Shin v ITCI, Inc.
2016 NY Slip Op 32565(U)
November 30, 2016
Supreme Court, Suffolk County
Docket Number: 09-24503
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-24503
CAL. No. 15-01813CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-26-16
ADJ. DATE 6-10-16
Mot. Seq. #006 - MotD

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DAVID SHIN,

Plaintiff,

- against -

ITCI, INC., HWAN H. SUNG, personally and in his capacity as an officer or director of ITCI, INC., HWAN H. SUNG d/b/a INTECON CONSTRUCTION, KENNY LEE, A.I.A. and KENNY LEE d/b/a KENNY LEE ARCHITECTS,

Defendants.

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Attorney for Defendants Kenny Lee, A.I.A. and Kenny Lee d/b/a Kenny Lee Architects
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 32 ; Replying Affidavits and supporting papers 33 - 37 ; Other memorandum of law 25 - 26 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Kenny Lee, A.I.A. and Kenny Lee d/b/a Kenny Lee Architects for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them is granted to the extent that the fourth cause of action is dismissed as to said defendants only, and is otherwise denied.

This is an action to recover damages which occurred as a result of the alleged breach of a construction contract by the defendants ITCI, Inc., Hwan H. Sung, and Hwan H. Sung d/b/a Intecon Construction (collectively Sung), and the alleged professional malpractice of the defendants Kenny Lee, A.I.A. and Kenny Lee d/b/a Kenny Lee Architects (collectively Lee). It is undisputed that the plaintiff purchased real property located at 164-11 45th Avenue, Flushing, New York (the premises) with the

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intention of subdividing the property and constructing two two-family dwellings thereon. On June 16, 2004, the plaintiff and Sung entered into a written contract wherein Sung agreed, among other things, to demolish the existing building on the premises and construct a "New 4 Family House" based on architectural drawings. On June 22, 2004, Sung and Lee entered into a written contract wherein Lee agreed, among other things, to "prepare architectural plan for the work scope of two family house new building," and to file and get municipal approvals for the project. It is further undisputed that, despite said filings, problems arose which delayed the project, that the existing two-family dwelling on the premises was demolished before approvals could be obtained, and that the New York City Department of Buildings (the DOB) refused to give final approval for the project. Unable to complete the project, the plaintiff sold the now vacant land for less than he had spent in purchasing the premises.

The plaintiff commenced this action by the filing of a summons and complaint on or about June 25, 2009. In his complaint, the plaintiff sets forth five causes of action. The first three causes of action respectively seek recovery against Sung based on breach of contract, violation of Lien Law Article 3A, and restitution. The fourth cause of action seeks damages from Sung and Lee for breach of implied covenant of good faith and fair dealing. The fifth cause of action seeks damages against Lee for professional malpractice. Both Sung and Lee failed to answer the complaint, and the matter proceeded to an inquest on damages on March 17, 2011. By decision and order dated July 12, 2011, the undersigned awarded judgment against the defendants in the sum of $696,572.60 with interest from the date of judgment. By order dated July 3, 2012, the undersigned granted Lee's motion seeking to vacate his default, permitted Lee to serve an answer and defend this action on the merits, and allowed the default judgment to stand as security pending determination of the matter, but precluded the plaintiff from enforcing said judgment. Lee served an answer to the complaint on or about August 9, 2012, and it appears that discovery has been completed.

