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NEW YORK

PROFESSIONAL MALPRACTICE

Claim Against Engineering Client Dismissed in Kings County (Brooklyn)



Robert A. Fitch

A judge recently granted our motion seeking a dismissal of all claims in favor of our client, the defendant engineer, in a case venued in Supreme Court, Kings County.

Robert A. Fitch and **Bryan J. Ferrara** of Rawle & Henderson, LLP represented the defendant engineer.



Bryan J. Ferrara

Plaintiffs, purchasers of real property, claimed that the property they had purchased had numerous design and construction defects resulting in water infiltration, cracked walls, and swaying of the building. Plaintiffs alleged that the work performed by the engineer defendant was defective and asserted seven causes of action for breach of contract, professional malpractice, unjust enrichment, fraud, negligent misrepresentation, deceptive acts or practices and for a declaratory judgment imposing alter ego liability on defendants.

By agreement with the developer, the defendant engineer performed engineering services during the construction of the two-family duplex. Plaintiffs were not a party to this contract. Rawle & Henderson LLP demonstrated how defendant engineer did not have any contact with plaintiffs, had no knowledge of the plaintiffs until after the purchase of the property, and did not intend plaintiffs to be third-party beneficiaries of the contract.

We filed a motion on behalf of the defendant engineer to dismiss plaintiffs' complaint for failure to state a cause of action under CPLR §3211. We argued in favor of dismissal based on, among other things, a lack of privity between the plaintiffs and the defendant engineer as well as plaintiffs' failure to allege facts evidencing that plaintiffs were intended beneficiaries of the engineer's contract with the developer.

We successfully argued that plaintiffs' first and second causes of action for breach of contract and professional malpractice be dismissed due to lack of privity as well as plaintiffs' failure to demonstrate that they were intended beneficiaries of the contract.

To establish an intended beneficiary relationship, there must be a showing that (1) the professional was aware that their work would be used for a particular purpose, (2) upon which a known party was intended to rely, and (3) that there was some conduct on the part of the professional linking them to the plaintiff. See *Caprer v. Nussbaum*, 36 A.D.3d 176 (2d Dept. 2006). A viable cause of action alleging professional negligence or malpractice requires that the underlying relationship between the parties be one of privity of contract or that the bond between them be so close as to be the functional equivalent of privity. See *Perfetto v. CEA Engrs., P.C.*, 114 A.D.3d 835 (2d Dept. 2014), and *Tambrands, Inc. v. Lockwood Greene Engrs.*, 178 A.D.2d 406 (2d Dept. 1991). The Court found that no such relationship existed between the parties.

We also successfully argued that plaintiffs' third cause of action for unjust enrichment be dismissed. An unjust

enrichment claim is that the defendant had obtained a benefit which in "equity and good conscience" should be paid to the plaintiff. See *Corsello v. Verizon, N.Y., Inc.*, 18 N.Y.3d 777 (2012); *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 (2011), *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415 (1972). However, an unjust enrichment claim is not available where it simply duplicates, or replaces a conventional contract or tort claim. See *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382 (1987), *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70 (2008), and *Town of Wallkill v. Rosenstein*, 40 A.D.3d 972 (2d Dept. 2007).

Similarly, we successfully argued that the fourth cause of action alleging fraud could not be permitted where the only fraud claim relates to a breach of contract. See *Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 40 A.D.3d 1073 (2d Dept. 2007).

With regard to plaintiffs' fifth and sixth causes of action alleging negligent misrepresentation and deceptive acts or practices, the Court dismissed both claims as inapplicable. Finally, the Court also dismissed Plaintiffs' final cause of action for alter ego liability based on the above findings.

Robert A. Fitch is the resident partner in our New York City office. He concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 125 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a **New York Metro Super Lawyer** in 2013, 2014, 2015, 2016, 2017 and 2018 by *Super Lawyers*, a program of Thomson Reuters. He has a peer review rating by Martindale-Hubbell of AV (the highest). Bob is a member of Rawle & Henderson LLP's Executive Committee.

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Bryan J. Ferrara is Of Counsel to the Firm in our New York City office. Bryan concentrates his law practice in the areas of insurance coverage, medical professional liability, and casualty and premises liability. Bryan earned his J.D. from St. John's University School of Law in 2008 and his B.A. in Psychology from SUNY College at Old Westbury in 2004. He is admitted to practice in New York, as well as the U.S. District Courts for the Southern and Eastern Districts of New York.

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ABA TIPS SECTION CONFERENCE

John C. McMeekin II will speak at the **American Bar Association Tort Trial and Insurance Practice Section (ABA TIPS) Conference** on May 1, 2019, in New York City. John will be a panelist in the session *"Trial Masters—Knowledge We Wish We Had Years Ago."* He and other panelists will discuss litigation and trial strategy tips, drawing from their experience with judges, juries, witnesses and opposing counsel. The conference will be held at the Westin New York at Times Square.



John C. McMeekin II

John is a partner in Rawle & Henderson LLP's Philadelphia office and a member of the Firm's Executive Committee. He represents clients as local, national and trial counsel in environmental, toxic and mass torts product and related class actions, products liability, insurance coverage and aviation litigation. He graduated *magna cum laude* from the University of Baltimore School of Law. John is admitted to practice in Pennsylvania, New Jersey and Maryland and related U.S. District Courts. John is a former firefighter and emergency medical technician, and is Hazmat certified. He has been published in professional and law review journals on a variety of topics related to toxic tort and environmental litigation. He was recently elected Vice Chair of the American Bar Association Tort Trial & Insurance Practice Section. He is currently serving as Section Secretary of the Tort Trial & Insurance Practice Section. He also served as the Section Revenue Officer, Chair of the Toxic Tort & Environmental Law Committee, Chair of the International Law Committee, Chair of the CLE Board and is currently co-Chairing the Corporate Counsel Initiative Task Force. In addition to his service with the ABA, John chaired the Philadelphia Bar Association Environmental and Toxic Tort Law Committee and has been a member of the Delaware Valley Environmental Inn of Court. His significant cases can be found in the *BNA Law Reports* and *Law360*. He is rated AV Preeminent by Martindale-Hubbell and has been selected as a 2019 Pennsylvania Super Lawyer.

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ABA TIPS INSURANCE CLAIMS INSTITUTE

Craig D. Baron, a partner in Rawle & Henderson LLP's New York City office, will speak at the **American Bar Association Tort Trial and Insurance Practice Section's (ABA TIPS) 1st Annual Insurance Claims Institute** on April 30, 2019. The CLE event will be held at Thomson Reuters, 3 Times Square, New York City. The event is designed to educate insurance professionals about emerging legal issues in the field, including insurance claims issues, initial coverage evaluation best practices, claims handling conflict and the insurance implications of #MeToo. Craig will moderate a panel session on *"Dealing With The Excess Insurer In Claims Handling—Notice, Interference and Cooperation."* The session will examine what happens in claims where there is both a primary liability insurer and an excess insurer. The panel will address the issues that arise when an excess insurer seeks to be part of the claims handling and settlement decision-making, and the implications on the claim, exposure and the policyholder and insurer relationships.



Craig D. Baron

Craig focuses his law practice on aviation litigation and environmental, mass and toxic tort litigation. He has served as National and Local Counsel to several Fortune 500 companies regarding asbestos and other toxic tort liability. He has handled all aspects of the defense of these claims from discovery through trial. Craig has counseled and defended insurers regarding pollution, health hazard and asbestos-related matters. He has negotiated coverage-in-place-agreements, policy commutations and structured settlements and has defended clients in coverage litigation. Craig earned his J.D. from Fordham University School of Law in 2001 and his B.A. from Brandeis University in 1998. He was selected as a **New York Rising Star** by *Super Lawyers* in 2013, 2014, 2015 and 2016. He is admitted to practice in the State of New York, and also the U.S. District Court for the Southern District of New York and the U.S. District Court for the Eastern District of New York. He is a member of the American Bar Association and New York County Lawyers Association. Prior to joining Rawle & Henderson LLP, Craig was a partner with an international insurance litigation firm based in Manhattan.

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WIDENER UNIVERSITY LECTURE

Michael J. Logullo was a guest lecturer at **Widener University's Tourism and Hospitality Management School** in February 2019 at the Widener Campus in Chester, Pennsylvania. Michael addressed students in the university's undergraduate *Law in the Tourism Industry* course. He spoke on various topics, including the duty of businesses to their guests, preventing incidents, handling incidents when they occur, preserving evidence, and procedural law and discovery once a lawsuit is filed. The students will be leaders in the hospitality industry and their background and understanding of the law will benefit their companies when they enter the workforce.



Michael J. Logullo

Michael is Of Counsel in the firm's **Wilmington, Delaware** office. He concentrates his practice in the areas of medical professional liability, casualty and premises liability, property damage, subrogation, construction accidents and product liability claims. An experienced trial attorney, Michael has handled all aspects of litigation in a variety of cases. He is admitted to practice in Delaware, as well as the U.S. District Court for the District of Delaware, the U.S. Court of Appeals for the Third Circuit, the Supreme Court of Delaware and the U.S. Supreme Court. Michael is a member of the Delaware State Bar Association, the Defense Counsel of Delaware, and DRI. He served as a law clerk to the Honorable Alex Smalls of the Delaware Court of Common Pleas from September 1999 to August 2000. Michael was selected as a top attorney in insurance defense by *Delaware Today* Magazine in 2015. He received a Rising Star Award in 2010 from OMSNIC, a national insurance company that provides insurance to oral and maxillofacial surgeons. Michael earned his J.D. in 1998 from the Widener University School of Law. He was on the Dean's Honors List for the Spring 1997 and Spring 1998 semesters and was a member of the legal honor society Phi Delta Phi, Harrington Inn Honor Chapter. In addition, he earned a Certificate of Achievement in Sales and Leases. Michael earned his B.S. in Business Administration in 1994 from the University of Delaware. He was on the Dean's List for five semesters and also was a member of the Golden Key National Honor Society and the Mu Iota Sigma Honor Society. Michael is a graduate of the selective TIPS/ABOTA National Trial Academy held at the National Judicial College in Reno, Nevada.

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PHILADELPHIA

Todd K. Foster has joined the Philadelphia office of Rawle & Henderson LLP as an associate. He has represented insurance carriers and self-insured organizations in workers' compensation matters for 15 years. Todd has appeared before nearly all of the Workers' Compensation Judges in Pennsylvania, having worked in both the eastern and western portions of the Commonwealth. He has successfully argued cases at the Commonwealth Court level.



Todd K. Foster

Todd earned his J.D. from the University of Pittsburgh School of Law in 2002. While attending law school, he participated in the Low Income Tax Clinic and was awarded the CALI Award for the highest grade in the clinic. He served an externship with the Honorable David B. Torrey, a Workers' Compensation Judge, during the summer of 2001. In addition, Todd was awarded a scholarship from the Erie County Bar Association.

He earned his B.A. in Economics, *cum laude*, from Allegheny College in 1999. Todd received an Alden Scholar Award at Allegheny College.

Todd is admitted to practice in Pennsylvania.

Prior to joining Rawle & Henderson LLP, Todd was an attorney with a workers' compensation law firm in Philadelphia.

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