

# Designing a Defense: Analyzing Claims Against Design Professionals in NY and NJ

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One frequent target of plaintiffs in construction defect litigation is the design professional who, in many cases, was retained by the sponsor, developer or builder of the property in question. Often, the plaintiff has no direct contractual relationship with the design professional. The ability to pursue such a party in a construction defect action will depend on several factors, including the asserted theory of liability against the defendant, the specific work performed by that defendant on the project, and the timing of the claim.

As a threshold issue, the first question a design professional must ask when faced with a claim for improper design is, “Where am I?” This is not an existential question but, rather, a jurisdictional one since the treatment of claims against design professionals varies from jurisdiction to jurisdiction. This article focuses on actions commenced in New Jersey versus those commenced in New York. The second consideration is the basis for the claim. Does the complaint sound in contract or tort? And does it matter?

Obviously, pursuit of a breach of contract claim is problematic where there is no contract. In a construction defect action in New York, a plaintiff is unable to sustain a claim for breach of contract against a design professional absent contractual privity or its functional equivalent. *Kerusa Co. v. W10Z/515 Real Estate Ltd. P’ship*, 858 N.Y.S.2d 109, 111 (N.Y. App. Div. 1st Dep’t 2008). Where the plaintiff can establish that it is an intended third-party beneficiary of a

contract between a design professional and another, however, the claim may proceed. See, *Board of Managers of Astor Terrace Condo. v. Schuman, Lichtenstein, Claman & Efron*, 583 N.Y.S.2d 398 (N.Y. App. Div. 1st Dep’t 1992). The same is true in New Jersey. *Broadway Maint. Corp. v. Rutgers, State Univ.*, 90 N.J. 253, 259 (1982). It is, therefore, vitally important to carefully analyze the applicable contractual language to determine whether a design professional is subject to a claim for breach of contract, either as an entity in direct privity or by virtue of a contract between the professional and another that confers third-party beneficiary status on the plaintiff.

Assuming there is no contract, and the language does not provide for a third-party beneficiary status on the part of the plaintiff, a breach of contract claim is not sustainable, and the question becomes whether there is any alternative basis for a claim. In both New York and New Jersey, a design professional is subject to a claim for negligence in connection with a claim for personal injury. *Totten v. Gruzen*, 52 N.J. 202 (1968); *Cubito v. Kreisberg*, 419 N.Y.S.2d 578 (N.Y. App. Div. 2d Dep’t. 1979). But what about a negligence claim involving alleged defective construction?

In New Jersey, the lack of a contract does not necessarily preclude a property owner from pursuing such a claim where there is no contractual privity. In *Juliano v. Gaston*, 187 N.J. Super. 491 (App. Div. 1982), the Appellate Division held that a homeowner who

purchased their property from a developer was entitled to pursue a negligence claim for faulty workmanship against a subcontractor, even though there was no contractual relationship between the parties. The court reasoned that there is no logical reason why a claim for property damage, like a claim for personal injury, should not be sustainable when a homeowner has suffered a loss due to work by a negligent subcontractor.

The *Juliano* court went a step further and determined that a purchaser could even recover damages associated with repair of defective workmanship, which constituted economic loss in a claim for negligence against a subcontractor. *Id.* at 498. In *Conforti & Eisele v. John C. Morris Assocs.*, 199 N.J. Super. 498 (App. Div. 1985), the Appellate Division upheld the trial court's determination that a contractor who suffered only economic damages could pursue a design professional where there was no contract between the parties. These cases, when read together, suggest that in New Jersey a property-owner plaintiff can pursue a design professional in tort, even in a case for pure economic damages, where there is no contract that would otherwise govern the rights of the parties.

In New York, however, a claim for negligence can be considered duplicative of a contractual claim, even in the absence of a contractual relationship, when the claim is for economic damages. *Residential Bd. of Managers of Zeckendorf Towers v. Union Square-14th Assocs.*, 594 N.Y.S.2d 161, 162 (N.Y. App. Div. 1st Dep't 1993). Put another way, if a claim would sound in breach of contract were there contractual privity, or its functional equivalent, the negligence claim will be subject to dismissal as duplicative of the breach of contract claim unless there is some independent duty breached.