Lee now moves for summary judgment dismissing the complaint on the grounds that there was no contract or special relationship between the plaintiff and him, that his work did not depart from generally accepted architectural standards, and that the plaintiff's damages were not proximately caused by any alleged departure from said standards or are not recoverable as consequential damages. In support of his motion, Lee submits, among other things, the pleadings, his affidavit, the subject written contracts, the transcript of the plaintiff's deposition testimony, the filings with the DOB, and a copy of a survey of the premises.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the part opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In his affidavit, Lee swears that he has been licensed by New York State as a professional architect for 21 years, that his contract with Sung excluded obtaining a demolition permit and required others to provide a survey of the premises if necessary. He states that he was unaware of the contract between Sung and the plaintiff until the commencement of this lawsuit, and that he filed an application to subdivided the premises with the DOB on July 29, 2004 which was approved the same day. He asserts that he received a survey from Sung which indicated that the premises was hooked up to a public sewer line along 45th Avenue, that he filed an application for a building permit with the DOB on August 30, 2004 under the correct zoning designation of R-4, and that the DOB denied approval of the building permit on September 8, 2004. Lee further swears that the subject denial "raised six objections to the plan ... [t]he main objection was ... the absence of an endorsed application for sewer line approval." He states that he contacted the appropriate municipal department on September 13, 2004 regarding the sewer issue, and that he was told "a few months later" that, contrary to the survey, the premises was not connected to the public sewage system and there was no sewer line on 45th Avenue in front of the premises. He indicates that he had informed Sung "at or about the time we entered into our contract" that when approvals of plans for the project were approved he could arrange to demolish the existing building, and that he continued his efforts to establish a viable sewer connection to the premises.

Lee further swears that, before his building plans could be approved, Sung demolished the existing building on the premises in September 2005, that he had no involvement in said demolition, and that the plaintiff personally signed the demolition permit issued by the DOB. He states that he first met the plaintiff "in or about 2006/2007," that he met with the plaintiff two more times thereafter, and that the plaintiff informed him at that second meeting that he did not wish him to act as the architect on the project any longer. He indicates that the plaintiff hired an expediter to take over the project. Lee further swears that he filed for reinstatement of his plans in March 2007, and that he learned that a new zoning ordinance had taken effect on July 27, 2005 which prohibited construction of the type of project the plaintiff wished to construct. He asserts that he applied to the appropriate municipal agency for a sewer line connection on March 5, 2007, that based on the expediter's designs he provided a new set of plans for the project as a favor to the plaintiff despite his lack of involvement, and that said plans were submitted to the DOB by the expediter on or about April 26, 2007. He indicates that the DOB issued new objections to the plans on April 27, 2007, that he made several revisions to the plans at the request of the expediter to satisfy said objections, and that it was the expediter's responsibility to take care of the new objections. Lee further swears that the expediter met with the DOB a number of times thereafter, re-submitted plans on or about April 25, 2008, and that the DOB re-issued a notice of objections which contained the same objections as those set forth in the April 27, 2007 notice of objections. He states that after the DOB rejected the new plans he had no more contact with the plaintiff.

At his deposition, the plaintiff testified that he took title to the premises by deed dated August 23, 2004, that he entered into a contract with Sung on June 16, 2004, and that, to the best of is knowledge, he met with Lee at Lee's office before he entered into the contract with Sung. He stated that he discussed his vision of the project with Lee at that meeting, that Lee said that the project was feasible, and that Lee said he had a lot of similar experience in the neighborhood and the project could be completed fairly quickly. He indicated that he had an oral and written contract with Lee regarding the project, that he lost his copy of the written contract, and that the contract between Sung and Lee dated

June 22, 2004 looked familiar to him. The plaintiff further testified that he personally delivered a retainer check dated June 9, 2004 to Lee at Lee's office, and that he did not remember how two additional checks to Lee were delivered. He stated that Sung told him near the end of 2005 that there was "a sewer problem," that he spoke with Lee who told him that he would take care of the problem, and that there came a time when the existing house on the premises was demolished. He declared that the signature on the application for demolition is not his signature, that he was angry when he learned of the demolition, and that he had told Sung and Lee that he did not want anything demolished until all of the project's plans were approved. He indicated that he did not know who had the existing building on the premises demolished, and that he asked Lee why the building plans had not been approved. The plaintiff further testified that Lee gave a complicated technical answer that did not include any information about the sewer problem, and that Lee promised to take care of the problems raised by the change in zoning. He stated that he then hired an expediter to help Lee get new plans approved, and that the expediter told him that Lee had filed an application under zoning ordinance R4-1 when the proper provision was still R4. He attested that he worked with Sung and Lee on this project until 2008 or 2009.

