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SCANNED ON 1/13/2005

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

PRESENT: HON. CAROL EDMEAD PART 35

0600706/2004

MAMA'S FOOD SHOP
vs
ROBROSE PLACE, L.L.C.

SEQ 4

DISMISS

NO. 600706/04

MOTION DATE 11/30/04

SEQ. NO. 004

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 | |

FILED
JAN 13 2005
COUNTY CLERK'S OFFICE
NEW YORK

**Cross-Motion:** ☐ Yes ☒ No

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants JKW Engineering, P.C. and James Wai to dismiss the Seventeenth, Eighteenth, Nineteenth, Twentieth and Twenty-First causes of action is granted; and it is further

ORDERED that said defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JAN 13 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/28/04

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MAMA'S FOOD SHOP and MICHAEL ROSENFELD,

Index No. 600706/04

Plaintiffs,

**DECISION/ORDER**

-against-

ROBROSE PLACE, LLC, SKY MANAGEMENT CORP., JKW ENGINEERING, P.C., JAMES WAI, LEVEL CONSTRUCTION COMPANY, YELLOW SQUARE CONSTRUCTION, INC., SIMON CHAN, SINVIN REALTY CORP., NOAH SHUBE, ESQ., and ABRAHAM B. KRIEGER, ESQ.,

Defendants.

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**HON. CAROL EDMEAD, J.S.C.**

MEMORANDUM DECISION

In this action for fraud, breach of express warranty, misrepresentation, mutual mistake, breach of contract and rescission of a certain store lease, and professional malpractice, defendants, JKW Engineering, P.C. ("JKW") and James Wai ("Mr. Wai") move for an order, (1) pursuant to CPLR § 3211 [a] [1] and [7], dismissing the Seventeenth (breach of contract) and Eighteenth (misrepresentation) causes of action against JKW on the ground that the defenses are based on documentary evidence and that the complaint fails to state a cause of action, and dismissing the Nineteenth (professional malpractice), Twentieth (breach of contract), and Twenty-First (misrepresentation) causes of action against James Wai; and (2) for an order, pursuant to CPLR 3016 [b], dismissing the Eighteenth cause of action against JKW and Twenty-First cause of action against Mr. Wai, on the ground that the Complaint fails to state the details constituting the misrepresentation. Mr. Wai also seeks dismissal of the Nineteenth through

Twenty-First causes of action against him on the ground that the Court lacks of personal jurisdiction over him, due to improper service.

According to the verified complaint, plaintiffs and Robrose Place, LLC ("Robrose") (the owner of the subject building) through its property management company, Sky Management ("Sky"), entered into a written ten-year lease agreement (the "lease") in which plaintiffs agreed to pay rent to Robrose in exchange for the use of the retail store and the basement (the "premises") at the subject building as an eat-in, take-out restaurant. At or about the time the lease was executed, plaintiffs hired defendant, Simon Chan ("Chan"), to build and construct the subject premises so as to enable plaintiffs to own and operate the eat-in, take-out restaurant. Permits for this construction were subsequently applied for and obtained from the New York City Department of Buildings (the "DOB") by either Chan and/or Mr. Wai, who Chan hired to work as a subcontractor at the subject premises. The verified complaint alleges that the application to the DOB filed by Mr. Wai stated that Mr. Wai "exercised a professional standard of care in certifying that the filed application is complete and in accordance with applicable laws, including the rules of the [DOB]"; "[Mr. Wai] has notified the owner that this application has been professionally certified."

After the permits were issued, plaintiffs allowed Mr. Wai to enter the subject premises in order to construct the eat-in, take-out restaurant. However, since that time, DOB has issued numerous warnings to Mr. Wai regarding non-conforming use, various violations, revocations of permits and stop work orders.[1] The verified complaint alleges that upon receipt of a second

[1] In a correspondence dated November 13, 2002, the DOB issued Robrose and Mr. Wai a notice questioning the appropriateness of the permits that had been issued for the subject premises, on the ground that a commercial use was not allowed in an R7-2 zoning district. According to the verified complaint, the November 13,

notice from DOB, Mr. Wai informed plaintiffs that a "zoning issue" existed at the subject premises but represented to plaintiffs that he was unwilling to resolve the matter with the DOB because of his belief that any effort to do so would be futile.

Plaintiffs' complaint alleges two causes of action against JKW: misrepresentation and breach of contract. In their misrepresentation cause of action against JKW (Eighteen), plaintiffs allege that they hired JKW, through its agent, Chan, to design and build the subject premises in order to operate the eat-in, take-out restaurant; that JKW agreed to obtain, for valuable consideration, *inter alia*, all permits and approvals to enable plaintiffs to operate the restaurant; by stating that he would obtain all permits and approvals, JKW, through Chan, assumed the obligation to inquire about, verify, and procure appropriate zoning for the premises; JKW failed to properly secure all permits and approvals from the City of New York for the premises; that JKW falsely represented to plaintiffs that the premises could be used in a commercial capacity, as leased, with the permission of the City of New York pursuant to the City's Building Code; prior to engaging JKW, plaintiffs informed them of their desire to use the premises as a eat-in, take-out restaurant and JKW stated that such use was lawful and proper; unbeknownst to plaintiffs, the representations made by JKW were false and made with the intent to induce plaintiffs to enter into an agreement with JKW and perform work at the premises, and plaintiffs relied on such statements at an expenses not less than $1 million. Portions of these allegations also form the

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Footnote 1, cont'd.

2002 correspondence further indicated that the DOB intended to revoke its approval of the work permits unless it was provided evidence demonstrating the appropriateness of those approvals. Plaintiffs allege that Mr. Wai took no action with regard to this notice other than to conceal from plaintiffs its existence and its subject matter. Wai then received a second correspondence from the DOB dated June 27, 2003, which also questioned the appropriateness of the permits approved for the subject premises.

basis of plaintiffs' Seventeenth breach of contract cause of action against JKW.

As to Mr. Wai, plaintiffs allege three causes of action against him: professional malpractice, misrepresentation, misrepresentation, and breach of contract.

In their Nineteenth cause of action for professional malpractice against Mr. Wai, plaintiffs allege that Mr. Wai undertook to perform professional engineering and architectural services on behalf of plaintiffs to design, certify and oversee the construction of the premises for an eat-in, take-out restaurant, and for procuring permits to facilitate same. During and before construction, Mr. Wai negligently rendered his professional skills and failed to meet the accepted and customary standards of care of an engineering professional by failing to undertake a due diligent inquest as to the current status of the zoning of the premises to determine whether the intended use was permitted by the City of New York. But for Mr. Wai's negligence, plaintiffs would not have constructed the premises as an eat-in, take-out restaurant, at the expense of a sum not less than $1 million. In their misrepresentation claim against Mr. Wai, plaintiffs allege that they hired Mr. Wai, through his agent, Chan, to design and build the premises for the purpose of operating the eat-in, take-out restaurant. Mr. Wai allegedly made the same misrepresentations made by JKW noted above. The Twentieth cause of action against Mr. Wai for breach of contract alleges that Mr. Wai also agreed to obtain, for valuable consideration, all permits and approvals necessary for the operation of the eat-in, take-out restaurant, and failed to do so. By stating that he would obtain these permits and approvals, Mr. Wai assumed the obligation to confirm the appropriate zoning for the premises.

Motion to Dismiss

In support of dismissal based on lack of personal jurisdiction over Mr. Wai, it is argued that service of the Summons and Complaint upon Mr. Wai by means of suitable age and discretion was improper. Mr. Wai claims that contrary to the affidavit of service, he never resided or maintained a place of business at "1008 Avenue L, Brooklyn NY 11236" as indicated on the affidavit; he resides, instead, at 100-08 Avenue L, Brooklyn, NY 11236, and his place of business is located at 153 Centre Street, New York, NY 10013. He states that he is Asian, and that contrary to the affidavit of service, "there was no and never has been any white male person at my residence or my place of business."[2]

As to dismissal on the remaining grounds, defendants contend that in August 2002, Chan contacted JKW and Mr. Wai to draft and submit application plans to the DOB for renovation of a fast food establishment at the premises. After checking the DOB records and zoning, Mr. Wai informed plaintiff Rosenfeld and Chan that the premises was located in a R7-2 residential zoning area and that commercial use was not permissible unless there was a certificate of occupancy (COO") permitting such non-conforming use (¶ 5 of Mr. Wai's affidavit in support). On or about August 15, 2003, plaintiff Rosenfeld caused a document and a COO (#17004) issued by the DOB to be faxed to Mr. Wai, in which the permissible use for the first floor of the premises is indicated "restaurant." Mr. Wai went to the premises and found it to be vacant and previously demolished.

Before submitting the application to the DOB, Mr. Wai confirmed that the COO was still valid, by reviewing (and submitting with the application) DOB website records, which indicated

[2] The defense based on lack of personal jurisdiction is alleged in defendants' is undisputedly untimely.

an absence of any change in usage from restaurant to residential or other use category. JKW and Mr. Wai submitted the application on or about August 22, 2002 for purpose of "renovat[ing] existing store for fast food establishment, install[ing] fire suppression system under kitchen hood, install[ing] 4 sprinkler heads and install[ing] new store front . . .," which DOB approved on or about September 4, 2004. Upon such approval, a Work Permit Application was submitted to the DOB, which issued the work permits on September 26, 2002 (#103294511).

By notices dated November13, 2002, and June 27, 2003 and addressed to Mr. Wai, DOB expressed its intent to revoke application #103294511 based on the use of the premises. In response, Mr. Wai scheduled an "Audit For Professionally Certified Applications by Technical Compliance Unit" regarding such application. On July 18, 2003, Mr. Wai presented a certified copy of the COO (#17004) to the examiner, who notated that the application passed the audit and endorsed the Audit sheet, with the stamp indicating "Pass." Such approvals and permits issued by the DOB based on application #103294511 were therefore validated by this July 18, 2003 audit.

DOB records indicate that there has been no change to the use and occupancy of the premises as a restaurant, and there was no prior alteration filed with the DOB for any change from "Restaurant" use to any other use category. Therefore, in August 2002 when Mr. Wai and JKW accepted the work from Chan, all DOB documents indicated and approved the "Restaurant" use. And, the only violations relevant to the alteration plan against the premises were DOB violation #032904C02P102 and ECB Violation #344323947, which were dismissed on May 13, 2004. Thus, there is no open or active violation against the application or plan filed by JKW and/or Mr. Wai. Moreover, plaintiff, Mama's Food Shop, has opened for and is still operating as

a restaurant.

Furthermore, the breach of contract claims against JKW (Seventeenth) and Mr. Wai (Twentieth) must fail, as there was no contract or agreement between plaintiffs of such defendants, no privity between plaintiffs and JKW and Mr. Wai, or any facts pleaded regarding the terms, conditions or consideration or money paid by plaintiffs to such defendants.

The Nineteenth professional malpractice claim against Mr. Wai must also fail because plaintiffs did not employ Mr. Wai for any work related to the premises; Mr. Wai was not paid by plaintiffs or received any compensation from the plaintiffs for any work performed. Also, the aforementioned documents show that JKW and Mr. Wai obtained all the required DOB approvals and permits on behalf of Chan (the applicant for the work permits) and Yellow Square Construction (the contractor). There can be no professional malpractice when the application submitted by Mr. Wai and JKW passed the DOB audit on July 10, 2003, and the objection thereto was overcome by the COO.

Further, the documents clearly show that there was no representation of any kind made by Mr. Wai to plaintiffs so as to support plaintiffs' Eighteenth and Twenty-First causes of action for misrepresentation, which are in any event, insufficiently pleaded under CPLR 3016 [b].

Finally, the complaint fails to state a cause of action given that plaintiffs have failed to plead any damages they suffered as a result of JKW and Mr. Wai's action, omission, or representation. Plaintiffs continue to operate the restaurant since the completion of the alteration.

In opposition, plaintiffs argue that Mr. Wai's denial of personal jurisdiction has been waived under CPLR 3211 [e], for failure to move on this ground within 60 days of answering the verified complaint.

Plaintiffs contend that Robrose would be entitled to an exemption from the current residential zoning scheme prescribed by R7-2, if they had a commercial tenant in the ground floor space while the premises were controlled by the prior zoning scheme and immediately prior to the zoning change; further Robrose would have to had continuously rented to commercial tenants since the new zoning regulations were enacted. When plaintiffs initially viewed the premises, the space had been demolished and plaintiffs were unaware of the prior residential tenancy.

Plaintiffs also point out that the moving defendants admit that they commenced their work after receiving the first notice challenging the appropriateness of the work permits previously obtained, and failed to notify plaintiffs of this potential problem and continued to complete the work and receive payment for same. Further, the moving defendants' claim that this problem was resolved by the audit on July 18, 2003 does not alleviate their liability for failing notify plaintiffs of such problem with the restaurant which may be shut down for unlawful use. Also, the changes in the Zoning Regulations supercede the permitted uses as stated in the COO. The COO does not address the question raised by the DOB in their November 13, 2002 letter, as to whether the prior commercial use had reverted back to residential use, thus rendering such COO ineffective as a matter of law. The current status with respect to the premises is that all permits have been revoked and the City is gathering all evidence from tenants in the surrounding area necessary to move forward with a hearing which will result in padlocking plaintiffs' restaurant.[3]

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[3] Plaintiffs also contend that at a preliminary conference, the Court reviewed the documents submitted by the moving defendants, and concluded that defendants' after-the-fact appearance before the DOB did not resolve the problem.

Plaintiffs also argue that the misrepresentation, fraud, and mistake claims are pleaded with sufficient particularity, in that the elements as to time, place, and substance are stated, pursuant to CPLR 3016 [b].

Further, plaintiffs argue that damages alleged in the complaint were actually sustained as a result of plaintiffs' inability to obtain permits to expand the restaurant into an outside sidewalk, and plaintiffs' inability to find anyone to assume the lease with the outstanding violations. After submitting applications to procure new permits for the sidewalk extension, such applications have been held up pending the outcome of various zoning violations. Plaintiffs also cannot realize the profits of a business due to their inability to sell the business and are deprived of the growth in good will value they may realize.

With respect to privity, plaintiffs hired Yellow Square Construction, Inc. to renovate the premises, which in turn, hired JKW and Mr. Wai to obtain the necessary permits and perform all appropriate engineering and related necessary work on behalf of plaintiff Mama's Food Shop. Thus, Mama's Food Shop was the intended beneficiary of the work to be performed by JKW and Mr. Wai, and remained involved the performance of the work from the beginning through the conclusion of the construction. JKW and Mr. Wai were in communication with plaintiff regarding the nature and scope of the work performed, and were well aware that plaintiffs were the intended beneficiaries of the work performed. Thus, the moving defendants were in a relationship with plaintiff that constituted the functional equivalent of privity as defined by caselaw.

In reply, Mr. Wai contends that the Zoning Resolution of 1961 does not supercede the non-conforming pre-existing use and occupancy permitted by the COO. If the first floor

premises had been changed from restaurant to residential, the COO had to have been changed as required by the Building Code. As there is no record of the premises being occupied for residential purposes, the COO has never been changed to reflect residential use/occupancy. The only record pertaining to the use and occupancy of the premises was the demolition Plan filed on April 5, 2002, which shows an open space. The demolition Plan also shows that the architect sought a DOB permit to demolish/remove a partition wall and the walls of 2 toilet rooms. Moreover, had the premises been occupied as residential, the demolition Plan would have and should have indicated the existence of a bathroom with bathtub/shower and a kitchen, which it does not.

Mr. Wai further states that neither he nor JKW ever dealt directly with plaintiffs. Every contact and document filed with the DOB was through Chan. The only occasion Mr. Wai met plaintiff Rosenfeld was on August 13, 2002 when he and Chan visited the premises. Further, the claim that Mr. Wai concealed the DOB notices from plaintiffs is contradicted by the fact that construction and renovation of plaintiffs' restaurant was completed by November 8, 2002, prior to Mr. Wai's receipt of the November 13, 2002 letter. When Mr. Wai received the November 8, 2002 notice, he advised Chan because he never dealt with plaintiff, except through Chan. The moving defendants further reiterate that all three violations referred to in plaintiff Rosenfeld's opposing affidavit have been dismissed by the DOB. Thus, plaintiffs' allegations regarding the violations are not valid, since they have been dismissed by the DOB by August 1, 2004.

Defendants' reply papers offer no response to plaintiffs' argument that their claim of lack of personal jurisdiction over Wai is untimely and waived.

Analysis

Generally, on a motion to dismiss pursuant to CPLR § 3211, the court's task is to determine whether plaintiffs' pleading states a cause of action (*Richbell Info Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 289, 765 NYS2d 575 [1st Dept 2003]). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts alleged fit within any cognizable legal theory (*Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78, 760 NYS2d 438 [1st Dept 2003]). Moreover, when the motion to dismiss is based upon documentary evidence, dismissal under CPLR § 3211 [a] [1] is warranted only if the documentary evidence submitted by the defendant conclusively establishes a defense to the asserted claims as a matter of law (*Morgenthow & Latham*, 305 AD2d at 78). The burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law is on the defendant (*Robinson v Robinson*, 303 AD2d 234, 235, 757 NYS2d 13 [1st Dept 2003]).

It is well established that when determining whether to grant a motion to dismiss made pursuant to CPLR § 3211 [a] [7], the complaint is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference and only determine whether the facts, as alleged, fit within a discernible legal theory (*Sheila C. v Povich*, 2004 NY App. Div. LEXIS 10400 [1st Dept 2004]). That is to say, "the motion must be denied if from the pleading's four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*Sheila C.*, 2004 NY App. Div. LEXIS 104000 *quoting 511 West 232nd Owners Corp. v Jennifer Rlty. Co.* , 98 NY2d 144, 151-52, 773 NE2d 496, 746 NYS2d 131 [2002]). However, on a motion to dismiss

for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]).

Breach of Contract

A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary, "and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract" (*LaSalle Nat. Bank v Ernst & Young LLP*, 285 AD2d 101 [1st Dept 2001]; *Zelber v Lewoc*, 6 AD3d 1043 [3d Dept 2004]). In order to claim third-party benefits, the putative third-party beneficiary will be deemed an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties *and* either [a] the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [not relevant here]; or [b] the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. . . ." (*Zelber v Lewoc*, 6 AD3d 1043, *supra*).

Here, plaintiff hired Yellow Square Construction, Inc. through its agent Chan, to renovate the subject premises into an eat-in, take-out restaurant, and Yellow Square Construction hired JKW and Wai to obtain permits and perform the engineering work related to the renovation. The intended purpose of the premises was known to all parties, to wit: to construct an eat-in, take-out restaurant.

Defendants JKW and Wai state that Wai informed Chan *and* plaintiff Rosenfeld that the

premises was located in a R7-2 residential zoning area and that commercial use was not permissible unless there was a COO permitting such non-conforming use (Wai affidavit ¶5). After Wai received the COO, Wai visited the premises to inspect and obtain detail and specifics from plaintiff Rosenfeld (Wai affidavit ¶5). Although the application by JKW and Wai to the DOB identifies the owner as Robrose Place, LLC, the application was for permits to renovate the subject premises for "fast food establishment." Under the circumstances, plaintiffs have sufficiently raised an issue of fact as to whether they were the intended third party beneficiaries of the contract between plaintiffs and Yellow Square Construction/Chan (*see City School Dist. of City of Newburgh v. Hugh Stubbins & Assoc., Inc.*, 85 NY2d 535 [1995]; *Reliance Ins. Co. v Morris Assoc., P.C.*, 200 AD2d 728 [2d Dept 1994])

Notwithstanding the above, however, it is well established that allegations of a breach of contract are not sufficient to sustain a complaint in the absence of allegations of fact showing damage (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 [1st Dept 1988]; *Ryan Ready Mixed Concrete Corp. v Coons*, 25 AD2d 530 [2d Dept 1966]). In light of the fact that plaintiffs' verified complaint contains no allegation that plaintiffs have in any way been precluded from operating an eat-in, take-out restaurant at the subject premises and that the record demonstrates that all Department of Buildings violations were dismissed, plaintiffs' breach of contract claim fails to allege any cognizable injury resulting from Wai or JKW's alleged failure to procure proper permits from the DOB.

Defendants' claim that their application to expand the restaurant to a sidewalk café has been held in abeyance by the DOB pending the resolution of the violations resulting in "damages" is insufficient. A "party may not recover damages for lost profits unless they were

within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty.... The second requirement, that damages be reasonably certain, does not require absolute certainty.... It requires only that damages be capable of measurement based upon known reliable factors without undue speculation" (*cf. Heary Bros. Lightning Protection Co., Inc. v Intertek Testing Services, N.A., Inc.*, 9 AD3d 870 [4th Dept 2004]). And, where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies instead, on wholly speculative theories of damages, the breach of contract claim must be dismissed (*Lexington 360 Assoc. v First Union National Bank of North Carolina*, 234 AD2d 187, 189-90 [1st Dept 1996]). Damages, if any, resulting from any delay in DOB approvals are insufficiently alleged and speculative. Further, plaintiffs' claimed inability to procure tenants to assume the lease of the premises or sell the restaurant for profit due to the violations is insufficient to sustain the breach of contract cause of action as alleged.

The Seventeenth and Twentieth breach of contract claims against JKW and Wai, respectively, are dismissed.

Misrepresentation Claims against JKW and Wai

As a general rule, "to recover on a theory of negligent misrepresentation, a plaintiff must establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false," "that the plaintiff reasonably relied upon the information provided" and that the incorrect information proximately caused his injury (*Peter Inzerilla v The American Tobacco Co.*, 2000 WL 34016364 (NY Sup 2000) *citing Grammar v Turits*, 271 AD2d 644 and *Pappas v Harrow*

*Stores, Inc.*, 140 AD2d 501).

The Complaint alleges that defendants JKW and Wai expressly advised plaintiffs that they would obtain all permits and approvals for the renovation work (Complaint ¶176). It is also alleged that JKW and Chan represented that the premises could be used in a commercial capacity, and that such statement was false (Complaint ¶178). Plaintiffs also asserted in the Complaint that JKW and Wai knew of the falsity of such statement and that plaintiffs relied upon the representations of JKW and Wai to their detriment.

However, the COO presented to defendants JKW and Wai expressly designated the permitted use as "restaurant" for the premises. The documents submitted by JKW and Wai flatly rebut plaintiffs' conclusory allegation that such defendants knew that their statement concerning the commercial capability of the premises was false. Additionally, the submissions also flatly contradict plaintiffs' allegation that JKW and Wai failed to obtained permits and approvals for the renovation work. Accordingly, the Eighteenth and Twenty-First causes of action against JKW and Wai, respectively, are dismissed.

Professional Malpractice against Wai

An action for professional malpractice also lies where, in the context of a contractual relationship, a professional negligently discharges the duties arising from that relationship *(AJ Contracting Co., Inc. v Trident Managers, Inc.*, 234 AD2d 195 [1st Dept 1996], *citing Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700, 708). A professional is required to exercise the skill and knowledge normally possessed by members of his or her trade or profession in good standing in similar communities (Restatement of Torts, 2d § 299A).

It is uncontested that prior to commencement of the renovation, in August, 2002, Wai

checked DOB records and zoning, and informed plaintiff Rosenfeld of the zoning applicable to the premises, and the need for a COO indicating the nonconforming use. Further, it is established that on August 15, 2002, JKW and Wai received the COO indicating "restaurant" as the permitted use on plaintiff Mama's Food Shop letterhead. It is also uncontested that Wai inspected the premises and obtained specifics from plaintiff Rosenfeld. It is also uncontested that on August 22, 2002, said defendants submitted plans to the DOB for the renovation of the premises and that on September 26, 2002, DOB issued permits for such work. It is also factually uncontested that said defendants commenced and completed the work by November 8, 2002.[4]

The record demonstrates that subsequently, by notices dated November 12, 2002 and June 27, 2003, DOB sought to revoke the permits previously issued essentially based on the possible impermissible commercial use of the premises. DOB also issued violations on January 23, 2004 and March 29, 2004.

Therefore, under these circumstances, plaintiffs' allegation that said defendants misrepresented the commercial ability of the premises, which arises from DOB's notices of intent to revoke and violations dated *after* the commencement and completion of the permitted work, is without merit. It bears repeating that the violations were subsequently dismissed, and plaintiffs' have not alleged that they have been unable to use or operate the eat-in, take-out restaurant since its inception.

Furthermore, where, as here, a misrepresentation claim is asserted in connection with a claim for professional malpractice, the plaintiff must, in addition to pleading the traditional

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[4] Notably, defendants' counsel's conclusory allegation that JKW and Wai commenced and performed all of their work after the November 13, 2002 DOB notice is factually unsupported and flatly contradicted by Wai, a witness with knowledge of the facts.

elements of misrepresentation, allege that "it failed to pursue an available remedy which would have corrected or alleviated the condition caused by the malpractice had it not been diverted from doing so by its reliance upon [the] defendant's alleged misrepresentation" (*Rochester Fund Municipals v Amsterdam Municipal Leasing Corp.*, 296 AD2d 785 [3d Dept 2002] *citing St. Alexander's Church v McKenna*, 294 AD2d 695, 697). The Complaint is devoid of any claim that plaintiff declined to pursue any remedy to correct or alleviate the condition caused by JKW's or Wai's alleged malpractice had plaintiffs not been diverted from doing so by relying on their statements concerning the commercial ability of the premises.

Accordingly, the Nineteenth cause of action against Wai for professional malpractice is dismissed.

Based on the foregoing, it is hereby

ORDERED that the motion by defendants JKW Engineering, P.C. and James Wai to dismiss the Seventeenth, Eighteenth, Nineteenth, Twentieth and Twenty-First causes of action is granted; and it is further

ORDERED that said defendants shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 28, 2004

Hon. Carol Edmead, J.S.C.