SHORT FORM ORDER

INDEX No. 07-12662
CAL No. 10-02117CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-22-11 (#005)
MOTION DATE 4-29-11 (#006)
MOTION DATE 6-9-11 (#007)
ADJ. DATE 6-30-11
Mot. Seq. # 005 - MG; SJ
006 - MotD
007 - MD

J. TORTORELLA SWIMMING POOLS, INC.,

Plaintiff,

- against -

JIL GANS and BERNARD GANS,

Defendants.

JIL GANS and BERNARD GANS,

Third-Party Plaintiffs,

- against -

EDMUND D. HOLLANDER LANDSCAPE ARCHITECT DESIGN, P.C. and EDMUND D. HOLLANDER,

Third-Party Defendants.

EGAN & GOLDEN, LLP
Attorney for Plaintiff
96 South Ocean Avenue
Patchogue, New York 11772

GORDON SIBELL & IANNONE, PLLC
Attorney for Defendants/Third-Party Plaintiffs
300 Garden City Plaza, Suite 450
Garden City, New York 11530

TROMELLO MCDONNELL & KEHOE
Attorney for Third-Party Defendants
P.O. Box 9038
Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated February 1, 2011, and supporting papers (including Memorandum of Law dated February 1, 2011) and Notice of Motion by the third-party defendants, dated February 1, 2011, and supporting papers; (2) Notice of Cross Motion by the third-party plaintiffs, dated May 6, 2011, supporting papers; (3) Affirmation in Opposition by the defendants/third-party plaintiffs, dated May 6, 2011, and by the third-party defendants, dated June 25, 2011, and supporting papers; (4) Reply Affirmation by the third-party defendants, dated June 28, 2011, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now the reading and filing of the following papers in this matter:

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (#005) by plaintiff J. Tortorella Swimming Pools, Inc. for summary judgment in its favor on the first cause of action for breach of contract and the fourth cause of action for contractual attorney fees, and dismissing the counterclaims in the verified answer is granted; and it is further

ORDERED that the motion (#006) by third-party defendants Edmund D. Hollander Landscape Architect Design, P.C. and Edmund D. Hollander for summary judgment dismissing the third-party complaint is granted to the extent of severing and dismissing the first, second, third and fifth causes of action in their entirety, severing and dismissing the fourth cause of action in its entirety as to Edmund D. Hollander and in part as to Edmund D. Hollander Landscape Design, P.C.; and it is further

ORDERED that the cross motion (#007) by third-party plaintiffs Jil and Bernard Gans to strike the answer in the third-party action is denied.

Plaintiff J. Tortorella Swimming Pools, Inc. ("Tortorella") commenced this action against defendants Jil Gans and Bernard Gans (hereinafter "the Ganses" when referred to collectively) to collect the balance due under an agreement dated November 22, 2005 to renovate the swimming pool and install a spa and pavers at their premises in Remsenburg, New York (the "project"). Third-party defendant Edmund D. Hollander Landscape Architect Design, P.C. was retained by the Ganses to prepare the drawings for the design, and the specifications for, the construction of the project. The agreement between Tortorella and the Ganses required "all work to be in accordance with the latest issue of drawings and specifications prepared by Edmund D. Hollander Landscape Architect Design, P.C." Tortorella maintains the project was completed pursuant to its agreement with the Ganses at a cost of $353,007.06, of which $52,883.28 remains outstanding despite due demand therefor. On December 1, 2006, within three months after the project was completed, Tortorella filed a notice of lien for the amount allegedly owed. In its verified complaint, Tortorella alleges causes of action against the Ganses for breach of contract, unjust enrichment, foreclosure of the mechanic's lien, and contractual attorneys fees.

The Ganses interposed an answer with counterclaims against Tortorella for breach of contract and unjust enrichment. In their verified answer, the Ganses allege, among other things, that Tortorella installed granite pavers in stone dust which was not in not accord with the agreement. The Ganses also allege that stone dust was an inappropriate setting material as it contains a high iron content and creates poor drainage conditions, which caused the granite pavers to stain and discolor within days of installation. The Ganses also commenced a third-party action against third-party defendants Edmund D. Hollander Landscape Architect Design P.C. and Edmund D. Hollander (hereinafter "Hollander Design" when referred to collectively) for negligent design (first and second causes of action), negligent supervision (third cause of action), breach of contract (fourth cause of action) and unjust enrichment (fifth cause of action). Hollander Design has interposed an answer with affirmative defenses, and commenced a second third-party action against Gerald Luss, the father of defendant Jil Gans, which was previously summarily dismissed.

