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| <b>Harracksingh v A.S.K. Enters., Inc.</b>   |
| 2015 NY Slip Op 32219(U)   |
| November 18, 2015  |
| Supreme Court, Putnam County   |
| Docket Number: 1329/11   |
| Judge: Lewis J. Lubell   |
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| This opinion is uncorrected and not selected for official publication.   |

SC 1/11/16 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF PUTNAM**

-----X  
CAROL HARRACKSINGH,

Plaintiff,

-against -

A.S.K. ENTERPRISES, INC., TOSHIKO  
MORI ARCHITECT, PLLC and TOSHIKO MORI,

Defendants.

-----X  
A.S.K. ENTERPRISES, INC.,

Third-Party Plaintiff,

- against -

DJ HEATING & AIR CONDITIONING., STJ  
BUILDERS, INC. and SCOTT JENNINGS,

Third-Party Defendants.

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**LUBELL, J.**

**DECISION & ORDER**

Index No. 1329/11

Sequence No. 1  
Motion Date 8/17/15

The following papers were considered in connection with this motion by defendants Toshiko Mori Architect, PLLC and Toshiko Mori for an Order pursuant to CPLR 3212 for summary judgment to dismiss plaintiff's claims and cross-claims as against TMA:

| <b>PAPERS</b>                                     | <b>NUMBERED</b> |
|---|-----------------|
| NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-M         | 1               |
| MEMORANDUM OF LAW IN SUPPORT                      | 2               |
| AFFIRMATION IN OPPOSITION/AFFIDAVIT/EXHIBITS 1-20 | 3               |
| MEMORANDUM OF LAW IN OPPOSITION                   | 4               |
| MEMORANDUM OF LAW IN REPLY/EXHIBIT N              | 5               |

Plaintiff commenced this action to recover damages for breach of contract and breach of fiduciary duty in connection with the design and construction of a custom, modern, predominantly glass,

ecologically friendly house upon plaintiff's property located at 90 Manitou Station Road, Hamlet of Garrison, Town of Philipstown, County of Putnam (the "Project").

In May 2005, plaintiff entered into a written contract with defendant Toshiko Mori and/or Toshiko Mori Architect, PLLC, (collectively referred to as "Mori") to perform design and administrative services in connection with the Project. Co-defendant, A.S.K. Enterprises, Inc. ("ASK"), was hired as the general contractor. Non-party Berkshire Wilton Partners ("Berkshire") was the excavation contractor.

By way of the first three causes of action in her Second Amended Complaint, plaintiff alleges that Mori breached her contract by (1) failing to timely provide and inspect Berkshire's excavation work, thereby allowing Berkshire to over excavate the Project site, (2) defectively designing skylights, and (3) failing to inspect radiant flooring, leaks in the living room roof, the front entrance and the door to the roof. Plaintiff's fourth cause of action alleges breach of fiduciary duty for failing to inspect and monitor work being performed on the Project. The fifth cause of action is a claim for breach of contract against ASK, the general contractor.

At the outset, the Court does not find that the absence of an affidavit in support of the motion for summary judgment (see CPLR 3212[b]) constitutes a fatal defect warranting the denial of the motion since the motion is supported by, among other things, deposition testimony (Branch Services, Inc. v. Cooper, 102 AD3d 645, 648 [2d Dept 2013][affirmation of attorney, although not asserting personal knowledge of the facts, which has annexed to it various exhibits including transcripts of deposition testimony, satisfies CPLR 3212 since it serves as a vehicle for the submission of documentary evidence]).

To the extent relevant to the disposition of this motion, although the contract provides that ". . . [Mori] shall not be responsible for any malfeasance, neglect or failure of any contractors or suppliers to meet their schedules for completion or to perform their respective duties and responsibilities", it does obligate Mori to

. . . visit the Project premises on a periodic basis, appropriate to the stage of construction, to become generally familiar with the progress and quality of the work and to determine in general if the work is proceeding in accordance with the Contract

Documents. However, the Architect shall not be required to make exhaustive and continuous on-site inspections to check the quality or quantity of the work. On the basis of such on-site observations, the Architect shall keep the Client informed of the progress and quality of the work, and shall endeavor to guard the Client against defects and deficiencies in the work of the contractors.

The Architect shall assist the Client in coordinating the schedules for delivery and the installation of furniture, furnishings and equipment and the issuance and pursuance of the punch list to the completion of the work. However, the Architect shall not be responsible for any malfeasance, neglect or failure of any manufacturers, contractors and responsibilities, including but not limited to delays or mistakes in delivery and defective or unsatisfactory furniture, furnishings and equipment.

Upon consideration of the contract and the evidence adduced by plaintiff in response to Mori's submissions on this motion for summary judgment, the Court finds that plaintiff has raised triable issues of material fact in response to Mori's prima facie showing of entitlement to judgment in her favor as a matter of law. These triable issues of material fact include, but are not limited to, whether Mori performed her contractual duties to plaintiff by, among other things, properly, adequately and timely inspecting the progress of construction work to verify compliance with the contract documents such, for example, as it relates to the degree and extent of excavation work performed and the installation of the green roofing system and skylights and, as well, whether or not the green roofing system and skylights were properly designed in the first instance.

There are sufficient allegations and proof adduced by plaintiff of Mori's breach of her own contractual duties to plaintiff such as to withstand Mori's motion for summary judgment on all causes of actions herein sought to be dismissed, including that for breach of fiducial duty (see Capstone Enterprises of Port Chester, Inc. v. Bd. of Educ. Irvington Union Free School Dist., 106 AD3d 856, 858 59 [2d Dept 2013]).

Accordingly, it is hereby

ORDERED, that Mori's motion for summary judgment dismissing the complaint is denied.

The parties are directed to appear before the Court on January 11, 2016 at 9:30 a.m. for a status conference.

Dated: Carmel, New York

November 18, 2015

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**HON. LEWIS J. LUBELL, J.S.C.**

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