SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** IAS MOTION 39EFM

Justice

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71 PARK AVENUE SOUTH, LLC, NAVA PARTNERS, LLC

Plaintiffs,

- v -

FOX ROTHSCHILD LLP, SBLM ARCHITECTS P.C.,

Defendants.

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INDEX NO. 158900/2017

MOTION DATE N/A, 05/09/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 39

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 40, 41

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This is an action for professional malpractice, gross negligence, and breach of contract related to a real estate project located at 4th Avenue and East 10th Street in Manhattan. In Motion Sequence No. 001, defendant Fox Rothschild LLP ("Fox") moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss plaintiffs Nava Partners, LLC's ("NP") and 71 Park Avenue South LLC's ("71 Park") (collectively, "Plaintiffs") complaint. In Motion Sequence No. 002, Fox moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for dismissal of the cross claims asserted against it by defendant SBLM Architects, P.C. ("SBLM"). Motion Sequence Nos. 001 and 002 are consolidated for disposition.

In 2014, NP, a real estate development company, identified two adjacent parcels of land – 71 4th Avenue and 82 East 10th Street – for a potential new development (the

"Project"). NP intended to purchase the two parcels, combine them into one lot known as 80 East 10th Street (the "Property"), and construct a 10-story, 34,300 gross square foot mixed-use building (the "Building") on the Property.

As the Property was located within a C6-2A zoning district, the proposed Building was subject to certain restrictions regarding the maximum allowable floor area ratio ("FAR").[1] The maximum allowable FAR varies on whether Inclusionary Housing is included.[2] The FAR for the proposed Building, without the Inclusionary Housing bonus, was 5.95. NP states that the maximum permissible FAR for the Building was an important factor in gauging the economic feasibility of the Project, which included the purchase price for the Property.

In June 2014, NP retained SBLM to determine whether the proposed Building design conformed with the requirements set forth in New York City Zoning Resolution § 35-30. SBLM's principal, George Fanous, allegedly confirmed that the FAR, without Inclusionary Housing, was 6.02.

NP also retained Fox as its legal counsel. On September 5, 2014, NP, through Stewart Osborne ("Osborne") as its agent, executed an engagement letter (the "Engagement Letter") with Fox wherein Fox agreed to provide "counsel on zoning matters

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[1] A property's FAR is calculated by dividing the total square footage of a building by the total square footage of the land on which it sits.

[2] New York City's Inclusionary Housing Program allows owners of new developments to increase the maximum permissible FAR by providing affordable housing as part of the new development or by preserving affordable housing elsewhere in the same Community Board district where the new development is located.

for 71 4th Avenue . . . and 82 East 10th Street." The Engagement Letter specifically identifies "Nava Partners LLC" as Fox's client and in a section entitled, "Identity of Client," further states that:

> [t]he Firm's only client in the Engagement is the party [Nava Partners LLC] identified as Client in the first paragraph of this Letter. The Engagement is not an agreement to represent any of Client's affiliates, subsidiaries, parents or related individuals, officers, directors, partners, members, shareholders, employees, independent contractors or agents (collectively, "Affiliates") unless the Firm has specifically agreed to do so in writing. Client agrees that the Firm's representation of Client in the Engagement does not give rise to an attorney-client relationship between the Firm and any of Client's Affiliates.

In addition, the Engagement Letter stated that the "Engagement Agreement" is comprised of both the Engagement Letter and an attached Standard Terms of Engagement ("Standard Terms"). Fox's Standard Terms contained a section titled "Affiliations by Client" which, in relevant part, states:

> Client agrees and acknowledges that, unless specifically stated otherwise in the Letter, the Engagement is not an agreement by the Firm to represent any of Client's affiliates, subsidiaries, constituents, parents or related individuals, officers, directors, partners, members, shareholders, employees, independent contractors or agents (collectively, "Affiliates"). Client agrees that the Firm's representation of Client in the Engagement does not give rise to an attorney-client relationship between the Firm and any of Client's Affiliates.

