Silverboys, LLC v Skordas
2015 NY Slip Op 31711(U)
September 4, 2015
Supreme Court, New York County
Docket Number: 653874/2014
Judge: Saliann Scarpulla

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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SILVERBOYS, LLC, HENRY SILVERMAN, and KAREN SILVERMAN,

Plaintiffs,

- against -

YIANNI SKORDAS,

Defendant.

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DECISION and ORDER

Index No. 653874/2014
Motion Seq. No. 002

HON. SALIANN SCARPULLA, J.:

In this action for breach of contract, professional malpractice, negligence per se, breach of fiduciary duty, and conversion, Defendant Yianni Skordas ("Skordas") moves pursuant to CPLR § 3211(a)(7) to dismiss the amended complaint of plaintiffs Silverboys, LLC ("Silverboys"), as well as Henry and Karen Silverman ("the Silvermans" and collectively with Silverboys, "Plaintiffs").

The following allegations are drawn from the amended complaint. Silverboys is a Delaware limited liability company owned and managed by the Silvermans, and it "was created to acquire, own, and manage the [Silvermans' property in the Bahamas]." On or about April 25, 2014, Henry Silverman signed a contract with Skordas, wherein "Skordas agreed to perform traditional architecture services" such as "coordinat[ing] all architectural, structural, MEP, and design drawings." "Skordas promised to deliver cost-effective, honest, and quality supervision and management of an estimated $8 million construction project that included extensive site work, renovation of an existing main residence, and construction of a guest house, pool, and staff residence." Plaintiffs allege

Skordas is responsible for many construction defects, including using inappropriate or inferior materials, installing a "jail-like fence around the property," constructing "a door to nowhere," and for failing to maintain proper records or make plans for some of the materials purchased.

In addition to acting as an architect, Plaintiffs allege that "Skordas agreed to act as the owner's representative and the project manager." Skordas's alleged responsibilities included, among other things "managing the bidding process for all general contractors and subcontractors, supervising the construction and making regular visits to the construction site, handling all shipments of materials and their clearance through customs, and approving payments to all contractors and subcontractors."

In addition to claims of mismanagement, Plaintiffs allege that Skordas was dishonest during their relationship. One of the alleged incidents of dishonesty occurred on July 21, 2014 when "Silverboys transferred $27,907 to Mr. Skordas as a deposit for a Veyko railing and as full payment for 3 Velux America skylights." Rather than distributing the funds to and placing the orders with the vendors, the Plaintiffs allege that Skordas, himself, retained the funds.

Plaintiffs further allege that Skordas proposed "subcontractors that quoted grossly inflated prices and with which he had undisclosed connections." For example, Plaintiffs cite a particular instance when Skordas suggested a landscaper who estimated that his work would cost more than $480,000, but "a comparable landscaper, contacted independently by the Silvermans, bid only $270,000 for the same project."

The Plaintiffs allege that Skordas never held a license to practice as an architect, which is required by New York Education Law §6512 and that Skordas presented himself as an architect and did not hire necessary engineers.

Skordas now moves to dismiss the amended complaint pursuant to CPLR § 3211(a)(7). First, Skordas argues that the claims asserted by Silverboys and Karen Silverman should be dismissed because they are not parties to the services contract and therefore lack standing. Second, Skordas contends that the professional malpractice cause of action should be dismissed precisely because Skordas "is not a professional" and, as such, did not owe Karen Silverman and Silverboys a duty which would give rise to a professional negligence claim.

Third, Skordas argues that Plaintiffs have inadequately stated a claim for negligence per se, because the violation of a licensing statute alone does not support the cause of action. Fourth, Skordas maintains that the breach of fiduciary duty claim should be dismissed because no fiduciary relationship existed between the parties. Fifth, Skordas contends that the conversion cause of action should be dismissed because the facts stated in the amended complaint do not support the cause of action. Skordas also maintains that the professional malpractice, negligence per se, breach of fiduciary duty, and conversion causes of action are duplicative of the breach of contract claim.