Tortorella now moves for summary dismissal of the counterclaims asserted against it by the Ganses, and for a judgment against the Ganses for the balance due of $52,883.28 with contractual interest from September 19, 2006, plus attorneys fees and costs. In support of its motion, Tortorella has submitted the

pleadings, a copy of the original agreement dated November 22, 2005, annotated with revisions and signed and dated by Jil Gans on January 23, 2006, transcripts of the examination before trial ("EBT") of Jil Gans, e-mail from the construction manager hired by the Ganses, Hobbs Incorporated ("Hobbs"), and copies of Hollander Design's drawings relative to the pavers and the pool cover.

It is well-settled that where a contractor must follow the architect's plans and specifications provided by an owner, the contractor will not be responsible for the consequences of defects in those plans and specifications (*see* ***United States v Spearin***, 248 US 132, 39 S Ct 59 [1918]; ***McKnight Flintic Stone Co. V Mayor ofCity of NY***, 160 NY 72, [1899]; ***Szatkowski v Turner & Harrison, Inc.*** 184 AD2d 504, 584 NYS2d 170 [2d Dept 1992]; ***Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.***, 180 AD2d 222, 584 NYS2d 248 [4th Dept 1992]; ***County of Westchester v Welton Becket Assoc.***, 102 AD2d 34, 478 AD2d 305 [2d Dept 1984], *affd* 66 NY2d 642, 495 NYS2d 364 [1985]). Moreover, a contractor will not be prevented from recovering payment for the work completed in compliance with the design drawings and plans, even if it is proved that such designs are inadequate to achieve the intended results (*see* ***Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.***, *supra,* and ***Ferrari v Barleo Homes, Inc.***, 112 AD2d 137, 490 NYS2d 827 [2d Dept 1985], citing ***MacKnight Flintic Stone Co. v Mayor of City of NY***, *supra*). There is no evidence before the court to establish that Tortorella deviated from Hollander Design's drawings, as revised, improperly installed the granite pavers and pool cover, or otherwise breached the agreement with the Ganses.

The agreement between Tortorella and the Ganses explicitly sets forth that in the pool area, "granite pavers on compacted sand and stone dust base" are to be installed. To bolster the argument that the terms of the agreement provided for the stone dust setting, Tortorella also submits an email dated May 22, 2006, to John Tortorella from Joseph Perna ("Perna") the construction manager employed by Hobbs. In the email copied to, among others, the Ganses, Perna confirmed that the Hollander Design drawings had been changed to reflect that all stone installations were to be set in stone dust with butt joints.

Tortorella also points to the examination before trial of Jil Gans conducted on October 28, 2009. Jil Gans was asked if anyone had recommended that the pavers be set on concrete or mortar; she answered John Tortorella. In response to questions regarding why she didn't follow John Tortorella's advice to use mortar, Jil Gans said "it was a design decision, and it was always determined that it would be stone dust and that's the aesthetic I wanted for the house." Jill Gans also testified Tortorella was not contracted to supply the granite pavers, she chose and purchased them based on recommendations from her project manager Marvin Rosenthal and by her father who previously owned an interior design and architecture firm. Although Jil Gans testified that her preference and expectation was to have the granite pavers in the pool area installed in a sand bed, upon further questioning she conceded that her expectation of a sand bed installation was different from Perna's direction to Tortorella to use a stone dust setting. Significantly, it is also noted that the third-party complaint verified by Jil Gans, provides at paragraph 20, "[t]hat Plaintiff J. Tortorella Swimming Pools, Inc., installed the granite pavers on stone dust setting bed made of pulverized stone as set forth in the construction drawings rendered by Third-Party Defendant."

Additionally, based on the evidence presented, Tortorella complied with Hollander Design's drawings, as revised, for the installation of the common wall between the pool and spa, and complied with the manufacturer's specifications for the installation of the pool and spa cover. Prior to installing the cover, John Tortorella expressed his concerns to Jil Gans regarding her request to add a mesh cover. Based on the email correspondence between Perna, the Ganses and John Tortorella, Tortorella advised that adding the mesh would

hinder the automatic pool cover from being completely concealed into the coping mechanism. Nevertheless, the Ganses approved the installation of the pool cover with the mesh, and as a result the pool cover is not completely concealed when retracted.

