

8-31

SUPREME COURT - STATE OF NEW YORK
DCM PART - SUFFOLK COUNTY

P R E S E N T :

Motion Seq. 001
Motion RD: August 3, 2001
Mot Adj. Date: August 24, 2001
MD

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Hon. ROBERT W. DOYLE
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
Frederick McKenna,

Decision and Order

Plaintiffs,

-against-

Custom Homes by Michael Levine, LTD.,
Michael Levine, Individually and Jerold Axelrod,
Defendants.
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Plaintiff's Attorney
Eric J. Rotbard, Esq.
81 Main Street, Suite 205
White Plains, New York 10601

Attorney Defendant Custom Home & Levine
Levine Hoffstetter & Frangk
316 Main Mall
Poughkeepsie, New York 12601

Attorneys Defendant Axelrod
Milber, Makris Plousadis & Seiden, LLP
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Garden City, New York 11530

Upon the following papers numbered 1 to 7 read on this motion by Notice of Motion (001) and supporting papers Exhibits A-B and Memorandum of Law; Notice of Cross Motion (002) and supporting papers _____; Answering Affidavits in Opposition and supporting papers Plaintiff's 1-9 Exhibit A, Def't. Custom Homes 1-2 & unlabeled Exhibits; Aff. Ettari, Exhibit A and Replying Affidavits and supporting papers _____; Other _____;
it is

ORDERED application (001) by defendant Jerold Axelrod pursuant to CPLR §§3211(a)(7), for an Order dismissing the complaint for failure of the complaint to state a cause of action against defendant Axelrod, opposed by plaintiff; is carefully considered and decided as follows:

This action was commenced by the filing of a Summons and Verified Complaint April 9, 2001 in which it is asserted that on May 28, 1998, plaintiffs contracted with defendants Custom Homes by Michael Levine (hereinafter Custom Homes) and Michael Levine to build a single family premises at Lot 2, Pepper Hill Road, Town of Beakman, County of Dutchess, New York, and that these defendants contracted with defendant Jerold Axelrod, an architect, to design the architectural plans and other design documents related to construction of the premises. Upon taking occupancy of the premises on June 26, 1999, plaintiffs allege that the house was not complete, many items contracted for were not provided, cracks began to develop in the masonry of the fireplace, sheetrock on the walls and ceilings, causing plaintiffs to retain the services of a consulting engineering firm when Custom Homes and Levine failed to take any remedial action upon being

notified of the problems. It is asserted that there were extensive design and construction defects as well as violations of state laws, codes and regulations with regard to the design and construction of the premises. Defendant Axelrod now moves for dismissal of the complaint as to him pursuant to CPLR §3211(a)(7) premised upon the failure of the complaint to state a cause of action against him as Axelrod's only connection with this matter was the preparation of initial generic design plans licensed to HomeStyles from him and the selling of the plans which were not included as part of plaintiffs contract with Levine since they were purchased by Levine and sealed after plaintiff entered into their agreement with Levine in May, 1998. Defendant Axelrod acknowledges in his Memorandum of Law that plaintiffs have asserted causes of action for professional malpractice against him and a cause of action premised upon negligence against all defendants collectively, and further asserts there is no privity, or the functional equivalent of privity, between him and plaintiffs.

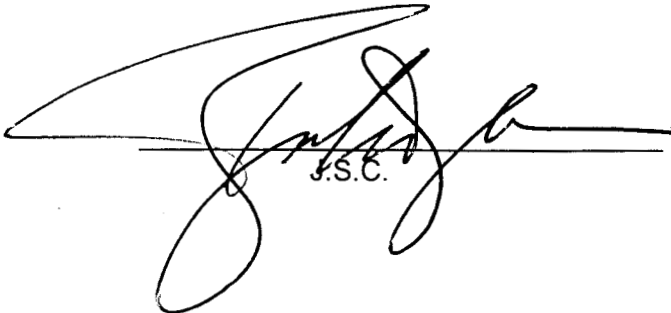
It is well settled that in response to a motion pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs, Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972. On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182. In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff, Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. State Educ. Dept., 116 A.D.2d 939, 498 N.Y.S.2d 516. Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature, Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 645-636, 389 N.Y.S.2d 314. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint, Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972., Thomas McGee v. City of Rensselaer, 663 N.Y.S.2d 949, 174 Misc.2d 491 (N.Y.Supp. 1997). In light of the foregoing, it is determined that the facts alleged in the complaint fit cognizable legal theories and causes of action upon which plaintiffs may proceed against defendant Axelrod for professional malpractice and negligence. Since the sole inquiry of this Court must be whether the facts alleged in the complain fit within any cognizable legal theory and not whether there is evidentiary support for the complaint, it is accordingly

ORDERED that application (00) by defendant Jerold Axelrod pursuant to CPLR §3211(a)(7) to dismiss plaintiff's complaint for failure to state a cause of action against defendant Axelrod is denied. It is further

ORDERED that the parties are directed to appear for a preliminary conference on September 7, 2001, Supreme Court, DCM Part, Griffing Avenue, Riverhead, New York, at 10 o'clock in the a.m. It is further

ORDERED that defendant shall serve a copy of this Order upon plaintiff within ten days of the date of this Order.

Dated: August 24, 2001



J.S.C.