Discussion

In addressing a motion to dismiss under CPLR §3211(a)(7), "the pleading is to be afforded a liberal construction, and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine

whether the facts, as alleged, fit within any cognizable legal theory." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 120-21 (1st Dep't 2002) (internal citation omitted).

1. **Breach of Contract**

"The elements of . . . a [breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Skordas asserts that Plaintiffs Karen Silverman and Silverboys are not parties to the contract and therefore cannot maintain the breach of contract claim. In opposition, the Plaintiffs contend that although the contract was signed by only Henry Silverman and Skordas, both Silverboys and Karen Silverman are third-party beneficiaries to it.

"'In determining third-party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement . . . Moreover, it is well settled that the obligation to perform to the third party beneficiary need not be expressly stated in the contract.'" *See Encore Lake Grove Homeowners Ass'n, Inc. v. Cashin Asssocs., P.C.*, 111 A.D.3d 881, 882 (2d Dep't 2013) (quoting *Aievoli v. Farley*, 223 A.D.2d 613, 614).

> In the context of a third-party beneficiary claim, the plaintiff must establish: '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost.'

Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011) (citation omitted).

The validity of the contract between Skordas and Henry Silverman is not disputed, and the Plaintiffs sufficiently allege that the Silvermans planned to reside in and enjoy the benefits of the Bahamian Property. Therefore, Karen Silverman is not merely an incidental beneficiary. *See Lebensfeld v. Bashkin*, 144 A.D.2d 542, 542-43 (2d Dep't 1989) (husband, a non-signatory of the contract, was "a third party beneficiary since the contract was intended for the mutual benefit of himself and his wife"). Additionally, Silverboys owned the property and paid Skordas's fees. Under these conditions, Silverboys is also an intended beneficiary. *See Logan-Baldwin v. L.S.M. Gen. Contractors, Inc.*, 94 A.D.3d 1466, 1468 (4th Dep't 2012) (quoting *Drake v. Drake*, 89 A.D.2d 207, 209 (4th Dep't 1982) ("'Where[, as here,] performance is rendered *directly to the third party*, it is presumed that the contract was for his [or her] benefit.'"); *see also White Plains Plaza Realty, LLC v. Cappelli Enters., Inc.*, 108 A.D.3d 634, 637 (2d Dep't 2013). As third-party beneficiaries to the contract executed by Henry Silverman and Skoras, both Karen Silverman and Silverboys may maintain their breach of contract claims. Skordas's motion to dismiss the first cause of action by Karen Silverman and Silverboys is therefore denied.

2. **Professional Malpractice**

In the second cause of action, Plaintiffs assert that Skordas agreed to perform professional architectural services on the Bahamian Property. In addition to performing architectural services without a valid license as required by New York Education Law §6512, Plaintiffs allege that Skordas deviated from acceptable standards of care for architects.

The "elements of [a] professional negligence cause of action . . . includ[e] a departure from the applicable standard of care, causation, and damages." *See Health Acquisition Corp. v. Program Risk Mgmt., Inc.*, 105 A.D.3d 1001, 1004 (2d Dep't 2013).

While Skordas contends that he cannot be liable for malpractice because he is not a licensed architect, defendants who hold themselves out as licensed professionals when they are not may nonetheless be liable for malpractice. *See Rudman v. Bancheri*, 260 A.D. 957, 957 (2d Dep't 1940) ("Recovery may be had in such an action as this only if the defendant's treatment of the plaintiff fell short of the professional standards of skill and care prevailing among those who offer treatment lawfully.").[1]

Second, the Plaintiffs' professional negligence cause of action is not duplicative of their breach of contract claim. "Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care." *See Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551 (1992) (internal citations omitted). Here, Plaintiffs sufficiently allege that Skordas held himself out as an architect while "fail[ing] to exercise reasonable care." *See id.* Plaintiffs correctly note that New York courts have held that a party may sue both for breach of contract and professional

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[1] *See also Phelan ex rel Phelan v. Torres,* No. 04 CV 3538 ERK, 2005 WL 4655382, at *15 (E.D.N.Y. Sept. 20, 2005) (footnote omitted)

> (More importantly, however, even if the individual defendants were not licensed social workers, they are alleged to have performed the duties and responsibilities of social workers. If they are ultimately shown to have violated the standards of care, they may still be liable, even if unlicensed, if they knew of or should have known of the infant's situation.).

malpractice. *See 17 Vista Fee Assocs. v. Teachers Ins. & Annuity Assoc. of Am.*, 259 A.D.2d 75, 83 (1st Dept. 1999); *see also City of Kingston Water Dept. v. Charles A. Manganaro Consulting Eng'rs*, P.C., No. 01-CV-1317 (LEK/DRH), 2003 WL 355763, at *4 (N.D.N.Y. Feb. 13, 2003) ("Whereas parties may not create a negligence claim simply by alleging that a contracting party was negligent, New York courts have allowed parties to assert professional malpractice claims together with breach of contract claims.")

Third, Skordas's claim that he owed no duty to Karen Silverman and Silverboys because he did not have a contractual relationship with them is meritless. Tort liability may be found absent privity of contract where the relationship of the parties is "so close as to approach that of privity." *See Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson,* 73 N.Y.2d 417, 424 (1989). *Ossining* references three factors in assessing liability under these circumstances: "(1) awareness that the [house] w[as] to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance." *See id.* at 425 (citing *Credit Alliance Corp. v. Andersen & Co.*, 65 N.Y.2d 536, 551 (1985)).

Here, the Plaintiffs allege facts establishing a relationship approaching privity between Karen Silverman, Silverboys, and Skordas. The Plaintiffs sufficiently allege that the Silvermans hired Skordas specifically for the purpose of performing architectural services, that they relied on Skordas to complete quality construction of their home, and that Skordas knew that the Silvermans relied on him. Moreover, the complaint alleges

that Silverboys, an LLC owned by the Silvermans "to acquire, own, and manage the Bahamian Property," received invoices from Skordas and remitted funds to Skordas.

For the foregoing reasons, Skordas's motion to dismiss the claim for professional malpractice is denied.

3. **Negligence Per Se**

"As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability." *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, 489 (2012) (citation omitted); *see Martin v. Herzog*, 228 N.Y. 164, 168 (1920). Plaintiffs allege that Skordas failed to obtain proper permits for the Bahamian Property. In addition, the Plaintiffs assert that the Defendant violated New York Education Law §6512 by lacking a valid license.

As Skordas argues in reply, violations of the Bahamas Building Code are insufficient to support a negligence per se claim because the Building Code is not a New York statute. *See Elliot v. City of New York*, 95 N.Y.2d 730, 734 (2001) (distinguishing a "violation of a State statute that imposes a specific duty[, which] constitutes negligence per se, or may even create absolute liability" from a "violation of a municipal ordinance[, which] constitutes only evidence of negligence").

Additionally, a violation of New York Education Law §6512 does not constitute negligence per se. *See Yenem*, 18 N.Y.3d at 489. Plaintiffs are correct that some courts have recognized negligence per se claims for violations of licensing statutes. *See, e.g., Coogan v. Torrisi*, 47 A.D.3d 669, 670 (2d Dep't 2008) ("A restriction placed upon [defendant's] learner's permit requiring him to have a licensed adult driver supervising

his actions when driving related directly to the actual operation of the vehicle. Accordingly, the statute sets up a standard of care, the unexcused violation of which is negligence per se."). Here, however, the alleged statutory violation of failing to obtain a license does not establish a standard of care that relates to working without a license, and therefore the negligence per se cause of action is unsustainable. *See Nicholson v. S. Oaks Hosp.*, 27 A.D.3d 628, 629 (2nd Dep't 2006) (finding that "Public Health Law §§ 3331-3374 do not impose a specific duty on the defendants and were not intended to protect any particular class of individuals"); *Washington v. Nedd*, N.Y.Sup., 31 Misc.3d 1211(A); 2011 N.Y. Slip Op. 50564(U), *2-3 (Sup Ct, Queens County 2011) (distinguishing *Coogan* by finding that "dr[iving] the tow truck with a suspended license did not relate directly to the issue of his operation of the vehicle").

Accordingly, Skordas's motion to dismiss the claim of negligence per se is granted.