The evidence presented by Tortorella is sufficient to make out a prima facie case that its work was performed in compliance with its agreement with the Ganses and in accord with the drawings and specifications, thereby entitling it to summary dismissal of the breach of contract counterclaim, and summary judgment in its favor on its cause of action for breach of contract. In opposition, the Ganses have failed to raise a material issue of fact requiring a trial.

In opposing the Tortorella motion, the Ganses rely on, *inter alia*, the EBT testimony and affidavit by Jil Gans to support their argument that Tortorella did not perform all of the conditions in the written agreement. The assertion by Jil Gans that the granite pavers were to be installed in a bed of sand and not on stone dust, contradicts the unambiguous terms of the written agreement with Tortorella, and thus is not dispositive (*see* ***W.W.W. Associates, Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

The Ganses have also proffered an affidavit of Denise P. Bekaert ("Bekaert"), a licensed registered architect who will purportedly testify as an expert witness if this case goes to trial. The Bekaert affidavit does not raise an issue of fact requiring a trial regarding the pool/spa and pool cover installations. Bekaert states at paragraph 20 of the affidavit, "[t]he failure of the pool cover to be concealed under the coping and for the cover to successfully clear the common wall is consistent with the failure of both the Landscape Architect and the Contractor to properly design and install the pool/spa structure and the cover mechanism in accordance with reasonable and accepted standards." Tortorella was not responsible for the design of the common wall, and neither the expert nor the Ganses have provided any evidence that the common wall installation deviated from Hollander Design's revised plans, or that the pool cover was not installed pursuant to the pool cover manufacturer's instructions. Therefore, Tortorella is entitled to summary judgment dismissing the counterclaim for breach of contract.

Tortorella is also entitled to summary judgment dismissing the counterclaim for unjust enrichment asserted by the Ganses. It is impermissible to seek damages in quasi-contract on the theory of unjust enrichment for events arising out of the subject matter governed by a valid and enforceable written contract (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]); ***Navillus Tile, Inc. V George A. Fuller Co., Inc.***, 83 AD3d 919, 920 NYS2d 786 [2d Dept 2011]). It is not disputed that the written agreement between Tortorella and the Ganses covers the controversy herein.

Therefore, the branch of the motion by Tortorella for summary judgment dismissing the counterclaims asserted against it is granted. In view of the foregoing, Tortorella is entitled to receive payment for the work performed. The Ganses do not otherwise challenge the balance owed to Tortorella. In view of the foregoing, the motion is granted to the extent that Tortorella is awarded summary judgment in its favor on the first cause of action in the complaint sounding in breach of contract, which cause of action is hereby severed from all others, and judgment shall enter in the amount of $52,883.28, together with the legal rate of interest from April 26, 2007 and such costs and disbursements as may be taxed and allowed by the clerk.

Tortorella will also be awarded reasonable attorneys fees as the contract provides therefor. The parties wishing to be heard on the issue of attorneys' fees are directed to appear in Part 17 on November 22, 2011

at 2:30 pm. Tortorella shall settle a judgment upon a copy of this order, reflecting the severance herein directed and the award of summary judgment in its on its first cause of action in the complaint for breach of contract and dismissing the counterclaims for breach of contract and unjust enrichment.

Turning to motion (#006), the application by Hollander Design for summary judgment dismissing the causes of action asserted against it by the Ganses in the third-party complaint for negligent design, negligent supervision, breach of contract and unjust enrichment, is determined as follows. In support of the motion, Hollander Design submits, among other exhibits, the pleadings, an affidavit of its president, Edmund D. Hollander ("Edmund Hollander"), an Abbreviated Form of Agreement Between Owner and Architect, the General Conditions of the Contract for Construction, drawings annotated with revisions, and an affidavit of Scott Hobbs. In opposition to the motion, the Ganses submit, among other exhibits, the transcripts of the deposition testimony of Jil Gans, John Tortorella and Edmund Hollander, and rely on the Bekaert affidavit.

