STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

ROCHESTER ENDOSCOPY AND SURGERY CENTER, LLC, and JARO COMPANY, LLC,
Plaintiffs,

v.

Case No. 18-168674-CB
Hon. James M. Alexander

DESROSIER ARCHITECTS, PC,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's motion for summary disposition. Plaintiffs are the owners and operators of a Freestanding Surgical Outpatient Facility located at 1349 South Rochester Road in Rochester Hills. Construction on the project at issue began in 2012, and Plaintiffs' general contractor was non-party OYK Engineering and Construction (OYK).

Defendant Desrosier Architects, PC, was a subcontractor that contracted with OYK to provide design drawings on the project. In its Complaint, Plaintiffs claim that Defendant lacked the requisite experience for the project and failed to adequately design the surgical center.

It is unclear, through Plaintiffs' Complaint, how much communication, if any, Plaintiffs had with Defendant regarding the alleged construction problems. However, Plaintiffs claim that "[i]n February 2014, the parties all met to set aside their differences and discuss possible solutions which could be pursued to complete the project and leave RESC with the facility they bargained for." (Complaint at ¶ 50). In the end, Plaintiffs claim that they were forced to hire a

new architect and builder to complete the project and suffered damages in excess of $500,000. (Complaint at ¶¶ 57, 67).

Rather than sue their general contractor, Plaintiffs sued Defendant on a single claim of (Count I) professional negligence.

Defendant now moves for summary of Plaintiffs' Complaint under MCR 2.116(C)(8). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1]

Defendant argues that it is entitled to judgment as a matter of law because (1) Plaintiffs have failed to establish the existence of a professional relationship between Plaintiffs and Defendant; and (2) Defendant did not owe a legal duty to Plaintiffs.

In order to state a claim for professional negligence, also known as malpractice, a plaintiff has the burden of alleging (1) the existence of a professional relationship; (2) negligence in the performance of the duties within that relationship; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

Further,

> Duty has been defined as 'an obligation to which the law will give recognition and effect, to conform to a particular standard of conduct towards another.' Whether such an obligation will be imposes is determined by the relationship between the actor and the injured person. It is well established that the threshold

[1] Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

> question of duty is an issue of law for the court to decide." *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 545; 421 NW2d 230 (1988).

Defendant argues that Plaintiffs have failed to establish that a professional relationship existed and show that they were owed a duty separate and distinct from the contractual obligations Defendant owed to OYK. Based on the same, Defendant argues that Plaintiffs cannot overcome the fact that the contract was between Defendant and OYK, "and that no other contract or duties were signed or assumed with respect to the [p]roject." (Defendant's Motion at 6).

In response, Plaintiffs argue that, although a contract can establish a professional relationship between the parties, the lack of a contract is not fatal to their claim. Plaintiffs argue that a professional relationship can extent to non-contracting, third-party beneficiaries. To support this proposition, Plaintiffs cite to *Beaty v Hertzberg & Golden, PC*, 456 Mich 247; 571 NW2d 716 (1997). Although Plaintiffs rely on *Beaty* to support their claim for relief as a third party, they fail to address what the *Beaty* court required for a third party to maintain a claim for negligence.

In *Beaty*, plaintiff, individually and as the personal representative of her late husband's estate, filed a malpractice suit against the attorneys for the bankruptcy trustee who supervised the liquidation of her husband's corporation. *Id.* at 249. Plaintiff alleged that the bankruptcy attorneys were negligent in their effort to collect her husband's life insurance proceeds. *Id.* at 252. Although the *Beaty* court did acknowledge "that an attorney's negligence may expose him to liability to third parties under certain circumstance," it did not find that plaintiff was entitled under the circumstance presented. *Id.*

The *Beaty* court reasoned:

> Generally, a legal malpractice action may be brought only by a client who feels that he has been damaged by retained counsel's negligence. In this case, however, we are presented with the less frequently seen situation in which a third party claims that her relationship with counsel is of a nature sufficient to justify the imposition of liability even in the absence of an attorney-client relationship. There has been a reluctance to permit an attorney's actions affecting a nonclient to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client.
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> Yet, this Court has recognized that an attorney's negligence may expose him to liability to third parties under certain circumstances. One vehicle for affording relief has been the doctrine of equitable subrogation. This doctrine is best understood as allowing a wronged party to stand in the place of the client, assuming specific conditions are met. Those conditions are: (1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two are merged with regard to the particular issue where negligence of counsel is alleged, (2) the third party must lack any other available legal remedy, and (3) the third party must not be a "mere volunteer," i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed to the client. *Id.* at 253-255 (internal citations omitted).