4. **Breach of Fiduciary Duty**

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011).

Skordas argues that this cause of action is duplicative of the breach of contract claim and that no fiduciary relationship exists. The Plaintiffs contend that "the breach of fiduciary duty claim is based solely on Defendant's breaches of fiduciary duties, including his misappropriation of funds intended for vendors, his recommendation of

subcontractors who charged inflated prices and lacked requisite skill, his undisclosed self-dealing, and his numerous acts of dishonesty." (Internal citations omitted) The Plaintiffs also argue that they have sufficiently pled a fiduciary relationship with Skordas. They support their claim by citing *Roni LLC v. Arfa*, describing a fiduciary relationship as one which "'exists when confidence is reposed on one side and there is resulting superiority and influence on the other.'" 18 N.Y.3d 846, 848 (2011) (citation omitted). Plaintiffs also note that determining if there is "a fiduciary relationship 'inevitably requires a fact-specific inquiry.'" *Id.* (citation omitted).

The allegations in support of Plaintiffs' breach of fiduciary duty cause of action relate to Skordas's contractual duties. As such, the breach of fiduciary duty claim is duplicative of the breach of contract cause of action and is dismissed. *See Kaminsky v. FSP Incorp.*, 5 A.D.3d 251, 251-52 (1st Dep't 2004) (affirming motion to dismiss breach of fiduciary duty claim and finding "[plaintiffs'] claim for breach of fiduciary duty fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative.").

5. **Conversion**

> Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights. 'Where the property [alleged to have been converted] is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner.' Thus, conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose.

Lemle v. Lemle, 92 A.D.3d 494, 497 (1st Dep't 2012) (internal citation omitted).

The Plaintiff alleges ownership of three specific sums of money: $27,907 which Skordas allegedly billed for materials that he did not order; $36,716.44, which was to be paid to vendors; and $80,000, which "Skordas, without Plaintiffs' knowledge or permission, directed . . . to himself for the purchase of 'Audio & Visual' equipment." As related to the latter amount, Plaintiffs allege "[o]n information and belief, Mr. Skordas charged markups on these purchases to which he was not entitled."

Skordas first argues that this cause of action duplicates the contract claim. He also argues that the Plaintiffs allege that Skordas obtained the $27,907.00 under false pretenses rather than conversion. Finally, with respect to the $80,000, Skordas contends "there is no allegation that the plaintiff transferred those funds to Skordas or ever had any superior right to such funds."

Regarding the $27,907, I find that the Plaintiffs sufficiently alleged a cause of action for conversion by alleging that Skordas induced Plaintiffs to pay for specific materials before converting the amount to his own use. *See Simpson & Simpson, PLLC v. Lippes Mathias Wexler Friedman LLP*, 2015 WL 4139537, at *1 (4th Dep't July 10, 2015) (finding money "sufficiently identifiable and traceable to sustain a cause of action for conversion"); *see also Mfrs. Hanover Trust Co. v. Chem. Bank*, 160 A.D.2d 113, 124 (1st Dep't 1990) (internal citation omitted) ("[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question. Money, specifically identifiable and segregated, can be the subject of a conversion action.").

Similarly, the misappropriation of $36,716.44 intended for others sufficiently states a claim of exercising unauthorized dominion over property distinct from the breach of contract and sufficiently states a claim for conversion. *See Lemle*, 92 A.D.3d at 497.

Finally, regarding the $80,000 that Skordas allegedly made payable to himself, Skordas has not cited a case that requires the direct transfer of funds from one party to another in order to successfully plead a claim for conversion. Plaintiffs adequately allege that Silverboys retained right to the amount of $80,000 that Skordas made payable to himself, which provides grounds for conversion.

Skordas's motion to dismiss the conversion claim is therefore denied.

In accordance with the foregoing, it is hereby

ORDERED that Defendant Yianni Skordas's motion to dismiss the amended complaint pursuant to CPLR § 3211(a)(7) is granted as to the third and fourth causes of action and the motion is otherwise denied; and it is further

ORDERED that Defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 4, 2015

ENTER:

Saliann Scarpulla, J.S.C.