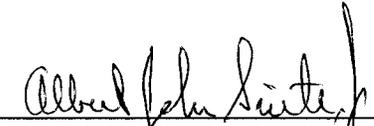


Defendant, O'Donnell & Naccarato, Inc. are DISMISSED, and O'Donnell & Naccarto, Inc. is no longer a party in this case.

BY THE COURT:



ALBERT JOHN SNITE, JR., J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

METROCLUB CONDOMINIUM	:	
ASSOCIATION,	:	
Plaintiff	:	MAY TERM, 2010
	:	No. 4545
	:	
v.	:	
	:	Control No. 13081821
201-59 NORTH EIGHTH STREET	:	
ASSOCIATES, L.P., 201-59 NORTH EIGHTH	:	
STREET, LLC, RONALD L. CAPLAN,	:	
GREGORY J. WEBSTER, AMY BROWN and	:	
PMC PROPERTY GROUP, INC. d/b/a	:	
PHILADELPHIA MANAGEMENT COMPANY,	:	
Defendants	:	
	:	
PMC PROPERTY GROUP, INC. and 201-59 :	:	
NORTH EIGHTH STREET ASSOCIATES,	:	
L.P.,	:	
Third-Party Plaintiffs	:	
	:	
v.	:	
	:	
M. KAUFMAN FAMILY CONTRACTORS,	:	
INC., COLORY METALS AND GLASS, INC.,	:	
PAUL RABINOWTIZ GLASS CO., JKR	:	
PARTNERS L.L.C., O'DONNELL &	:	
NACCARTAO, INC., DIRECT AIR PHILA	:	
INCORPORATED and SPORTSLINE INC.,	:	
Additional Defendants.	:	
	:	
COLORY METALS AND GLASS, INC.,	:	
Fourth-Party Plaintiffs,	:	
	:	
v.	:	
	:	
ALUMICOR CORP d/b/a ALUMICOR and	:	
ALUMICOR LIMITED d/b/a ALUMICOR	:	
Additional Defendants.	:	

MEMORANDUM OPINION

By: Honorable Albert John Snite, Jr.

Before the court is the Motion for Summary Judgment of additional defendant O'Donnell & Naccarto, Inc. (hereinafter "O&N"). I am granting O&N's Motion for Summary Judgment,

concluding that there has been no expert report or opinion to support a cause of action against O&N.

PROCEDURAL HISTORY

This action was commenced by a Writ of Summons on June 3, 2010.

On October 27, 2010, Plaintiff filed an eight count complaint against 201-59 North Eighth Street, Associates L.P., 201-59 North Eighth Street, LLC, Ronald L. Caplan, Gregory J. Webster, Amy Brown and PMC Property Group, Inc. d/b/a Philadelphia Management Company (collectively herein “PMC Defendants”). The eight count Complaint was composed of Count I (Breach of Contract), Count II (Breach of Contract), Count III (Breach of Public Offering Statement), Count IV (Breach of Warranty), Count V (Breach of Implied Warranties), Count VI (Fraud in the Inducement), Count VII (Unfair Trade Practices and Consumer Protection Law), Count VIII (Breach of Fiduciary Duty), as well as a claim for alter-ego, punitive damages, and attorney’s fees.

On December 7, 2010, this case was transferred into the Commerce Program.

On December 8, 2010, PMC Defendants filed preliminary objections to Plaintiff’s Complaint.¹ On December 27, 2013, Plaintiff filed an opposition to the preliminary objections.

On March 14, 2011, Judge Bernstein sustained the preliminary objections in part, and overruled in part, ultimately dismissing Counts I, II, III, VII, and striking Plaintiff’s request for attorney’s fees in each count of the Complaint. Thus, the causes of action against PMC Defendants remained: Count IV (Breach of Warranty), Count V (Breach of Implied Warranties), Count VI (Fraud in the Inducement), and Count VIII (Breach of Fiduciary Duty).

On May 11, 2011, PMC Defendants filed their Answer with New Matter to Plaintiff’s Complaint, as well as a Joinder Complaint.

¹ Control no. 10121145.