It is undisputed that the contract for Defendant's services was between Defendant and OYK. As such, Plaintiffs would have to establish that they are entitled to recovery as a third-party beneficiary. In this case, Plaintiffs have not pled any facts to establish the existence of a special relationship with Defendant, and therefore, have not met the first condition.

Similar to the instant case, the *Beaty* court found that another adequate legal remedy was available to the plaintiff. *Id.* at 256. In *Beaty*, plaintiff had another legal remedy available through the bankruptcy proceedings. *Id.* Here, Plaintiffs had, and pursued, another available legal remedy. Indeed, on July 14, 2014, Plaintiffs filed a counterclaim and third-party complaint against OYK and Defendant.[2]

[2] The case (case no. 14-140862-CH) was originally assigned to Hon. Colleen O'Brien. It was subsequently reassigned to Hon. Wendy Potts, and then to Hon. Martha Anderson. Plaintiffs brought a counterclaim and third-party complaint against OYK and Defendant on claims of (Count I) breach of contract against OYK; (Count II) negligence against DesRosiers; (Count III) fraud against Fred Hadid and OYK; (Count IV) slander of title against OYK; (Count V) violation of MCL 55.291 against Amal S. Hadid; (Count VI) violation of MCL 570.1101 against

In its counterclaim against OYK, Plaintiffs allege that OYK breached their contract by, among other reasons, "designing and constructing a build-out that has several material defects." As such, another legal remedy was available to Plaintiffs to seek recovery for the same wrongs they allege in the present suit. Beyond that, Plaintiffs availed themselves of that legal remedy. Based on the same, Plaintiffs have not satisfied the conditions to seek recovery as a third-party beneficiary as outlined by the *Beaty* court.

In its reply, Defendant further argues that *Beaty* does not address professional relationships in general, and it cannot overcome the general rule that a professional relationship is established by a contract for professional services. To support this general rule, Defendant relies on *Hill by Burston v Kokosky,* 186 Mich App 300; 463 NW2d 265 (1990). The Court agrees.

The *Hill* court explained that

> [i]n physician malpractice cases, the duty owed by the physician arises from the physician-patient relationship. Accordingly, a professional physician-patient relationship is a legal prerequisite to basing a cause of action in professional malpractice against a physician. A physician-patient relationship exists where a doctor renders professional services to a person who has contracted for such services. *Id.* at 302-03 (internal citations omitted).

As stated, the contract at issue was between OYK and Defendant. Plaintiff was not a party to the contract. Although Plaintiffs give a detailed account of how architects can be liable for professional negligence generally, the fail to establish that a professional relationship for services existed between Plaintiff and Defendant. As correctly stated by Plaintiffs, "[p]rofessional malpractice involves the breach of a duty owed by one rendering professional services to a person who has contracted for such services." *Saur v Probes*, 190 Mich App 636,

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OYK and Fayiz Hadid; (Count VII) violation of MCL 570.152 against Fayiz Hadid and OYK; and (Count VIII) accounting against OYK. The case was dismissed based on an agreement between the parties by an Order on November 5, 2015.

638; 476 NW2d 496 (1991). Plaintiffs did not contract for professional services with Defendant, OYK did. As a result, a professional relationship did not exist between Plaintiffs and Defendant, and Defendant cannot be liable for malpractice.

Based on the foregoing, Plaintiffs have not established that, as a matter of law, a professional relationship existed with Defendant, or that they were entitled to any duties from Defendant that could give rise to liability. Accepting all well-pled allegations as true, Plaintiffs' claim for professional negligence is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. As such, Defendant's motion for summary disposition in GRANTED and Plaintiffs' Complaint is DISMISSED.

Motion to Amend

On April 24, 2019, the Court heard oral argument on Plaintiffs' Motion for Leave to Amend Complaint. The Court took the motion under advisement pending the ruling on Defendant's motion for summary disposition.