In the first cause of action for negligent design, the Ganses allege that the drawings by Hollander Design specifying granite pavers set in stone dust were not in accordance with generally accepted industry standards and guidelines. It is also alleged that as a consequence of Hollander Design's negligence, the Ganses had to discard, replace and install newly purchased used brick pavers. In the second cause of action, the Ganses allege that the design of the spa/pool structure and coping mechanism for the pool cover was negligent and not in accordance with reasonable and generally accepted industry standards or the specifications set forth by the manufacturer of the pool cover.

The negligent design claims against Hollander Design state a cause of action for breach of contract, not negligence (*see* ***Wiernik v Kurth***, 59 AD3d 535, 873 NYS2d 673 [2d Dept 2009]; ***Gordon v Teramo & Co.***, 308 AD2d 432, 764 NYS2d 144 [2d Dept 2003]). A simple breach of contract cannot be considered a tort unless a legal duty independent of, and arising from circumstances extraneous to the contract itself has been violated (*see* ***Clark-Fitzpatrick Inc v Long Is. R.R. Co.***, *supra*; ***Kallman v Pinecrest Modular Homes, Inc.***, 81 AD3d 692, 916 NYS2d 221 [2d Dept 2011]). Moreover, the damages sought by the Ganses are for purely economic loss. Thus, as the Ganses do not allege and have not proffered any evidence that Hollander Design breached a legal duty independent of its contractual obligations, the exclusive basis for Hollander Design's liability for damages, if any, is breach of contract (*see* ***Clark-Fitzpatrick Inc v Long Is. R.R. Co.***, *supra*; ***Wiernik v Jurth***, *supra*; ***Gordon v Teramo & Co.***, *supra*). Hence, as a matter of law, the first and second causes of action for negligent design asserted against Hollander Design in the third-party complaint cannot stand, and are hereby severed and dismissed.

Hollander Design is also entitled to summary judgment dismissing the third cause of action for negligent supervision of Tortorella's construction of the spa and installation of the pool cover. The contract between Hollander Design and the Ganses explicitly provides that Hollander Design is neither required to make continuous on-site inspections to check the quality or quantity of the work, nor responsible for construction means, methods, techniques, sequences or procedures in connection with the work, nor in control over or charge of the contractor or any persons performing work on the project. Thus, based on these unambiguous contract terms, Hollander Design did not agree to supervise Tortorella or the construction of the project (*see* ***Jewish Bd. of Guardians v Grumman Allied Indus.***, 96 AD2d 465, 464 NYS2d 778 [1st Dept 1983], *affd* 62 NY2d 684, 476 NYS2d 535 [1984]).

Now, as to the fourth cause of action in the third-party complaint for breach of contract, the Ganses allege at paragraph 37: "That by reason of Third-Party Defendants' negligence, Third-Party Defendants have committed a material breach of contract." Although inartfully drawn, the court has evaluated this breach of contract claim in the context of the allegations made for the negligent design claims, the gravamen of which allege that Hollander Design breached its contract by failing to specify an adequate setting bed material for the pavers, and failing to design a "vanishing" spa/pool cover that would be completely concealed in its coping mechanism.

As an initial matter, Edmund Hollander cannot be held liable for any cause of action alleging breach of contract as he did not purport to bind himself individually under the contract with the Ganses (*see* ***Wiernik v Kurth***, *supra*). Thus, the fourth cause of action in the third-party complaint is hereby severed and dismissed as to Edmund D. Hollander.

Edmund D. Hollander Landscape Architect Design, P.C. ("Hollander PC"), is entitled to summary judgment in its favor dismissing that portion of the fourth cause of action for breach of contract as to the granite pavers. Hollander PC has submitted an affidavit from Scott Hobbs, president of Hobbs (the Ganses' construction manager), who asserts that during the 55 years the business has been in existence building homes and installing stone terraces, the use of stone dust has been a common practice for properties at every price range. Scott Hobbs, also asserts that the use of stone dust as a setting bed for the granite pavers in and around the pool area for the Ganses' project was appropriate and acceptable. Edmund Hollander testified that originally the drawings specified pavers set in concrete, but the Ganses desired stone dust. Edmund Hollander testified that the drawings were changed since stone dust is a typical setting bed material for granite pavers. Moreover, emails generated by Perna and sent to the Ganses, indicate that rust stains had formed on unused granite pavers still on the pallets on which they were delivered. This evidence is sufficient to make out a prima facie case for summary dismissal.

The evidence submitted in opposition is insufficient to raise an issue of fact to warrant a trial. The Ganses claim that despite Edmund Hollander's insistence that he did not choose the stone dust setting, stone dust is written on Hollander PC's drawings. This argument is disingenuous as Jil Gans acknowledged during her EBT testimony that the handwritten changes were made by her project manager, Marvin Rosenthal. Furthermore, as indicated above, Jil Gans testified, it was her decision to use stone dust as that was the aesthetic she wanted for the house because she did not want to see mortar joints between pavers.

The opinion of the Ganses' expert architect, Bekaert, is speculative and unsupported by any evidentiary foundation. Bekaert asserts she performed a site inspection on May 17, 2007, but makes no reference to her personal findings. Bekaert makes references to trade organizations which she categorizes as nationally recognized organizations that set standards for stone installations, but fails to provide any correlative facts to demonstrate that Hollander PC breached its contract with the Ganses (*see* ***Jewish Bd. of Guardians v Grumman Allied Indus.***, *supra*). Rather, in concluding that Hollander PC's specification of a stone dust setting was inappropriate, Bekaert on a December 29, 2006 report entitled, "Investigation of Rust Stains on Granite Paving-Gans residence, Remsenberg, NY," prepared by Ceramic Tile and Stone Consultants ("CTSC"). Specifically, Bekaert asserts, "[a]s stated in the CTSC Report the stone dust's consistency and mineral make-up may vary and therefore drainage and leeching capacities may vary. For this reason it is not recommended as a setting bed for stone paving." The CTSC report is not annexed to the papers and no information has been provided as to CTSC's qualifications to render an opinion as to what caused the rust stains on the subject

pavers, or what testing was performed to reach its conclusion. Furthermore, Bekaert does not support her conclusion with any data or findings based on samples or analysis she personally conducted on the stone dust and granite pavers used on the project. Therefore, with regard to the appropriateness of the use of stone dust, the opinion of Bekaert is of no probative value (*see* ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]; ***Shea v Sky Bounce Ball Co.***, 294 AD2d 486, 742 NYS2d 383 [2d Dept 2002]). Thus, the portion of the fourth cause of action for breach of contract with regard to the granite pavers is severed and dismissed as to Hollander PC.

Hollander PC, however, has failed to establish that it complied with the terms of its contract with regard to the pool and spa cover and coping mechanism. The Ganses retained Hollander PC to install an automatic pool cover for the pool and spa that would completely retract into the coping mechanism; it does not work as designed. Additionally, Jil Gans testified, and Bekaert asserts that her inspection revealed that the pool cover does not clear the common wall between the pool and spa. Despite the fact that the original design drawings and specifications for the spa and pool common wall, coping mechanism and pool cover were changed by the Ganses or their representatives, the changes were incorporated by Hollander PC and given its imprimatur when the revised drawings were distributed to Tortorella and the Ganses. Therefore, the branch of the motion by Hollander PC which seeks summary judgment in its favor dismissing the fourth cause of action in the third-party complaint for breach of contract with regard to the design of the pool and spa common wall and the pool cover and the coping mechanism, is denied.

Finally, Hollander Design is also entitled to summary judgment dismissing the fifth cause of action for unjust enrichment for the reasons stated above, i.e., it is undisputed that a valid and enforceable written contract exists between Hollander Design and the Ganses which covers the controversy herein (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, *supra*); ***Navillus Tile, Inc. V George A. Fuller Co., Inc.***, *supra*).

In light of the above, the cross-motion by the Ganses to strike the answer of Hollander Design for failure to respond to interrogatories, is denied as moot. In any event, the Ganses have failed to establish that the failure by Hollander Design to respond to the interrogatories was the result of willful, deliberate, or contumacious conduct (*see* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Dennis v City of N.Y.***, 304 AD2d 611, 758 NYS2d 661 [2d Dept 2003]). Additionally, the Ganses have failed to provide an affirmation of good-faith effort to resolve any discovery disputes as required by 22 NYCRR 202.7 (*see* ***Tine v Courtview Owners Corp.***, *supra*; ***Dennis v City of N.Y.***, *supra*). Therefore, the cross motion must be denied.

Dated: 10/27/11

Peter H. Mayer
PETER H. MAYER, J.S.C.