On July 29, 2011 the PMC Defendants filed their Second Amended Joinder Complaint against additional defendants O&N, M. Kaufman Family Contractors, Inc., Colory Metals and Glass, Inc., Paul Rabinowitz Glass Co., JKR Partners, L.L.C., Direct Air Phila Incorporated, James Sankey & Associated, Ltd. and Sportsline Inc.

In the Second Amended Joinder Complaint, the joining defendants allege that, pursuant to an oral agreement with PMC, Additional Defendant O&N was the structural engineer and member of the design team for the MetroClub condominium conversion. Joinder Compl. ¶15. The joinder complaint further alleges that O&N's contractual duties also included the provision to Declarant² of a report dated October 19, 2004 (attached to the joinder complaint), pursuant to sections 3404(a) and 3411(c) of the UCA. 68 Pa. C.S. §§3404(a) and 3411(c). Joinder Compl. ¶16. The joinder complaint pleads two counts of Breach of Contract, and asserts that should the joining defendants be found liable to the Plaintiff, the additional defendants, including O&N, are in turn liable to the joining defendants as a breach of their respective contractual obligations.

Third-party defendants O&N (control no. 11082172), Colory Metals (control no. 11081537), Paul Rabinowitz Glass Co. (control no. 11082170), JKR Partners, LLC (control no. 11082491), and Direct Air Philadelphia Incorporated (control no. 11082717), each filed preliminary objections to the Second Amended Joinder Complaint, under the respective control numbers. All preliminary objections were overruled by the court.

Upon completion of numerous discovery hearings and motions for extraordinary relief, the final revised Case Management Order was docketed on June 28, 2013, with discovery to be completed by June 3, 2013, Plaintiff's experts reports to be submitted by June 3, 2013,

² Under the Pennsylvania Uniform Condominium Act, 68 Pa. C.S. 3103, "Declarant" is any person (which includes a limited partnership) who has executed a declaration for a condominium, under section 3205 of the Act. Here, defendant Declarant is 201-59 North Eighth Street Associates, L.P.

Defendant's expert reports submitted by August 5, 2013, and all pre-trial motions to be filed by August 19, 2013.

On August 16, 2013, O&N filed the instant motion for summary judgment.³ On September 16, 2013, Plaintiff and third-party plaintiffs PMC Property Group and 201-59 North Eighth Street Associates, L.P., both filed responses in opposition. On September 27, 2013, O&N filed a reply in support of its Motion for Summary Judgment.

FACTUAL HISTORY

This action was initiated by the Plaintiff MetroClub Condominium Association, arising from allegedly faulty and defective construction of residential condominiums built and sold by Defendant 201-59 North Eighth Street Associates, L.P. (the "Declarant"). Plaintiff is the MetroClub Condominium Association, a non-profit corporation whose membership is made up of the individuals who own units in the MetroClub Condominium.

In March 2003, Declarant began renovating a building previously known as the Metropolitan Hospital, with the intention of developing a 130 unit condominium, located at 201 North Eighth Street, Philadelphia, Pennsylvania. Compl.¶23. Declarant's development of the subject property consisted of renovation and redevelopment of the existing building, construction of additional floors and installation of certain amenities such as a swimming pool, fitness facility, extension of elevator service and related improvements. Compl.¶24.

Plaintiff alleges numerous masonry façade defects, glass curtain walls/window problems, roof defects, balcony defects, pool defects, life safety issues and defects, mechanical, electrical and plumbing deficiencies, and structural defects. Compl.¶29.

³ For procedural purposes, although not at issue in the current motion, on August 19, 2013, additional defendant JKR Partners, L.L.C. filed a motion for summary judgment (control no. 13082187). On August 19, 2013, PMC Defendants filed a motion summary judgment (control no. 13082445).

Plaintiff brought claims against the Declarant, the Declarant's general partner 201-59 North Eighth Street, LLC, Philadelphia Management Company (the general contractor, and alleged alter-ego of Declarant), and three individuals who were Executive Board Members (Caplan, Webster, and Brown).

PMC and Declarant then joined various additional defendants with whom they had contracted, including O&N, on the theory that should the Plaintiff be awarded judgment, that the additional defendants should be held solely liable to the Plaintiff, or alternatively, jointly and liable with or over to PMC Defendants.

DISCUSSION

The claims against O&N are premised on allegations that O&N's professional services as the structural engineer were deficient. Although pled as a breach of contract, the essence is a professional liability claim: "If and to the extent that the [Plaintiff] Association's averments of deficiencies are found to be true with respect to the work for which the Additional Defendants [including O&N] are responsible . . . then the Additional Defendants breached their respective contractual obligations to PMC." Joinder Compl. ¶37, 44. (emphasis added).

The claim is premised on the negligent or deficient practices of O&N as structural engineer on the project, which led to an alleged breach of contract. This breach allegedly includes the statutory requirement of the Act, wherein a public offering statement of a condominium of a conversion building must contain a statement by the Declarant, based on a report prepared by an independent registered architect or professional engineer, describing various elements of the condition of the building and the results of a visual inspection. 68 Pa. C.S. §3404.

Once the relevant pleadings have closed, any party may move for summary judgment.

Pa. R.C.P 1035.2. “Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.” Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001). Further, granting summary judgment is appropriate only when the evidentiary record shows the material facts are undisputed. McCarthy v. Dan Lepore & Sons 4 Co., Inc., 724 A.2d 938, 940 (Pa. Super. 1998). The trial court must view the record in the light most favorable to the non-moving party. Rausch, 783 A.2d at 821.

Our Superior Court has held that “the rule of law regarding expert testimony calls for it when the matter involves skill and training beyond that of an ordinary layman.”⁴ It is clear to this court that ascertaining the specific requirements of the standard of professional care applicable to the engineering services provided by O&N, and to determine whether O&N’s actual services met those requirements, is beyond the “skill and training” of ordinary layman and “requires special experience.”⁵ In most cases, a claim for breach of contract that sounds in a breach of one’s professional duty must be supported by expert opinion, because the negligence of a professional encompasses matters not within the ordinary knowledge and experience of laypersons.⁶ This is true in the case at hand.

Here, in order to establish any liability as to O&N, the parties must demonstrate that the engineering services O&N provided to the project were not in accordance with what a reasonable engineer would have done, and that such a failure to meet the standard of professional care resulted in damages claimed by the Plaintiff. The parties have failed to do so, as it has not been

⁴ Electron Corp. v. Short, 597 A.2d 175, 180 (1991). In Electron, the court held that in a breach of contract action against the designer of a heating and cooling system, plaintiff had the burden to produce expert testimony to establish a breach that the design was not up to professional standards. Id.

⁵ See National Case Register v. Haak, 335 A.2d 407,410-11 (1975).

⁶ Sokaites Contracting Inc. v. Trant Corp., 968 A.2d 1282, 1287 (Pa. Super. 2009).

demonstrated either what the requirements of the applicable standard of professional care are, or how O&N's professional services allegedly failed to meet those requirements.

Both Plaintiff Association and PMC Defendants oppose O&N's motion, for differing reasons. Plaintiff takes the position that an expert is not necessary, and the jury would have sufficient knowledge and experience to render a just and proper decision without the necessity of expert testimony. PMC Defendants assert that there are two separate expert opinions that are sufficient.

Plaintiff admits that O&N was retained to provide structural engineering services in connection with the MetroClub project.⁷ Plaintiff supplements the record by attaching an affidavit of Neil Kalani, a unit owner and member of the Association's Executive Board, who testified to the Association's problems with the glass curtain wall and other problems.⁸ Plaintiff further cites to Michael P. Dennison, an employee of Alumicor Corporation, who inspected the MetroClub curtain wall in August 2012 and noted that some problems with the curtain wall "could be an anchor issue, which would then twist the frame, which would then put excess pressure on the glass."⁹ Plaintiff also cites a report produced by Structural Design Associates, Inc. ("SDA") dated November 30, 2012 and a supplement thereto, dated May 8, 2013.¹⁰ The initial SDA report identified defects in the curtain wall system and observed that the "typical vertical mullion joint and related thermal gaskets are allowing water and air flow to the interior."¹¹ SDA also noted that there were unprotected openings in the fire rated floor slabs and

⁷ Pl. Ans. ¶4.

⁸ Kalani Affidavit ¶ 5-7, attached to Pl. Resp. as Exh. A.

⁹ Dennison Deposition, 218, 286-87, attached to Pl. Resp. as Exh C.

¹⁰ Attached to Pl. Resp. as Exh. E.

