SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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CORNICE LLC

Plaintiff,

- v -

2LS CONSULTING ENGINEERING, D.P.C.,

Defendant.

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INDEX NO. 159200/2018

MOTION DATE 12/07/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL.

In this action for breach of an engineering design services contract, 2LS Consulting Engineering, D.P.C. (**2LS**) moves pursuant to CPLR 3211 (a) (7) to dismiss the complaint and Cornice LLC (**Cornice**) cross-moves for leave to file an amended complaint (the **Amended Complaint**). For the reasons set forth below, Cornice's cross-motion for leave to file the Amended Complaint is granted and 2LS's motion to dismiss is granted in part to the extent that the second cause of action for negligence in the Amended Complaint is dismissed, and is otherwise denied.

Reference is made to a letter agreement (the **Design Agreement**), dated November 2, 2015, as revised on November 6, 2015 and November 17, 2015, by and between 2LS and Cornice, pursuant to which 2LS agreed to provide engineering design services for a mixed-use development project for Cornice at its property located at 35 Walker Street, New York, New York (the **Property**; NYSCEF Doc. No. 17, at 1). The Design Agreement invited Cornice to indicate its acceptance by executing the document and initialing each page (*id.*, at 9). Patricia

Moezinia, Cornice's sole member, signed the Design Agreement and initialed each page (*id.*, 2-10). 2LS began work on the project and submitted invoices to Cornice, which Cornice paid (Moezinia Aff., ¶ 14). Cornice alleges that 2LS performed defective work (*id.*, ¶ 15). For example, Cornice alleges that 2LS improperly installed the heating and ventilation systems, including installing a heating duct directly in front of a skylight, blocking it completely; allocating insufficient heat to some areas and no heat at all to the bathrooms; installing insufficient ventilation and exhaust systems throughout the premises; improperly designing the sprinkler systems; and abandoning the hydrant flow tests (*id.*, ¶¶ 17-34).

Leave to amend pleadings should be freely given unless the proposed amendment would result in prejudice or surprise or is palpably improper or insufficient as a matter of law (CPLR § 3025 [b]; *McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). In this case, granting leave for Cornice to file the Amended Complaint would not result in prejudice or surprise at this early stage in the proceedings, nor is the proposed Amended Complaint palpably improper or insufficient as a matter of law except as it relates to the second cause of action grounded in negligence for the reasons set forth below. Accordingly, Cornice's cross-motion for leave to file the Amended Complaint is granted.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court affords the pleadings a liberal construction (CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Dismissal under

CPLR 3211 [a] [1] is warranted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

To state a cause of action for breach of contract, a plaintiff must allege (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages [*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]). Here, in the Amended Complaint, Cornice alleges that Cornice and 2LS entered into a valid and binding contract (re: the Design Agreement; Amended Complaint, ¶¶ 3-8), pursuant to which Cornice performed by paying 2LS in excess of $35,000 for its services (*id.*, at ¶ 10). Cornices further alleges that 2LS breached the Design Agreement by failing to comply with its terms and conditions and performing substandard work (*id.*, ¶¶ 11-35). To wit, the Amended Complaint alleges that 2LS performed deficient work relating to the heating and ventilation systems (*id.*, ¶¶ 15-22), used outdated and non-code complaint background drawings in performing its sprinkler design and filing services (*id.*, ¶¶ 23-28), and failed to conduct hydrant flow tests (*id.*, ¶¶ 29-32).

Cornice alleges that, as a result of 2LS's breach, it has suffered damages in excess of $250,000 (*id.*, ¶ 33). To the extent that 2LS argues that Cornice is not a party to the Design Agreement because it is not explicitly named, or that it is unclear in what capacity Patricia Moezinia signed the Design Agreement, these arguments are unavailing. Cornice is the owner of the Property. The Design Agreement is for work at the Property. Patricia Moezina is the Principal and sole member of Cornice. Pattricia Moezinia executed the Design Agreement on behalf of Cornice

just as L2S's principal, Jeremy Latterman, executed it on behalf of L2S. Accordingly, the motion to dismiss the first cause of action is denied.

However, the second cause of action grounded in negligence fails. Although "defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfil its contractual obligations," (*New York University v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; (*Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 211 [1st Dept 1991; *Strauss v Belle Realty Co.*, 65 NY2d 399, 402 [1985]; *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987]), there are no such allegations in the Amended Complaint. Simply put, the gravamen of the allegations set forth in the Amended Complaint is that the defendant did not properly perform. Therefore, the second cause of action for negligence in the Amended Complaint is dismissed.

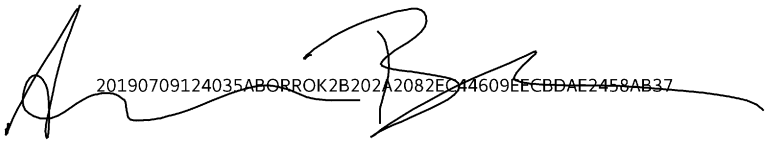
The court notes that at oral argument and following the court's ruling, the defendant accepted service of process of the Amended Complaint.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part to the extent that the second cause of action of the Amended Complaint is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 30 days after the date of this order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference forthwith.



7/9/2019
DATE

ANDREW BORROK, 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