

**Sass v NAT Varisco**

2011 NY Slip Op 33386(U)

December 14, 2011

Sup Ct, NY County

Docket Number: 111851/07

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
*Justice*

PART 55

Alison Sass

INDEX NO. 111851/07

MOTION DATE 8/8/11

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

- v -  
Varisco, et al.

The following papers, numbered 1 to 6 were read on this motion to/for summary judgment

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

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

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

PAPERS NUMBERED

1-4

5-6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the enclosed memorandum decision and order.*

*N.B. - see end of decision re pre-trial conf. scheduled for 1/23/12 at noon.*

**FILED**

DEC 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/14/11

JANE S. SOLOMON *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: IAS PART 55

-----X

ALISON SASS,

Plaintiff,

-against-

NAT VARISCO, NAT VARISCO d/b/a  
ONPOINT CONSTRUCTION, TINA MARIE  
TAPINEKIS & ASSOCIATES, LLC, TMT  
RESTORATION CONSULTANTS LTD.,  
EDDIE TORRES, EDDIE TORRES d/b/a  
ONPOINT CONSTRUCTION and ONPOINT  
CONSTRUCTION AND DEVELOPMENT,  
LLC,

Defendants.

-----X

SOLOMON, J.:

Defendant Tina Marie Tapinekis & Associates, LLC (TMTA) moves for summary judgment dismissing the complaint against it in this action arising from an apartment renovation gone wrong. The motion is granted in part for the following reasons.

Plaintiff Alison Sass (Sass) owned the shares appurtenant to two adjacent cooperative apartments located in a building on West 60<sup>th</sup> Street. She wanted to combine the apartments. She consulted with a designer, Barbara Sackaroff (Sackaroff), who introduced her to an architect<sup>1</sup> and TMTA, a company in the business of interior renovation projects. Sass

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<sup>1</sup> The architect, former defendant TMT Restoration Consultants Ltd., moved for summary judgment under motion sequence 002. The motion was granted by an order dated August 8, 2011.

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DECISION AND ORDER

**FILED**

**DEC 16 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

hired TMTA to be the general contractor, pursuant to a written contract dated March 16, 2006 (Contract, Aff. of Dennis McCoobery, Esq., Ex. C). As submitted by TMTA, the Contract includes a letter from TMTA to Sackaroff that describes the scope of work for architectural and general contracting/management services.<sup>2</sup> The specified construction work includes the following: demolition of walls, floors and finishes; construction of new walls; installation and painting of new doors; installation of new wood flooring as supplied by Sass; installation of new electrical outlets, switches, lighting, cable TV and phone jacks; installation of new tile, fixtures and accessories in the bathroom; installation of new finished cabinetry supplied by Sass; installation of crown molding; construction and installation of a "Built-in" unit; and preparation and patching of wood flooring as required by the relocation of walls.

Section 9.10.1 of the Contract provides that contract disputes are referred to the architect for decision. After the architect's decision, or 30 days after the dispute is submitted to the architect, the dispute is subject to mediation "as a condition precedent to the arbitration or the institution of legal or equitable proceedings by either party." Section 9.10.3

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<sup>2</sup> Although the printed date on the letter is February 16, 2006, it has a handwritten date by Varisco, and acceptance by Sass, dated March 16, 2006.

work by writing checks to "OnPoint Construction". Varisco continued to be her contact overseeing the project; however, it appears that he had shifted loyalties to defendant OnPoint Construction and Development, LLC (OnPoint). It is not clear what Varisco or Sackaroff intended by advising Sass to direct payment to OnPoint, but apparently Varisco did not tell Sass that the job was no longer TMTA's responsibility.

Work continued for several months, and many problems arose (see Sass EBT, Notice of Motion, Ex. B). A few examples of Sass's complaints: the floors were installed in the early stage of construction and were damaged by subsequent work; the crown moldings were improperly installed and had to be partially removed and reinstalled, and the reinstallation was defective; base molding was crooked and mismatched; shower fixtures leaked and did not operate properly; built-in units around windows, including radiator covers, were defective; bathroom floor and wall tiles were cracked and uneven; and kitchen cabinets were installed improperly and had to be reinstalled.

Sass commenced this action on August 30, 2007. The amended verified complaint has four causes of action: (1) negligence, (2) breach of contract, (3) breach of warranty, and (4) fraud. TMTA appeared by counsel and filed its answer in November 2007. Defendants Varisco, Eddie Torres and Onpoint were

states that "the parties shall endeavor to resolve their disputes by mediation," and Section 9.10.4 states that disputes not resolved by mediation shall be decided by arbitration. The Contract contains a warranty to the owner that the materials furnished under the Contract will be of good quality, and that the work will be free of defects and in accordance with the contract documents (Contract, Section 8.4).

TMTA is a limited liability company. Its members were Tina Marie Tapinekis (Tapinekis), defendant Nat Varisco (Varisco), and architect Eugene Villani. Tapinekis testified at deposition that she was an officer of TMTA authorized to sign contracts on TMTA's behalf, but Varisco was not (Tapinekis EBT, Aff. In Opposition of Lauren Currie, Esq., Ex. F). When Varisco signed the Sass Contract on behalf of TMTA, she questioned Varisco about why he did it, but did not seek to re-execute the contract or take any other steps to rectify the matter. TMTA began work and accepted payment from Sass, so TMTA ratified the Contract.

Sass communicated with TMTA through Varisco, who frequently was at the apartment. Demolition, including removal of walls between the apartments, was finished in August 2006. Soon thereafter, parquet wood floor tiles were installed, as was the crown molding. In September 2006, at the request of Varisco and Sackaroff, Sass stopped paying TMTA, but instead paid for the

not deposited.<sup>3</sup> After discovery, a note of issue was filed on April 29, 2011.

As a threshold issue, Sass contends that TMTA's motion for summary judgment should be denied because it did not annex a complete copy of the pleadings to the motion, as required by CPLR 3212(b). Sass cites case law stating that a motion for summary judgment should be denied if it is not supported by a copy of the pleadings (e.g., *Sted Tenants Owners Corp v Chumpitaz*, 5 AD3d 663 [2d Dept 2005]), but in this case, TMTA's failure to include a copy of its verified answer in the motion is remedied by plaintiff's annexation of the pleading to its opposition. Sass also argues that the motion should be denied because it relies in part on her deposition transcript, which was not presented to her for signature before the motion (CPLR 3116[a]). Sass submits an affidavit opposing the motion in which she states that she did not read and sign the deposition transcript; however, she does not allege that the transcript testimony is inaccurate or incomplete. Her deposition does not include any admission against interest relied upon in this motion, and the facts alleged in it are construed favorably to her as the party opposing summary judgment (*see, Henderson v City of New York*, 178 AD2d 129 [1<sup>st</sup> Dept. 1991]). Accordingly, TMTA's motion is not

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<sup>3</sup> The court's records indicate that these defendants did not file answers, but no formal default has been taken against them.

denied on that basis.

TMTA first argues that the complaint should be dismissed as against it because Sass failed to comply with a contractual condition precedent to commencement of this lawsuit; i.e., she did not seek mediation as required in section 9.10.1 of the Contract, and she did not submit the dispute to arbitration in accordance with section 9.10.4. Despite New York's "long and strong public policy favoring arbitration" (*Stark v Molod Spitz DeSantis & Stark, PC*, 9 NY3d 59, 66 [2007]), a contractual right to arbitration may be waived (*id.*). TMTA waived its right to arbitration, or to enforce the condition precedent provision in section 9.10.1, by participating in this litigation for more than three years without moving to compel arbitration, or even raising it as an affirmative defense (*see, Sherrill V Grayco Builders, Inc.*, 64 NY2d 261, 272 [1985]) .

Next, TMTA correctly contends that the first cause of action, for negligence, should be dismissed against on the ground that it duplicates the breach of contract claim. (*Clark Fitzpatrick, Inc. v LIRR Co.*, 70 NY2d 382 [1987]).

TMTA then argues that the breach of contract claim should be dismissed because Sass is unable to prove that she suffered damages from TMTA's work, as opposed to the work performed independently by defendants Varisco and OnPoint. This argument fails because there are questions of fact as to what



part of the job Varisco did in his capacity as TMTA's representative, and what part (if any) can be attributed to him or OnPoint alone. Some of the work, such as the floor and crown molding installation, was TMTA's responsibility under the Contract, and was performed before Varisco ever mentioned OnPoint. While other problems arose after Varisco asked that payments be made to OnPoint, it cannot be said that TMTA no longer was contractually obligated to Sass. TMTA is not entitled to summary judgment as to liability on either the breach of contract or breach of warranty claims because TMTA worked on the project, there were problems with that work for which TMTA was responsible, and there are questions of fact about whether and when Sass understood that Varisco had taken the project over as OnPoint, terminating TMTA's obligation to her.

TMTA's motion is granted with respect to the fraud claim. Sass argues that TMTA misrepresented the relationship between it and the architect, defendant TMT Restoration Consultants Ltd., but even if true, there is no evidence of reliance on her part or damages. Accordingly, that branch of TMTA's motion is granted.

For the foregoing reasons, it hereby is


ORDERED that defendant TMTA's motion for summary judgment is granted to the extent that the first and fourth causes of action are dismissed, and the motion otherwise is

denied; and it further is

ORDERED that a pre-trial conference is scheduled to take place in Part 55 on January 23, 2012 at 12 noon.<sup>4</sup>

Dated: December 14, 2011

ENTER:



J.S.C.

**JANE S. SOLOMON**

**FILED**

**DEC 16 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

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<sup>4</sup> In view of my retirement, check the court's website (<http://www.nycourts.gov>) or call the Trial Support Office at (646) 386-3155 to ascertain the judge handling the case and his or her court room.