Lee's submission includes a copy of the application for subdivision of the premises that he filed with the DOB on July 29, 2004. Said application indicates that it was made on behalf of the owner of the premises, the plaintiff. The submission also includes a copy of the application for a building permit filed with the DOB on August 30, 2004. Said application indicates that it was made under zoning district R4-1, as indicated in the plaintiff's testimony, not R4 as Lee contends. In addition, the complaint and bill of particulars attached as exhibits to Lee's submission set forth allegations solely referencing Lee's alleged failure to meet the applicable professional standards for architects.

Here, Lee has established his prima facie entitlement to summary judgment dismissing the plaintiff's fourth cause of action for breach of the implied covenant of good faith and fair dealing. This is the case despite the fact that there are issues of fact whether there was a contract or special relationship between the plaintiff and Lee. Claims for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is based on the same allegations and seeks the same damages as a cause of action for professional malpractice (*see* ***Weight v Day***, 134 AD3d 806, 20 NYS3d 640 [2d Dept 2015; ***Ullmann- Schneider v Lacher & Lovell-Taylor, P.C.***, 121 AD3d 415, 994 NYS2d 72 [1st Dept 2014). The plaintiff's fourth causes of action is duplicative of his professional malpractice claim since it arises from the same facts and asserts the same injury. Accordingly, the plaintiff's fourth cause of action is dismissed as to Lee only.

However, Lee has failed to establish his prima facie entitlement to summary judgment dismissing the plaintiff's fifth cause of action for professional malpractice. "A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury" (***43 Park Owners Group, LLC v Commonwealth Land Tit. Ins. Co.***, 121 AD3d 937, 995 NYS2d 148 [2d Dept 2014], quoting ***Georgetti v United Hosp. Med. Ctr.***, 204 AD2d 271, 611 NYS2d [2d Dept 1994]). Lee's affidavit does not address the applicable accepted standards of architectural practice or his compliance with those standards. Neither does Lee submit an affidavit from an expert indicating that he performed in accordance with accepted standards of practice for architects in New York City (*cf.* ***Mary Imogene Bassett Hosp. v Cannon Design***, 84 AD3d 1524,

923 NYS2d 751 [2011]; ***Estate of Burke v Repetti & Co.***, 255 AD2d 483, 680 NYS2d 645 [2d Dept 1998]). A defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]; ***Blackwell v Mikevin Mgt. III, LLC***, 88 AD3d 836, 931 NYS2d 116 [2d Dept 2011]).

In addition, there are issues of fact whether the plaintiff and Lee had the necessary contractual or "special" relationship to permit recovery against him. It is well settled that the bond between parties can be so close as to be the functional equivalent of contractual privity (***Ossining Union Free School Dist. v Anderson LaRocca Anderson***, 73 NY2d 417, 541 NYS2d 335 [1989]). Where the parties have had direct contact, have shared information, and the defendant is aware of the nature of the work and the reliance of the plaintiff on that work, the absence of a written contract does not preclude a claim for professional malpractice (*see* ***Ossining Union Free School Dist. v Anderson LaRocca Anderson***, *id.*)

Here, there are issues of fact precluding summary judgment on the fifth cause of action including, but not limited to, whether Lee knew or did not now about the contract between Sung and the plaintiff until the commencement of this action, whether Lee met with the plaintiff prior to 2006/2007 and entered into an oral or written contract with the plaintiff, whether Lee's relationship with the plaintiff established the equivalent of contractual privity, whether certain applications to the DOB were made designating the proper zoning, whether Lee's professional responsibilities ended when the plaintiff hired an expediter in this matter, and why certain objections by the DOB were not resolved. The court' s function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, *supra*).

Finally, there are issues of fact whether any or all of the damages allegedly suffered by the plaintiff were proximately caused by any alleged departure by Lee from the applicable accepted standards of practice for architects, or are non-recoverable consequential damages. Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, Lee's motion for summary judgment is granted to the extent that the fourth cause of action is dismissed as to Lee only, and is otherwise denied.

Dated: 11-30-16

Hon. Denise F. Molia
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION