SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 156812/2017

HOTTENROTH & JOSEPH ARCHITECTS, MARK MCMASTER, and MICHELLE MCMASTER,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

P.A. COLLINS P.E. CONSULTING ENGINEERING, PLLC,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action seeking damages for, inter alia, breach of contract, defendant P.A. Collins P.E. Consulting Engineering, PLLC ("PAC") moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint. Plaintiffs Hottenroth & Joseph Architects ("HJA"), Mark McMaster ("Mr. McMaster"), and Michelle McMaster ("Mrs. McMaster") (collectively "plaintiffs") oppose the motion. After a review of the motion papers, and after consideration of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

By contract executed on or about December 16, 2010 ("the contract"), PAC, an engineering consulting firm, agreed to provide services to HJA, an architectural firm, in connection with the

renovation of a townhouse referred to as "12 East 93rd Street, McMaster Residence, NYC". Doc. 15.

According to the contract, PAC was to provide, inter alia, working drawings and specifications for ventilating systems, plumbing, and a hot water heating system including a boiler. Doc. 15. The contract stated that "[a]ny work installed using drawings and specifications that are not issued 'for construction' is [to be performed] at the sole risk and responsibility of the installing contractor." Doc. 15. Additionally, the contract provided that PAC "will issue drawings and specifications (Contract Documents) for use by others to procure bids for, and for the construction of the project" and that "[s]hould [Mr. and Mrs. McMaster] permit any bidders to exclude any portion of the work as defined in the Contract Documents", then PAC would bill for any extra time or services required. Doc. 15. Further, the contract required Mr. and Mrs. McMaster and their "consultants, such as [HJA] and the Expediter, as well as installing subcontractors [to] agree to perform all controlled inspections, and furnish all required sign-offs", as well as to obtain all necessary approvals. Doc. 15. The contract further provided that "[a]ny other details, which should arise in the future and which are not covered above, will be handled in accordance with [the AIA agreement]" between HJA and PAC, which is discussed below. Doc. 15. On or about December 20, 2010, HJA paid PAC a retainer fee of $4,200 pursuant to the contract. Doc. 4; Doc. 15.

On or about April 15, 2011, Mr. and Mrs. McMaster, as owners, entered into an agreement with HJA, an architectural firm, for the purpose of having HJA draw up plans for the renovation of the townhouse owned by Mr. and Mrs. McMaster at 12 East 93rd Street in Manhattan. Doc. 2. The agreement was drafted on American Institute of Architects form B101-2007 ("the AIA agreement"). Doc. 2.

On January 23, 2012, PAC submitted to HJA a proposal to design a back-up generator on the roof of the premises. Doc. 22. The work was to include the design of a natural gas booster system and gas piping to a back-up generator. Doc. 22.

Plaintiffs commenced the captioned action by summons and complaint filed July 28, 2017. Doc. 1. In their complaint, plaintiffs alleged causes of action sounding in breach of contract, professional malpractice, and negligent misrepresentation, alleging damages of $175,000 on each claim. Doc. 1. Plaintiffs claimed, inter alia, that inspections reports written by PAC dated February 28 and November 6, 2013 and November 20, 2014 failed to identify a defective condition which prevented the boiler from working properly. Doc. 1, at pars. 13-15. They further alleged that PAC's plans called for the back-up generator to have 1" gas piping despite the fact that the generator required a 2" gas line to function properly. Doc. 1, at pars. 16-19.

On September 8, 2017, PAC filed the instant motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Docs. 10 and 11. In support of the motion, PAC submits the affidavit of its principal shareholder, Paul Andrew Collins, P.E., who states that, pursuant to the contract, PAC was to design a mechanical plan for a hot water heating system, including a boiler, pumps, and vent distribution piping system. Doc. 14. According to Collins, the manufacturer's specifications for the Lochinvar Knight KB-501 boiler to be used at the premises required that vent distribution piping to the boiler were not to exceed 100 feet. Doc. 14. However, states Collins, the contractor which installed the pipes did not conform to PAC's design and the piping exceeded 100 feet. Doc. 14. By email dated May 28, 2015, HJA advised PAC that the boiler vent system had to be redesigned at a cost of $22,920 because it was improperly designed. Doc. 20. On May 29, 2015, PAC emailed HJA that the boiler venting exceeded 100 feet because it was not installed in accordance with the Contract Documents. Doc. 20. Collins maintains in his affidavit that a

"chimney design solution" annexed to PAC's motion establishes that the piping could be installed at a length of less than 100 feet. Doc. 14.

Collins admits in his affidavit that PAC's design specified the use of an 80 kilowatt backup generator, with an appropriately sized 1" gas line, on the roof of the premises. Doc. 14. However, he maintains that HJA and/or Mr. and Mrs. McMaster later decided to increase the electrical capacity of the generator, thereby requiring a larger unit and a 2" gas line. Doc. 14. Collins admits that "[t]he larger generator was submitted to and approved by PAC, but no submittal or shop drawings pertaining to the [2"] gas piping" were submitted to PAC prior to the installation of the larger generator. Doc. 14. Collins asserts that, since the 2" gas piping was installed without approved shop drawings, which were not submitted to PAC until December 3, 2014, after the 1" gas line was installed, PAC cannot be liable for any damages arising from this installation.

CONTENTIONS OF THE PARTIES:

In support of the motion, PAC argues that the breach of contract claim must be dismissed because Mr. and Mrs. McMaster are not intended third-party beneficiaries of the contract. PAC further asserts that HJA's breach of contract claim must be dismissed since HJA failed to allege that it sustained any damages as a result of the alleged breach. Additionally, PAC maintains that plaintiffs' claims sounding in professional negligence and negligent misrepresentation are barred by the economic loss doctrine. PAC also contends that, since there is no privity between it and Mr. and Mrs. McMaster, Mr. and Mrs. McMaster cannot sue PAC for professional negligence. Further, PAC asserts that it cannot be held liable on any theory since plaintiffs' damages, if any, arise from a failure by the construction contractor to follow PAC's plans.

In opposition to the motion, plaintiffs assert that their complaint states a valid claim of breach of contract and that Mr. and Mrs. McMaster were third-party beneficiaries to the contract. Plaintiffs further assert that they have stated a valid claim of professional malpractice, independent of their breach of contract claim, as against PAC. Additionally, plaintiffs contend that PAC has failed to establish, as a matter of law, that it cannot be liable herein because any alleged damage to plaintiffs arose from deviations from PAC's plans. Specifically, they contend that PAC's admission in its November 20, 2014 inspection report, i.e., that a 1" pipe was specified for the back-up generator where a 2" pipe was actually required, prevents this Court from dismissing the complaint at this juncture.

LEGAL CONCLUSIONS:

In deciding a motion to dismiss, a court's task "is to determine whether plaintiffs' pleadings state a cause of action." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151–52 (2002). In carrying out this task, courts have clarified that "the nature of the inquiry is whether a cause of action exists and not whether it has been properly stated." *Marini v. D'Apolito*, 162 A.D.2d 391, 392 (1st Dept. 1990).

Here, PAC relies on CPLR 3211(a)(1) and (a)(7). CPLR 3211(a)(1) provides for dismissal based on documentary evidence. Should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, then the motion will be granted. *See 150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dept. 2004); *see also Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). If the "allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . . ." *Sterling Fifth Assocs. v. Carpentille Corp., Inc.*, 9 A.D.3d 261, 261–62 (1st Dept. 2004).

Under CPLR 3211(a)(7), however, "where the task is to determine whether the pleadings state a cause of action, the complaint must be liberally construed, the allegations must be taken as true, and all reasonable inferences must be resolved in favor of the plaintiff." *Sterling Fifth Assocs.*, 9 A.D.3d at 261. "[A] complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists." *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 634 (1976).

Breach of Contract (First Cause of Action)

In order to properly plead a cause of action for breach of contract, a plaintiff must allege the existence of a valid contract, plaintiff's performance of his obligations thereunder, defendant's breach, and resulting damages. *See Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007). Here, plaintiffs allege that HJA and PAC entered into a contract pursuant to which PAC was to perform engineering services, that HJA paid PAC a $4,200 retainer in accordance with the terms of the contract, that PAC breached the contract by failing to exercise due care in the preparation of the mechanical plan and gas and riser diagram and by failing to ensure that the boiler and back-up generator were properly constructed, and that, as a result, they were damaged in an amount no less than $175,000. Therefore, plaintiffs have adequately pleaded a claim for breach of contract against PAC.

PAC maintains that, due to a lack of privity, the McMasters cannot assert a claim against it unless they establish that they were third-party beneficiaries to the contract. This, urges PAC, the McMasters have failed to prove. This Court disagrees. A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for his benefit and (3) that the benefit to him is

sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." *State of California Pub. Employees' Ret. Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 (2000), quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 (1983). "The parties' intent to benefit the third party must be apparent from the face of the contract." *La Salle Nat'l Bank v Ernst & Young LLP*, 285 AD2d 101, 108 (1st Dept 2001). "Performance rendered directly to plaintiff would indicate that plaintiff is a third-party beneficiary." *Tarrant Apparel Group v Camuto Consulting Group, Inc.*, 40 AD3d 556, 557 (1st Dept 2007) (citation omitted).

Here, plaintiffs allege the existence of a valid contract between them and PAC. Plaintiffs allege that HJA entered into the contract with PAC as a disclosed agent of the McMasters, which is tantamount to a claim that HJA entered into the contract for the benefit of the McMasters. Additionally, HJA was to pay a $4,200 retainer upon acceptance of the contract, and the contract provided a timeline for the work to be performed by PAC. Thus, the benefit which inured to the McMasters as a result of the contract was not merely incidental. Further, it is apparent from the face of the contract, which referenced work to be performed at "12 East 93rd Street, McMaster Residence, NYC", that that the McMasters were to be beneficiaries of the agreement. Doc. 3. Moreover, PAC's services were to be rendered to HJA as well as to the McMasters. The McMasters also assert that, as a result of the breach, they were damaged in amount of at least $175,000. Thus, the McMasters sufficiently state a claim for breach of contract as third-party beneficiaries of the contract.

This Court rejects PAC's contention that HJA failed to adequately plead a claim for breach of contract because it did not specifically allege damages which resulted from the alleged breach. Although the paragraphs of the complaint comprising the first cause of action only reflect that Mr.

and Mrs. McMaster allege damages in an amount of no less than $175,000, the wherefore clause of the complaint reflects that plaintiffs, not just Mr. and Mrs. McMaster, demand judgment in that amount. Since the complaint is to be construed liberally on a motion to dismiss pursuant to CPLR 3211(a)(7) (*see Leon v Martinez*, 84 NY2d at 87-88), this Court finds that HJA has adequately pleaded damages in connection with its claim for breach of contract.

PAC is not entitled to dismissal of the breach of contract claim based on documentary evidence. Pursuant to CPLR 3211(a)(1), "such motion may be appropriately granted only where the documentary evidence utterly refutes Plaintiff's allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Affidavits, such as that submitted by Collins, do not constitute documentary evidence upon which one moving for dismissal can rely (*see Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651 [1st Dep't 2011]), although they may be used to submit or authenticate documentary evidence. However, since the documentation submitted through Collins' affidavit does not conclusively establish a defense to the breach of contract claim, dismissal pursuant to 3211 (a) (1) is denied.

Professional Malpractice (Second Cause of Action)

Plaintiffs' claim for professional malpractice fails to state a cause of action. "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987) (internal citations omitted). "Simply alleging a duty of due care does not transform a breach of contract action into a tort claim." *Briar Contr. Corp. v City of New York*, 156 AD2d 628, 629 (2d Dept 1989).

> "'[T]he nature of the injury, the manner in which the injury occurred and the resulting harm'" are all relevant factors in considering whether claims for breach of contract and tort may exist side by side." *Verizon New York, Inc. v Optical Communications Group, Inc.*, 91 AD3d 176 (1st Dept. 2011) (citing *Sommer v Federal Signal Corp.*, 79 NY2d 540 (1992). The First Department has described the nature of the harm, "particularly whether it is 'catastrophic,' as 'one of the most significant elements in determining whether the nature of the type of services rendered gives rise to a duty of reasonable care independent of the contract itself.'" *Verizon New York, Inc. v Optical Communications Group, Inc., supra* (quoting *Trustees of Columbia Univ. v Gwathmey Siegel & Assocs. Architects*, 192 A.D.2d 151, 154 [1st Dept. 1993]). Accordingly, parallel actions sounding in contract and tort have been found to exist only where a defendant's failure to perform contractual duties competently can have "catastrophic consequences" affecting a significant public interest.

Cole v Apollo Bldrs. LLC, 2018 NY Slip Op 31338(U), *4 (Sup Ct, NY County 2018).

Since plaintiffs fail to cite any duty of care owed to them by PAC independent of the contract, and do not allege that PAC's failure to perform its duties had catastrophic consequences affecting a significant public interest, the professional malpractice claim is dismissed.

Negligent Misrepresentation (Third Cause of Action)

Plaintiffs' claim for negligent misrepresentation must be dismissed as well, since the acts they allege are not based on breaches of legal duties distinct from the contract. *See RKB Enterprises Inc. v Ernst & Young*, 182 AD2d 971, 972 (3d Dept 1992); *cf. Wyle Inc. v ITT Corp.*, 130 AD3d 438, 442 (1st Dept 2015).

In light of the foregoing, it is hereby:

ORDERED that the motion to dismiss by defendant P.A. Collins P.E. Consulting Engineering, PLLC is granted to the extent that the second and third causes of action of the

complaint are dismissed, and the Clerk is directed to enter judgment dismissing those claims; and it is further

ORDERED that the motion to dismiss by defendant P.A. Collins P.E. Consulting Engineering, PLLC is denied to the extent that it seeks dismissal of the first cause of action of the complaint; and it is further

ORDERED that defendant P.A. Collins P.E. Consulting Engineering, PLLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 280, 80 Centre Street, New York, New York, on January 8, 2019, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

8/17/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE