

<b>Tutor Perini Bldg. Corp. v Port Auth. of N.Y. &amp; N.J.</b>
2020 NY Slip Op 30045(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 156211/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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TUTOR PERINI BUILDING CORP.,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, STV INCORPORATED,

Defendants.

-----X

INDEX NO. 156211/2018

MOTION DATE 08/07/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64,
65, 66, 67, 68, 82, 83, 84, 85, 86, 87, 88, 97, 103, 104

were read on this motion to/for REARGUMENT/RECONSIDERATION

Defendant STV Inc. (STV) moves, pursuant to CPLR 2221 (d), to reargue this court's July 1, 2019
decision and order (Prior Decision) (NYSCEF 59), and, upon reargument, vacating the Prior Decision
and dismissing plaintiff's negligent misrepresentation and professional malpractice claims.

STV, the architect engaged by a third-party to generate construction designs three years
before plaintiff was engaged as the general contractor for the project, argues that the court mistakenly
applied controlling law in finding that plaintiff adequately alleges that, despite having no contract or
other privity with STV, plaintiff's tort claims may survive a CPLR 3211 motion as there exists a
relationship between it and STV that is so close as to constitute the functional equivalent of privity (see
Pile Found. Constr. Co. v Berger, Lehman Assoc., 253 A.D2d 484 [2d Dept 1998 ["The Supreme Court
properly declined to dismiss the plaintiff's first cause of action alleging negligent misrepresentation, as
the record reveals that the relationship between the plaintiff and the defendants was so close as to be
the functional equivalent of privity."], citing Ossining Union Free School Dist. v Anderson LaRocca
Anderson, 73 NY2d 417, 424 [1989]).

In *Ossining*, the Court of Appeals discussed its decision in *Credit Alliance Corp. v Arthur Andersen & Co.* (65 NY2d 536, 551 [1985], amended 66 NY2d 812 [1985]), and clarified that the three-part *Credit Alliance* test for negligent misrepresentation claims against nonprivity parties (*id.* at 551 [holding that the near-privity requirements include that nonprivity party (1) was aware the work was to be used for a particular purpose, (2) the work was prepared “in the furtherance of which a known party . . . was intended to rely,” and (3) engaged in some conduct “linking them to that party” or their “understanding of that party or parties’ reliance”]) applies to more than only accountants (*see Ossining*, 73 NY2d at 424).

As STV correctly argues, however, the applicability of the *Credit Alliance* test has been further clarified by the First Department as well as the Court of Appeals in the intervening period between the Second Department’s issuance of *Pile Foundation* and the Prior Decision.

In *Bri-Den Const. Co., Inc. v Kapell & Kostow Architects PC* (20007 WL 6379834 [Sup Ct, NY County August 27, 2007]), an architectural firm was engaged to produce design materials for a construction project and the trial court dismissed the complaint of the general contractor which, after the designs were completed, won the project by submitting the lowest bid (*see generally id.*). On appeal, the First Department affirmed, holding:

“There is admittedly no contractual privity between the parties, and the court properly found that plaintiff contractor failed to state a cause of action under any of the theories set forth in the complaint because it failed to demonstrate the ‘functional equivalent of contractual privity’ under the three prong [*Ossining/Credit Alliance*] test . . . .

In *Ossining* the Court of Appeals rejected the argument that reliance on plans and specifications included in the bid package constituted the functional equivalent of privity, holding that any asserted reliance must be by a known party and not a class of potential parties, such as future bidders. Even were we to find that a class composed of prequalified bidders was sufficiently known for purposes of *Ossining*, the prequalified bidders were simply not “known” at the time of the complained-of conduct”

(*Bri-Den Const. Co., Inc. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355, 355 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]).

Further, in the context of a negligence claim against an engineering firm surrounding misrepresentations relied on by the purchasers of an apartment unit, the Court of Appeals again contemplated the three-part test espoused in *Ossining* and *Credit Alliance* and plainly held that “[t]he words ‘known party or parties’ in the *Credit Alliance* test mean what they say” (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372-373 [2010] [affirming dismissal of the complaint when the claim was “based on statements made in the offering plan given to plaintiffs before they purchased their apartment” and “contained descriptions (and performance representations) of the heating and air conditioning systems”]). That is, the “known party or parties” have to be “known” at the time that work product is created in the context of a plaintiff’s claim against a nonprivity party.

Accordingly, reargument is granted and, upon reargument, plaintiff’s complaint is dismissed as against STV. Here, the architectural plans were created years before plaintiff’s involvement in the project and it is of no moment that the plans were created with the knowledge that, at some future date, an unknown contractor would use the plans in the course of completing the project. Contrary to plaintiff’s arguments in opposition to this motion, the rule of law set forth in *Bri-Den* does not foreclose all actions against an architect that creates plans for any construction project where the contractor-bidding process has not yet begun. Rather, it relegates claims for negative misrepresentation and professional malpractice to those in privity with, or those that meet the *Ossining/Credit Alliance* test to raise those claims against the architectural firms, which, in an instance such as this, could have been raised as direct or third-party claims at the appropriate time by an entity other than plaintiff, which lacks standing to pursue its negligent misrepresentation and professional malpractice claims under *Bri-Den* and *Sykes*.

Accordingly, it is

ORDERED that Motion Sequence Number 003, STV Inc.’s motion to dismiss the complaint, is granted; and it is further

ORDERED that, upon reargument, the complaint is dismissed as against defendant STV Incorporated, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

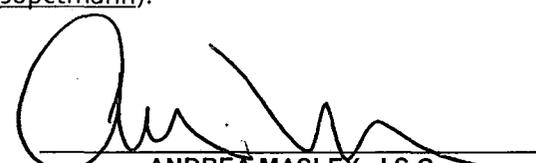
ORDERED that the complaint is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for STV Incorporated shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the General Clerks Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that all service shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website - [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

1.6 /2020  
DATE

  
ANDREA MASLEY, J.S.C.  
**HON. ANDREA MASLEY**

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	DENIED