In the motion, Plaintiffs seek to amend their complaint to include counts of professional negligence, breach of contract, fraud based on false misrepresentation, fraud based on failure to disclose (silent fraud), and promissory estoppel.

The Court notes that it rejects Plaintiffs' attempt to cast its claims as one for breach of contract under a third-party beneficiary theory. The Court of Appeals has squarely rejected the notion that a property owner is a third-party beneficiary of a contractor-subcontractor contract:

> In general, although work performed by a subcontractor on a given parcel of property ultimately benefits the property owner, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. Absent clear contractual language to the contrary, a property owner does not attain intended third-party-beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would

> ultimately benefit the property owner. *Kisiel v Holz*, 272 Mich App 168, 171; 725 NW2d 67 (2006) (internal citations omitted).

In their response to Defendant's motion for summary disposition, Plaintiffs cite to *Vanerian v Charles L Pugh Co., Inc,* 279 Mich App 431; 761 NW2d 108 (2008). The instant case, however, is distinguishable from *Vanerian*. In *Vernerian*, the subcontractor discussed the project directly with the homeowner. *Id.* at 439. Further, the subcontractor agreed to do specific work on behalf of the homeowner rather than through the general contractor. *Id.* This allowed for the homeowner to maintain a breach of contract claim as a third-party beneficiary because the subcontractor undertook to do something directly for the homeowner. *Id.*

Here, the contract at issue was between OYK and Defendant. Although Defendant knew that the plans would ultimately benefit Plaintiff, there is no indication or evidence before the Court that Defendant undertook any work for Plaintiffs directly or any work outside of the scope of its contract with OYK. In their proposed amended complaint, although Plaintiffs allege that there was communication between the parties, they fail to allege that Defendant agreed to do specific work on behalf of Plaintiffs directly. As such, Plaintiffs fail to establish that they are entitled to relief as a third-party beneficiary on their breach of contract claim. Any such amended alleging the same would be futile.

Plaintiffs also seek to amend their complaint to add claims of fraudulent misrepresentation and silent fraud. In the proposed amended complaint, Plaintiffs allege that Defendant made false representations and failed to disclose regarding its experience in designing health care facilities. Plaintiffs claim that they relied on these representations and false impressions.

It is well-established that "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1).

The Michigan Court of Appeals has held:

> To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Michigan law is also clear that "to sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008) (emphasis in original), citing *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); and *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004).

In addition,

> To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013); quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008)

Plaintiffs' argument fails as a matter of law. Plaintiffs did not hire Defendant for their project, OYK did. Pursuant to their Complaint, Plaintiffs allege that "OYK selected and contracted with DesRosiers to be the project architect." (Complaint, at ¶ 38). Therefore, Plaintiff could not have relied on any representations or impressions that Defendants may have

made, as they were not the contracting parties. As a result, any amendment asserting claims of fraud are also futile.

Finally, Plaintiffs' seek to amend to include a claim against Defendant for promissory estoppel. Their proposed amendment fails as it is clearly contrary to the factual allegations in their Complaint. As stated above, OYK selected and hired Defendant. Additionally, the contract for the project was between OYK and Defendant. In the proposed amended complaint, however, Plaintiffs allege that *they hired* Defendant as the architect. Accepting all well-pled allegations as true, Plaintiffs claim for promissory estoppel appears to be a blatantly unfounded. Not only that, it is contrary to their argument seeking recovery as a third-party beneficiary to the OYK/DesRoisers contract - the same contract they now claim they are a party to.

Plaintiffs' claim for promissory estoppel would be so clearly unenforceable as a matter of law that any amendment would be futile, frivolous, and potentially subject to sanctions.

Based on the foregoing, Plaintiffs Motion for Leave to Amend is DENIED in its entirety.

Conclusion

Because Plaintiffs fail to establish a professional relationship with Defendant, they fail to establish that Defendant owed them a duty of care, and Defendants are entitled to judgment as a matter of law. As a result, Defendants' motion for summary disposition under MCR 2.116(C)(8) is GRANTED, and Plaintiffs' Complaint is DISMISSED. Further, Plaintiffs' motion to amend their Complaint is DENIED.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

June 5, 2019 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge