of 2016, in advance of the court-mandated arbitration, plaintiff and Think settled. The moving defendants have now renewed their motion to dismiss the causes of action asserted against them for negligence/malpractice, unjust enrichment, conversion and aiding and abetting the unauthorized practice of engineering.

The court first turns to that portion of the moving defendants' motion to dismiss plaintiff's negligence/malpractice claim pursuant to CPLR § 3211(a)(5) on the ground that it is time-barred. "A defendant who seeks dismissal of a complaint pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*, that the time in which to commence an action has expired." *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403, 405 (2d Dept 2007). Pursuant to CPLR § 214(6), "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based on contract or tort" must be commenced within three years. Malpractice is the "negligence of a professional toward a person for whom a service is rendered." *Santiago v. 1370 Broadway Assoc., L.P.*, 264 A.D.2d 624 (1st Dept 1999). It is well-settled that structural engineers are professionals for the purposes of CPLR § 214(6), *see Travelers Indem. Co. v. Zeff Design*, 60 A.D.3d 453 (1st Dept 2009), and that "a claim for professional malpractice against an engineer…accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship," *Town of Wawarsing v. Camp, Dresser & McKee, Inc.*, 49 A.D.3d 1100, 1101-02 (3d Dept 2008).

Here, this court finds that the moving defendants' motion to dismiss plaintiffs' negligence/malpractice claim is denied on the ground that the moving defendants have failed to establish, *prima facie*, that such claim is time-barred. In support of their motion, the moving defendants provide the affirmation of their counsel in which he conclusorily affirms that the moving defendants completed their services on the Project by October 2010, before the underpinning work began on the Project. However, such affirmation is insufficient to establish, *prima facie*, that plaintiffs' negligence/malpractice claim is time-barred, without some other admissible evidence in support thereof. *See Banks v. Auerbach*, 56 A.D.2d

819, 819 (1st Dept 1977)(denying defendant's motion to dismiss on the basis of statute of limitations on the ground that "[t]he factual basis for defendant's motion rests entirely on an affirmation of an attorney who [does not have] personal knowledge of the facts....") The moving defendants have failed to provide any admissible evidence, such as an affidavit or testimony of someone with personal knowledge, of when the moving defendants actually completed their services on the Project. The moving defendants have provided the affidavit of defendant Pensiero but nowhere in his affidavit does Pensiero affirm that the moving defendants completed their services on a specific date nor does he even discuss the completion of services on the Project. Rather, Pensiero merely affirms that the work performed by the moving defendants was rendered "as outlined in the proposal/contract." However, an examination of such proposal/contract does not specify a timeframe for completion of the work on the Project. Moreover, plaintiffs provide their affidavit in which they affirm that the moving defendants were still performing their services on the Project as late as August 2012 when they performed a site visit to the Project and prepared a report in accordance with the proposal/contract.

The court next turns to that portion of the moving defendants' motion to dismiss plaintiff's unjust enrichment claim pursuant to CPLR § 3211(a)(7) on the ground that it fails to state a claim. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

To state a cause of action for unjust enrichment, a plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other

party to retain that is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). However, it is well-settled that "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012). "[A]lthough the plaintiff [is] not required to allege privity, it [has] to assert a connection between the parties that [is] not too attenuated." *Id.* at 517. The "relationship between the parties" must be one "that could have caused reliance or inducement." *Mandarin Trading Ltd.*, 16 N.Y.3d at 182-183. "[M]ere knowledge" of the other party is insufficient to support a claim for unjust enrichment when the parties "had no dealings with each other" or when the parties had no contact "regarding the purchase transaction." *Georgia Malone & Co., Inc.*, 19 N.Y.3d at 517-518.

In the instant action, the moving defendants' motion to dismiss plaintiffs' unjust enrichment claim is granted on the ground that plaintiffs' relationship with the moving defendants is too attenuated to support a claim for unjust enrichment. It is undisputed that plaintiffs hired MAD as the architect on the Project and that it was MAD, and not plaintiff, which hired and contracted with the moving defendants for their work on the Project. It is also undisputed that plaintiff paid MAD for the architectural work performed on the Project and that it was MAD, and not plaintiff, which paid the moving defendants for their work on the Project. Plaintiffs do not allege that they had any dealings or relationship with the moving defendants whatsoever or that they ever had any contact with them. Mere awareness on the part of the moving defendants that the plaintiffs existed and were the owners of the plaintiffs' property is insufficient to support a claim for unjust enrichment.

Additionally, that portion of the moving defendants' motion to dismiss plaintiff's claim for aiding and abetting the unauthorized practice of engineering pursuant to CPLR § 3211(a)(7) is granted on the ground that New York does not recognize a civil cause of action for aiding and abetting the unauthorized practice of engineering. Plaintiffs' assertion that their claim is actually one for aiding and abetting fraud, which *is* a recognized civil claim in New York, is without merit. It is clear from the allegations in the complaint that plaintiffs' claim is not for fraud but rather for aiding and abetting the unauthorized practice of engineering. Indeed, the complaint alleges that MAD performed engineering services on the Project but

that MAD is not a licensed engineer; that the moving defendants knew that MAD was not a licensed engineer; that the moving defendants assisted MAD's unlicensed practice of engineering by performing the engineering services on MAD's behalf; and that the moving defendants received payment from the plaintiffs through MAD in connection with the engineering services.

Finally, that portion of the moving defendants' motion to dismiss plaintiffs' conversion claim is granted without opposition.

Accordingly, the moving defendants' motion to dismiss the complaint is granted to the extent that plaintiffs' claims for conversion, unjust enrichment and aiding and abetting the unauthorized practice of engineering are dismissed as against the moving defendants. This constitutes the decision and order of the court.

DATE : 5/4/17

CK

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.