Outside of claims for breach of contract or negligence, a frequent allegation in construction defect litigation is one for fraud. The validity of such a claim in New York is extremely fact specific. For example, a claim for fraud based on omissions from an Offering Plan is precluded by The Martin Act, GBL §23-A, and no private cause of action is available. *Hamlet on Olde Oyster Bay Home Owners Ass'n v. Holiday Org.*, 887 N.Y.S.2d 125, 128 (N.Y. App. Div. 2d Dep't 2009). Courts in New York have held, however, that The Martin Act does not preclude claims based on alleged material misrepresentations on the part of the design professional, as opposed to omissions, although such fraud claims must be pled with particularity. *Bhandari v. Ismael Leyva Architects*, 923 N.Y.S. 2d 484 (N.Y. App. Div. 1st Dep't 2011); *see also*, *Sutton Apts. Corp. v. Bradhurst 100 Dev.*, 968 N.Y.S.2d 483, 648 (N.Y. App. Div. 1st Dep't 2013).

In New Jersey, the validity of an independent claim under the Consumer Fraud Act is generally not available, although it may be cognizable depending upon the specific activities performed. In *Blatterfein v. Larken Assocs.*, 323 N.J. 167 (1999), the Appellate Division found that "a design professional can be exposed to a private claim for fraud in connection with services performed in connection with real estate where the architect's design services are held out as part of what is being sold." However, in *Blatterfein*, the activities were related to the selling of real estate designed by the defendant, not merely a rendering of professional services. The New Jersey Supreme Court found in *Macedo v. Dello Russo*, 178 N.J. 340 (2004), however, that the ruling in *Blatterfein* did not subject a professional to claims under the Consumer Fraud Act in connection with the rendering of professional services but, rather, only for representations made while functioning outside of his professional capacity.

An additional distinction between claims in New Jersey and New York is the applicable Affidavit of Merit statute. In New Jersey, in order to pursue a claim against an architect, engineer or land surveyor for either professional malpractice or negligence, the claimant must file and serve an affidavit by a like professional within 60 days of the defendant's answering the complaint. N.J.S.A. 2A:53A-26–29. For good cause shown, the time can be extended for an additional 60 days. Pursuant to *Hill Int'l v. Atlantic City Bd. of Educ.*, 438 N.J. Super. 562 (App. Div. 2014), the affidavit must be made by an individual in the same profession. Absent the appropriate affidavit, the claim will be subject to dismissal for failure to state a cause of action. Therefore, it is vitally important to be keenly aware of the dates of the applicable pleadings and the deadlines in place when analyzing a case venued in New Jersey.

In New York there is no Affidavit of Merit requirement, but the timing of the pleadings is nonetheless important due to the statute of limitations. A claim for property damage in New York must be commenced within three years. N.Y. CPLR 214(4). While a claim arising out of construction of real property must be brought within six years, negligent design claims against architects and engineers in a construction defect action must generally be commenced within three years, which is the limitations period for a claim for professional malpractice. N.Y. CPLR 214(6). A construction defect action in New Jersey, however, must be commenced within six years, whether the claim sounds in contract or tort, which may be extended depending on when the defective condition was first discovered. N.J.S.A. 2A:14-1. However, where the complaint involves the existence of a defective and dangerous condition, litigation commenced over ten years

from the completion of services on the project will be subject to dismissal pursuant to the statute of repose, N.J.S.A. 2A:14-1.1. There is no statute of repose in New York, although if a claim is brought more than ten years from the rendering of services, there are additional notice requirements pursuant to N.Y. CPLR 214-d.

It is difficult to address the entire universe of claims that may be asserted against a design professional in connection with a construction defect action, or to discuss every potential scenario in which a claim for breach of contract or negligence may be applicable. However, the analysis above paints with broad strokes some of the initial inquiries for a litigant when analyzing a claim and preparing a defense, or in the case of the plaintiff, determining the validity of a claim. Specifically, the questions to pose are: (1) does the party bringing the claim have a direct contractual relationship with the design professional or the functional equivalent of privity; (2) does the basis for the claim sound in contract or tort; (3) where is the matter venued; (4) when were the services rendered and when was the action commenced; and (5) is the claim for pure economic damage or for consequential damages? “Who, what, where, when and why?” The answers will help determine whether the claim is cognizable or subject to dismissal.



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