SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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W 108 DEVELOPMENT LLC,

Plaintiff,

- v -

DOMINICK R. PILLA, ARCHITECTURE-ENGINEERING P.C. D/B/A DOMINICK R. PILLA ASSOCIATES P.C., DOMINICK R. PILLA, XYZ CORP.,

Defendant.

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INDEX NO. 654801/2016

MOTION DATE 06/13/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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, 30, 31, 32

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3211 (a) (7), of defendants Dominick R. Pilla, Architecture-Engineering, P.C., d/b/a Dominick R. Pilla Associates, P.C. and Dominick R. Pilla is granted to the extent that the second, third, fourth and fifth causes of action in the complaint are dismissed in their entirety and the complaint as against defendant Dominick R. Pilla only is dismissed in its entirety, and the motion is otherwise denied; and it is further

ORDERED that defendants are 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 331, 60 Centre Street, on November 15, 2018, at 9:30 AM.

DECISION

In this action for breach of contract and related relief, co-defendants Dominick R. Pilla, Architecture-Engineering, P.C., d/b/a Dominick R. Pilla Associates, P.C. (Pilla PC) and Dominick R. Pilla (Pilla) move to dismiss a portion of the complaint, pursuant to CPLR 3211 (a) (7) (motion sequence number 001).

Background

Plaintiff W 108 Development LLC (West 108), a real estate development corporation, is the owner of a building complex (the property) located at 324-326 West 108th Street in the County, City and State of New York.

In this action, plaintiff alleges that defendants did not carry out its obligations to develop the property during the West 108 project.

In its complaint, West 108 first states that, on February 25, 2015, it "engaged defendants, as architect . . ., to complete five separate phases of architectural work" as part of its development project. These comprised: 1) pre-design; 2) schematic design; 3) design development; 4) construction document; and 5) construction administration. Defendants note that there was never any formally executed contract, and aver

that, although the complaint draws no distinction between Pilla and Pilla PC, "to the extent that an agreement existed between plaintiff and any party, that agreement was between plaintiff and [Pilla PC], and not with Pilla, individually." West 108 does not dispute these facts, although it raises other arguments regarding liability. The court observes that West 108 has not presented a copy of a contract, but rather copies of an email trail, exchanged from February-March 2015, that indicates that West 108 had retained Pilla PC as its architect.

West 108 next alleges that due to defendants' negligence and/or malpractice, defendants failed to discharge their professional services, and thereby caused the development project to suffer undue delays and cost overruns. West 108 also claims that, despite its growing dissatisfaction, it ultimately paid defendants $233,803.00 of their agreed on architectural fee of $248,000.00. West 108 finally claims that, on September 19, 2016, defendants served an inaccurate invoice for $19,847.63 in unpaid fees, and thereafter, on September 28, 2016, filed a mechanic's lien against the property for $193,532.62.

For their part, defendants deny West 108's allegations of negligence and malpractice. Defendants also deny West 108's allegations regarding payment and assert that the entirety of the $193,532.62 sought in the mechanic's lien represents unpaid invoices. Defendants have since commenced a separate action in

this court to foreclose the mechanic's lien (Dominick R. Pilla, Architecture-Engineering, P.C. v Orly Gilat, et al, Index No. 159613/16).

On October 28, 2016, West 108 filed a complaint that sets forth causes of action for: 1) breach of contract; 2) professional malpractice; 3) fraud; 4) breach of the implied covenant of good faith and fair dealing; and 5) attorney's fees. Defendants have submitted the instant motion to dismiss, pursuant to CPLR 3211 (motion sequence number 001).

Discussion

Defendants' motion specifically seeks the dismissal of the entire complaint as against Pilla individually, and dismissal of the second through fifth causes of action as against Pilla PC. West 108 states that it has no objection to the dismissal of the first (breach of contract) and fourth (breach of implied covenant) causes of action as against Pilla. Therefore, as an initial matter, the court shall grant defendants' motion to the extent of dismissing these two causes of action as against Pilla, without objection, and now turns to the balance of the motion.

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." See Chanko v

American Broadcasting Cos. Inc., 27 NY3d 46, 52 (2016), citing Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002). However, where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. Scott v Bell Atl. Corp., 282 AD2d 180, 183 (1st Dept 2001), affd as mod, Goshen, 98 NY2d 314, citing Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 (1st Dept 1994). Here, as there is no remaining dispute regarding the first cause of action in the complaint, the court will confine its analysis to the second through fifth causes of action therein.

West 108's second cause of action asserts a claim of "professional malpractice" against both defendants. New York law treats architectural malpractice as a species of "'professional negligence [which] requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury.'" *143 Bergen St., LLC v Ruderman*, 144 AD3d 1002, 1003 (2d Dept 2016), quoting Kung v Zheng, 73 AD3d 862, 863 (2d Dept 2010). Here, the complaint alleges that defendants committed four negligent departures from architectural standards, including misunderstanding and misapplication of: 1) the "Sliver Law" (New York City Zoning Resolution § 23-692); 2) the portion of the Zoning Resolution that governs parking in the neighborhood where

the property is situated; 3) the Americans with Disabilities Act; and 4) the portion of the New York City Building Code that governs egress requirements for renovated buildings. The complaint also alleges that these departures were the proximate cause of the financial injuries that West 108 consequently suffered. Id. As a result, the court finds that the complaint satisfies the legal pleading requirements for this cause of action. Defendants, nevertheless, raise two arguments for its dismissal.

First, defendants cite the decision of the Appellate Division, First Department, in Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC (104 AD3d 613, 614 [1st Dept 2013]) to argue that the architectural malpractice claim should be dismissed, as against Pilla, because it is barred, as a matter of law, since there is no privity of contract between Pilla and West 108. That case did, indeed, uphold the dismissal of an architectural malpractice claim on the grounds of lack of privity where there was no evidence that the plaintiffs were the intended beneficiaries of the contract at issue therein. West 108 responds that this holding is inapposite, however, and that the instant action is instead governed by Business Corporation Law (BCL) § 1505 (a), which provides that:

> "Each shareholder, employee or agent of a professional service corporation and a design professional service corporation shall be personally and fully liable and

> accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation."

In Crystal Clear Dev., LLC v Devon Architects of N.Y., P.C. (97 AD3d 716 [2d Dept 2012]), the Appellate Division, Second Department ruled that this statute precluded the dismissal of an architectural malpractice claim against the individual principal of an architecture PC, despite the absence of privity between the plaintiff and that individual, because:

> "the record indicates that [the individual] handled and supervised the architectural planning and represented the professional corporation, . . . throughout the contractual relationship. As such, Business Corporation Law § 1505 (a) renders [the individual] potentially liable for the malpractice of [the PC] to the extent of his own personal negligence or to the extent of negligent acts committed at his direction."

97 AD3d at 719-720.

Here, the record has not yet been developed, but the complaint certainly alleges that Pilla "handled," "supervised" and/or "directed" the work performed by Pilla PC. The court finds that these allegations are sufficient to support West 108's architectural malpractice component of its breach of contract claim against Pilla, personally. The court also notes that defendants unaccountably chose to completely ignore West 108's BCL § 1505 (a) argument in their opposition papers. In any case, for the foregoing reasons, the court rejects

defendants' first argument to dismiss West 108's architectural malpractice claim.

Defendants next argue that West 108's architectural malpractice claim should be dismissed against both defendants because that claim is duplicative of West 108's breach of contract claim. They cite the general rule, promulgated long ago by the Court of Appeals in Clark-Fitzpatrick, Inc. v Long Is. R.R. Co. (70 NY2d 382, 389 [1987]), that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." West 108 responds by citing the portion of CPLR 3014, which provides that "[c]auses of action or defenses may be stated alternatively or hypothetically," and arguing that New York courts routinely interpret the statute as permitting an exception, at the pleading stage of litigation, to the general rule that tort based claims should be dismissed when they are duplicative of breach of contract claims. West 108's statement of the law is correct. See e.g. Citi Mgt. Group, Ltd. v Highbridge House Ogden, LLC, 45 AD3d 487, 487 (1st Dept 2007). Furthermore, the instant complaint does contain the allegation that defendants committed professional malpractice, which certainly constitutes the violation of a duty separate from a contractual obligation.

However, a review of the complaint shows that as to such tort claim plaintiff seeks "only a benefit of the bargain recovery, viz, economic loss under the contract", 17 Vista Fee Associates v Teachers Ins. and Annuity Ass'n of America, (259 AD2d 75, 83 [1st Dept. 1999]) as opposed to damages for personal injury or property loss. Therefore, the court accepts defendants' second dismissal argument, and finds that their motion should be granted with respect to West 108's architectural malpractice claim.

West 108's third cause of action alleges fraud. The proponent of a claim for fraud "must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." Zanett Lombardier, Ltd. v Maslow, 29 AD3d 495, 495 (1st Dept 2006). Here, too, defendants argue that West 108's fraud claim should be dismissed as duplicative of its breach of contract claim. It is indeed the case that a fraud claim will be dismissed as duplicative of a breach of contract claim where it does not allege any tortious conduct separate or distinct from the breach of contract claim. See e.g. 20 Pine St. Homeowners Assn. v 20 Pine St. LLC, 109 AD3d 733, 735 (1st Dept 2013). Defendants argue that the complaint contains no such allegations. West 108 responds that its fraud claim is not impermissibly duplicative because it is based on

misrepresentations or omissions of contemporaneous facts that were collateral to the agreement. Specifically, these "contemporaneous facts" include the allegations that: 1) "[d]efendants intentionally allowed development of construction documents . . . to commence and continue without informing [West 108] that the [p]lans . . . were unapproved and ... materially defective"; and 2) : "[d]efendants intentionally induced [West 108] to enter into and continue under the [a]greement by intentionally concealing or misrepresenting the [p]lans' various flaws." West 108 then argues that "[d]efendants' alleged misrepresentations or omissions related to contemporaneous facts - not [d]efendants' intention to perform - and were, therefore, 'collateral' to the [a]greement." Defendants reply that "plaintiff has failed to articulate a distinction [between their contractual obligations and the aforementioned 'contemporaneous facts'] sufficient to establish that its cause of action for fraud is based on a duty which is separate from [defendants'] contractual obligations." The court agrees. The "contemporaneous facts" that West 108 bases its argument on consist of allegations that the architectural plans that defendants prepared were "defective" or "flawed." However, promulgating proper architectural plans was what defendants had contracted to do, and to allege that they instead promulgated improper plans merely alleges that they breached their contract.

It does not "allege tortious conduct separate and distinct from its breach of contract claim." 20 Pine St. Homeowners Assn., 109 AD3d at 735. Therefore, the court rejects West 108's opposition argument, and finds that the portion of defendants' motion that seeks dismissal of West 108's cause of action for fraud should be granted.

West 108's fourth cause of action alleges breach of the implied covenant of good faith and fair dealing. The Appellate Division, First Department holds that "all contracts imply a covenant of good faith and fair dealing in the course of performance, and 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Security Pac. Nat. Bank v Evans, 62 AD3d 512, 514 (1st Dept 2009), quoting Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995), quoting Kirke La Shelle Co. v Armstrong Co., 263 NY 79, 87 (1933). The First Department also holds that the covenant "is breached when a party acts in a manner that—although not expressly forbidden by any contractual provision—would deprive the other party of receiving the benefits under their agreement." Sorenson v Bridge Capital Corp., 52 AD3d 265, 267 (1st Dept 2008), citing Ellenberg Morgan Corp. v Hard Rock Cafe Assoc., 116 AD2d 266, 271 (1st Dept 1986). Here, defendants argue that West 108's fourth cause of action for breach of the

implied covenant should be dismissed as duplicative of its first cause of action for breach of contract. They cite the First Department's decision in Bostany v Trump Org. LLC (73 AD3d 479 [1st Dept 2010]) for the proposition that "[s]uch a claim cannot be maintained where, . . .the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" 73 AD3d at 481, quoting Canstar v Jones Constr. Co., 212 AD2d 452, 453 (1st Dept 1995). They then argue that such an "intrinsic connection" exists here, because West 108's claim "is derived of an alleged breach of [defendants'] agreement for the [p]roject." West 108 responds that its breach of covenant claim is separate from its breach of contract claim because it "arises specifically from the allegation that [defendants] improperly invoiced [West 108] for numerous unauthorized charges, including . . . attorney's fees and costs incurred in preparing the [l]ien (i.e., after the termination of the [a]greement); and . . . charges related to several entirely new phases of work that were neither contemplated in the [a]greement nor approved by [West 108]." Defendants' reply papers merely restate their original argument.

After review, the court finds in favor of defendants. The fourth cause of action duplicates the first cause of action for breach of oral contract in that plaintiffs are alleging that defendants breached such agreement by performing unauthorized

work, overcharging them, and filing a baseless lien. See, e.g., British American Tobacco Company, Ltd. v United States Fidelity and Guaranty Company, 177 AD 582 (1st Dept 1917).

The emails that memorialize the agreement between the parties to this action stated that there would be five phases of architectural work and a contract price of $248,000.00. The complaint alleges that due to their professional misconduct, defendants obliged West 108 to delay its development project to perform additional, unplanned architectural work, and that defendants eventually filed a lien for $193,532.62 to cover the cost of this work, despite having previously received payments from West 108 of $233,803.00 toward that $248,000.00 contract price. These allegations clearly state a claim that defendants' actions caused West 108 to lose the benefit of its original bargain; i.e., a set amount of work to be performed for a set price during a set time frame. Further, these allegations clearly allege that West 108 suffered money damages that are beyond the scope of the original contract. As a result, reading such allegations in the light most favorable to West 108, the court believes that they state a claim that defendants violated the implied covenant of good faith and fair dealing of the parties' agreement. Therefore, the court concludes that defendants' motion should be granted with respect to plaintiff's

fourth cause of action, which merely replicates the first cause of action for breach of contract.

West 108's final cause of action is a claim for attorney's fees, costs and expenses. Defendants argue that this claim is "not cognizable" because of the general rule, set forth by the Court of Appeals in Chapel v Mitchell (84 NY2d 345, 349 [1994]), that "absent a contractual or statutory basis, a successful litigant may not recover legal fees from another party." West 108 responds that defendants' argument is "premature at this juncture, and, at a minimum, is an issue of fact.". However, the court determines that such claim is not cognizable on a different ground than argued by either party, i.e., that a claim for attorney fees is not a separate cause of action but if permitted by statutory or common law, available should plaintiff prevail on any of the remaining claims. See La Porta v Alacra, Inc., (142 AD3d 851, 853 [1st Dept 2016]). Thus, the court finds that defendants' motion should be granted with respect to West 108's fifth cause of action.

As a final matter, West 108 requests that, should the court decide to grant all or any portion of defendants' motion, West 108 should be given leave to amend the complaint. However, West 108 does not state what amendments to the complaint it wishes to make, nor does it attach a copy of such proposed amendments to its opposition papers, as is required by CPLR 3025 (b).

10/10/2018
DATE

DEBRA A. JAMES, 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