¹¹ Id. p. 15.

unprotected fire wall penetrations.¹² Plaintiff uses this evidence to conclude, in its opposition to summary judgment, that:

Where, as here, Defendants, failed to note or observe openings in fire protection systems, including floor slabs and fire rated walls, and provided engineering advice regarding the connection mechanisms used for the defective curtain wall, including shims, which connections may have led to twisting and at least a portion of the problems described in the Association's expert reports, a jury would have sufficient knowledge and experience to render a just and proper decision without necessity of expert testimony. Pl. Resp. ¶41.

Plaintiff notes that, in fact, the jury would need the Association's expert reports to identify the problems. The responsibility for discovering, identifying, and making recommendations concerning defective items described are certainly not within the layperson's knowledge and experience.

PMC and Declarant assert that it has produced sufficient evidence to allow the jury to find that O&N breached its contractual or professional obligations in connections with the MetroClub conversion project.¹³ PMC Defendants respond to O&D's motion by noting what O&N was responsible for on the Project, including: approving structural calculations for connection of the new curtainwall to the existing structure; serving as engineer of record for the construction of a new residential penthouse at the ninth and tenth floors of the MetroClub building; preparing a report which described the results of a visual survey of the building's existing structural components, to be included in the Public Offering Statement; providing analysis and certifications to the City of Philadelphia's Department of Licenses & Inspection in order to obtain building permits; and performing additional engineering services on an as-needed basis.¹⁴ PMC Defendants note that two separate putative expert opinions conclude that, if the

¹² Id. pp. 1-2.

¹³ PMC Defendants Memo. p. 2 (emphasis added).

¹⁴ PMC Defendants Resp. ¶4-6.

curtainwall is not functioning properly, deficiencies in installation may be a factor.¹⁵ PMC Defendants asserts that O&N's role in engineering and approving the anchor system is within fair scope of the causes identified in the expert reports.

PMC states that it is clear that O&N's professional services are questioned by the expert reports produced by the parties, namely the Edwards Report and the Toneatto Report, as well as statements by Mr. Dennison (of Alumnicor) that improperly placed anchors may prevent the compression seals from locking appropriately.¹⁶ The Edwards Report attributed purported air infiltration and condensation problems to "the reduced primary and secondary compression seals at the mullion interlock due to installing this curtainwall in a segmented configuration."¹⁷ The Toneatto Report opined that if problems with the curtainwall exist, they may be caused by improper anchor placement: "It is important to mention at this point that if the first layer of curtain wall was not carefully and conscientiously placed and aligned, the effect of any such misalignment (simple geometry) can magnify over the distance to the top of the wall."¹⁸

However, none of this evidence identifies O&N, or any breach of professional duty on behalf of the (unnamed) O&N engineer. Without expert opinion that O&N deviated from any standard of professional care, resulting in an alleged breach of contract with PMC Defendants, O&N is entitled to summary judgment. In this case, O&N is clearly identified as the engineer, never a manufacturer or installer, and its deviant role cannot even be inferred from the expert reports. As such, no party has met the requirements to prove professional negligence.

¹⁵ Id. ¶8, referencing the reports of Julian M. Toneatto of Adler Engineers, Inc. (on behalf of Alumicor), and Robert D. Edwards, Jr. of Edwards & Company (on behalf of PMC), attached as Exhibits 11 and 12.

¹⁶ June 7, 2013 Dennison Dep. at 282:21-283:13.

¹⁷ Edwards Rpt. at 3.

¹⁸ Toneatto Rpt. at 4.

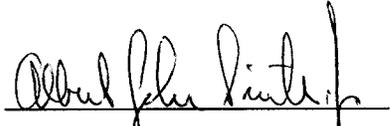
Lastly, in light of the fact that no parties to the case have been designated as an expert to offer opinions regarding the responsibilities and the work performed by O&N, or whether it complied with section 3404 of the Act, summary judgment must be granted in favor of O&N.

CONCLUSION

In conclusion, I am granting O&N's Motion for Summary Judgment on the basis there has been no expert report or opinion produced to support a finding of professional negligence of O&N. O&N is dismissed as a party from this action.

BY THE COURT:

DATE: October 16, 2013


ALBERT JOHN SNITE, JR., J.