The Engagement Letter provided that Osborne would serve as NP's contact person, and that all invoices should be sent to him. Between October 2014 and February 2016, Fox sent NP at least seven invoices addressed to Osborne.

In October 2014, NP provided Fox with specifications for the anticipated mixed-use Building, including height, gross square footage, and floor plans to "aid Fox in counseling on any Zoning Resolution issues." On December 5, 2014, Osborne wrote an email to Jerald

A. Johnson ("Johnson") at Fox requesting "a letter from you noting that the current scheme for 71 4th Avenue is compliant per zoning and [Department of Buildings] regulations." Johnson responded that to write the requested letter, Fox required "a set of zoning calculations/plans signed and sealed by an architect." NP states that it did not provide the sealed plans and this letter was never drafted.

Then, on April 7, 2015, Osborne's partner at NP, David Ruff ("Ruff"), emailed Johnson asking for "a letter describing the buildable square footage for [the Property]," which would be given to the "lender for their due diligence." Johnson provided Ruff with a draft land opinion letter for comment, to which Ruff responded, "this looks perfect." Johnson provided the final land opinion letter (the "Opinion Letter") to the lender, Savitar Realty Advisors ("Savitar"), on April 8, 2015.

The Opinion Letter states that the Property, with an area of 4,362 square feet, sits within a C6-2A zoning district and has an R8A residential district equivalent which permits both commercial and residential use. According to the Opinion Letter, C6-2A/R8A districts permit a commercial FAR of 6.0, and a residential FAR of 5.4 which can be increased to 7.2 with the provision of Inclusionary Housing. The Opinion Letter provided the maximum permissible square footage for the Property based on the FARs for commercial, community facility or residential use (both with and without the Inclusionary Housing bonus). The last sentence of the Opinion Letter stated that

> [t]his letter may only be relied upon by the entities to which it is addressed, their participants, successors, assignees and co-lenders and may not be relied upon by any other person or entity . . .

Despite Ruff's statement that the Opinion Letter was "perfect," the complaint alleges that the letter failed to address the maximum allowable square footage for a mixed-use building such as the specific Building proposed by NP for the Property. The complaint further states that, based on its belief that the Opinion Letter confirmed the proposed Building's compliance with the zoning resolution, NP caused plaintiff 71 Park LLC ("71 Park") – a Delaware limited liability company formed by NP on April 24, 2015 – to purchase the Property for $22.5 million on May 4, 2015.

In June 2015, SBLM filed a new building application with the Department of Buildings ("DOB"). The application proposed a Building with a total of 25,567 square feet and a 6.02 FAR. DOB rejected the application because the proposed Building's FAR exceeded the permissible 5.4 FAR for a mixed-use building without an Inclusionary Housing component.

Plaintiffs allege that the fair market value of the Property, using the correct 5.4 FAR, was $14.5 million, significantly less than the purchase price of $22.5 million. Plaintiffs further allege that they grossly overpaid on the purchase price, and that they were forced to pay more than $2 million in development rights to ensure that the Building was compliant with New York City Zoning Resolution § 35-30.

On October 5, 2017, Plaintiffs commenced this action asserting a cause of action by 71 Park LLC for professional malpractice against Fox and a cause of action by NP for breach of contract against Fox.[3] Fox moves, pre-answer, to dismiss the complaint.

[3] The complaint also asserted a cause of action by 71 Park against SBLM for gross negligence and a cause of action by NP against SBLM for breach of contract.

Discussion

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). "To be considered 'documentary'" under CPLR 3211 (a) (1), "evidence must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1,* 73 A.D.3d 78, 86 (2d Dept. 2010) (citation omitted). While contracts constitute documentary evidence, affidavits do not. *See id.* at 84; *Lowenstern v. Sherman Sq. Realty Corp.*, 143 A.D.3d 562, 562 (1st Dept 2016); *Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651, 651 (1st Dept 2011).

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (citations omitted).

Professional Malpractice

71 Park alleges that Fox had a "duty to exercise the knowledge, skill and ability ordinarily possessed by members of the legal profession" in providing legal services, and that "Fox breached its duty to [plaintiffs] by failing to inform [them] that the proposed Building's FAR was not in compliance with the Zoning resolution."

Fox argues that the Engagement Letter itself shows that its sole client was NP, rather than 71 Park and that the latter cannot assert a legal malpractice claim against Fox. Fox

points out that 71 Park did not even exist at the time that the Engagement Letter was signed. Fox further contends that the Engagement Letter precludes a finding of privity or near privity between Fox and 71 Park.

Plaintiffs, in opposition, argue that because Fox knew that NP would use a "to-be-formed single-purpose entity" to purchase and develop the Property, Fox's attempt to exclude that entity from the definition of "Client" is unreasonable, or "at least sufficiently unreasonable" to warrant denial of the motion to dismiss at this stage of the litigation.[4]

To state a cause of action for legal malpractice, a plaintiff must plead "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages." *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dept. 2006). A necessary element to sustain a legal malpractice claim is the existence of an attorney-client relationship. *Waggoner v. Caruso*, 68 A.D.3d 1, 5 (1st Dept. 2009). An attorney's liability does not extend to a third party in the absence of privity. *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 308-309 (2010). Although a third party may benefit from an attorney's actions, "that circumstance does not give rise to a duty on the part of the attorney to the third party." *Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 47 A.D.3d 52, 60 (1st Dept. 2007).

Here, the documentary evidence plainly and expressly refutes Plaintiffs' claim of an attorney-client relationship between Fox and 71 Park. NP is the sole client identified in

[4] Plaintiffs tender an affidavit from Osborne, a vice president in 71 Park and a partner in NP in which he states that he specifically informed Fox that NP intended to form a single-purpose entity to acquire title to the Property, borrow funds for the Project, construct the Building and act as sponsor.

the Engagement Letter, and that letter clearly and unambiguously states that Fox does not represent any of NP's affiliates, subsidiaries or agents. The Engagement Letter, and the attached Standard Terms, specifically disclaim the creation of an attorney-client relationship between Fox and NP's affiliates arising out of Fox's representation. And, contrary to Plaintiffs' assertion, it was not unreasonable for Fox to narrowly define "client" in the Engagement Letter.

Additionally, the fact that NP allegedly informed Fox of its intention to form a single-purpose entity does not mean that Fox agreed to represent that single-purpose entity, given the Engagement Letter's limitation on who was the "client."[5] Notably, the "unilateral belief of a plaintiff alone does not confer upon him or her the status of a client." *Wei Cheng Chang v. Pi,* 288 A.D.2d 378, 380 (2d Dept. 2001). Further, despite that the Engagement Letter provided a mechanism by which Fox's representation could extend to an NP affiliate – *i.e.*, an agreement to such representation by Fox in writing – NP never requested written approval of representation for 71 Park following that entity's formation.

Plaintiffs also argue that their malpractice claim should be sustained because they plead facts sufficient to establish a relationship approaching near privity. To sustain a claim for legal malpractice based on near privity, a plaintiff must allege that the professional was "aware that its services will be used for a specific purpose, the plaintiff must rely upon those services, and the professional must engage in some conduct evincing

[5] Nor could Fox have represented 71 Park when the Engagement Letter was signed as 71 Park did not legally exist until seven months later.

some understanding of the plaintiff's reliance." *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 175 (1st Dept 2004).

Here, Plaintiffs fail to allege sufficient facts to show near privity. First, the documentary evidence contradicts Plaintiffs' argument that 71 Park was in near privity with Fox. As stated above, the Engagement Letter disclaimer stated that Fox agreed to represent only NP, not 71 Park. Second, the Land Opinion letter, which 71 Park alleges that it relied upon to its detriment, was addressed to Savitar and stated that it could "only be relied upon by the entities to which it is addressed … and may not be relied upon by any other person or entity. . .." Lastly, the complaint is devoid of any allegations that 71 Park requested legal advice from Fox, that Fox agreed to perform a specific task for 71 Park, or that there was any direct contact between Fox and 71 Park after the latter entity was formed. In fact, Fox continued to address its invoices to NP as per the Engagement Letter through 2016. Thus, Fox and 71 Park did not have a relationship of near privity. S*ee Wei Cheng Chang,* 288 A.D.2d at 380-381.

The documents executed by the parties preclude a finding of an attorney-client relationship between Fox and 71 Park. Based upon this documentary evidence, I dismiss Plaintiffs' cause of action for legal malpractice and do not address the remaining arguments in support of dismissal.

Breach of Contract

The complaint alleges that Fox breached its contract to counsel NP on zoning matters by: 1) failing to inform NP that the proposed Building did not comply with the

Zoning Resolution; and 2) issuing a materially misleading Opinion Letter that NP relied on to purchase the Property.

Fox argues that this cause of action should be dismissed because the documentary evidence shows that Fox fulfilled its contractual obligations. Specifically, it performed under the Engagement Letter and supplied the Opinion Letter as requested. Fox also contends that the Opinion Letter is not misleading because it fulfilled its purpose of describing the buildable square footage for the Property. Furthermore, Fox claims that NP cannot demonstrate that it sustained any damages for the purported breach because it did not purchase the Property.

In opposition, Plaintiffs submit that NP retained Fox to provide counsel on zoning matters related to the Project, but Fox failed to perform in a competent manner, and, therefore, NP is entitled to the return of its legal fees.

To sustain a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010). A cause of action for breach of contract "may be maintained against an attorney 'only where the attorney makes an express promise . . . to obtain a specific result and fails to do so.'" *Aglira v. Julien & Schlesinger*, 214 A.D.2d 178, 185 (1st Dept. 2004) (citation omitted). Additionally, "allegations that an attorney failed to exercise due care do not state a cause of action for breach of contract." *Goldfarb v. Hoffman*, 139 A.D.3d 474, 475 (1st Dept. 2016).

The Engagement Letter states that NP retained Fox to provide "counsel on zoning matters." Considering this general description, the document does not "utterly refute"

Plaintiffs' allegations. *See Goshen*, 98 N.Y.2d at 326. Construing the complaint liberally in Plaintiffs' favor, as I must do on a motion to dismiss, Plaintiffs' allegation, that "Fox breached its agreement with [NP] by failing to inform [NP] that the proposed Building was not in compliance with the Zoning Resolution," arguably alleges a breach of the Engagement Letter's promise to provide counsel on zoning matters. *See Reidy v. Martin*, 77 A.D.3d 903, 903 (2d Dept. 2010) (holding that "[a] cause of action to recover damages for breach of contract may be maintained against an attorney where there is a promise to perform and no subsequent performance.") Thus, I find that NP adequately pleads a cause of action for breach of contract and deny Fox's motion to dismiss this claim.

SBLM's cross claims

On December 1, 2017, SBLM filed its Verified Answer to Plaintiffs' complaint which stated three cross-claims against Fox: common-law indemnification; contractual indemnification; and contribution. Fox's first argument for dismissal of the cross-claims is that Fox is not liable to SBLM because Fox is not liable to Plaintiffs. As I sustained Plaintiffs' breach of contract claim, this argument is moot. Next, Fox argues that the cross-claims should be dismissed because none of these claims state a valid cause of action.

1. Common-Law Indemnification

Fox argues that SBLM cannot obtain common-law indemnification because it is being sued for its own wrongdoing. In its opposition brief, SBLM fails to oppose Fox's motion to dismiss the common-law indemnification cross-claim.

Common-law indemnification "requires that the one claiming indemnification has committed no wrong and is being held liable solely 'by virtue of some relationship with

the tort-feasor or obligation imposed by law.'" *Petrucci v. City of New York*, 167 A.D.2d 29, 33 (1st Dept. 1991) (citation omitted). Thus, "[a] party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification." *Mathis v. Central Park Conservancy*, 251 A.D.2d 171, 172 (1st Dept. 1998).

SBLM's answer fails to plead that Plaintiffs' injuries were caused solely by Fox's negligence or that SBLM has been held vicariously liable for Fox's wrongdoing. Moreover, the complaint shows that Plaintiffs sued SBLM for its own alleged wrongdoing rather than under a vicarious liability theory. Because SBLM neither sufficiently plead a claim for common law indemnification nor opposed the motion to dismiss, I grant Fox's motion and dismiss SBLM's cross-claim for common-law indemnification.

2. Contractual Indemnification

Fox asserts that SBLM's counterclaim for contractual indemnification must be dismissed because SBLM does not plead the existence of a contract between SBLM and Fox. SBLM again offers no opposition to dismissal of this counterclaim.

A party is entitled to contractual indemnification where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement." *Campos v. 68 E.86th St. Owners Corp.*, 117 A.D.3d 593, 595 (1st Dept. 2014) citing *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 (1987). And, "to recover upon a theory of indemnity, a party must have a contractual relationship with the entity from which indemnification is sought." *SSDW Co. v. Feldman-Misthopoulos Assocs.*, 151 A.D.2d 293, 295 (1st Dept. 1989).

Here, SBLM fails to allege the existence of a contract between it and Fox or to oppose the motion to dismiss the cross-claim. Accordingly, the cross-claim for contractual indemnification fails and is dismissed.

3. Contribution

Fox argues that that SBLM's cross-claim for contribution should be dismissed because Plaintiffs seek only economic damages from SBLM, which renders contribution unavailable.

In opposition, SBLM argues that "Plaintiffs claims for malpractice against Fox and for gross negligence against SBLM are torts subject to apportionment among the Defendants because Plaintiffs allege injury to property."

Under CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death may claim contribution." Contribution, however, is not available for a "purely economic loss resulting from a breach of contract [because the loss] does not constitute 'injury to property' within the meaning of New York's contribution statute." *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987) (citation omitted).

Here, Plaintiffs plead claims for both gross negligence and breach of contract. Although the complaint includes allegations sounding in tort, the damages that Plaintiffs seek are economic. *See Children's Corner Learning Ctr. v. A. Miranda Contr. Corp.*, 64 A.D.3d 318, 324 (1st Dept. 2009); *Trump Vil. Section 3, Inc. v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 897 (1st Dept. 2003); *Chatham Towers, Inc. v Castle Restoration & Constr., Inc.*, 151 AD3d 419, 420 (1st Dept 2017). More specifically, Plaintiffs seek

damages in an amount that would place them in the same position had SBLM advised them of the correct FAR. As a result, contribution is not available to SBLM. *See Board of Educ. of Hudson City School Dist.*, 71 N.Y.2d at 26. For this reason, I dismiss SBLM's cross-claim for contribution against Fox.

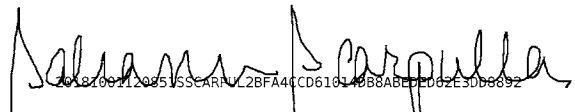
Accordingly, it is

ORDERED that the motion of defendant Fox Rothschild LLP to dismiss the complaint is granted as to the legal malpractice cause of action and denied as to the breach of contract cause of action; and it is further

ORDERED that the motion of defendant Fox Rothschild LLP to dismiss the cross-claims asserted against it by defendant SBML Architects, P.C. is granted in its entirety, and the cross-claims of defendant SBML Architects, P.C. are dismissed; and it is further

ORDERED that defendant Fox Rothschild LLP 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 Part 39, Room 208, 60 Centre Street, on November 14, 2018, at 2:15 PM.



10/1/18
DATE

SALIANN SCARPULLA, 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