

The ‘privity-like’ requirement for professional negligence and negligent misrepresentation claims

Thomas J. Hall and Judith A. Archer, *New York Law Journal* – December 15, 2022

As discussed in this article, determining whether a privity-like relationship is proven, or at the motion to dismiss stage adequately pleaded, is intensively fact-specific.

Claims for professional negligence and negligent misrepresentation generally require a showing of some type of privity between the plaintiff and defendant. Direct contractual privity, by which the plaintiff contractually retained the defendant to provide services, is the easiest to prove. Even without a contractual relationship, however, a plaintiff may still prevail on such claims by demonstrating the existence of a privity-like relationship. As discussed below, determining whether a privity-like relationship is proven, or at the motion to dismiss stage adequately pleaded, is intensively fact-specific.

Appellate precedent

It is well-established that a cause of action stemming from professional negligence will be dismissed when no privity of contract, or the functional equivalent thereof, exists between the parties. See *Walker v. Chiauzzi*, 57 A.D.3d 353, 1354 (3d Dep’t 2008). Professional malpractice actions can proceed without contractual privity “only if the parties share a ‘relationship so close as to approach that of privity.’” *Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 424 (1989).

In finding professional negligence where no contractual privity existed in the context of an accountant-non-client relationship, the New York Court of Appeals held that the accountant could be liable to the non-client where there is (1) a particular purpose for the accountants’ report, (2) a known relying third-party, and (3) some conduct on the part of the accountant linking them to that party. *Credit All. Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 (1985).

A claim for negligent misrepresentation requires a plaintiff to plead that: “(1) *the existence of a special privity-like relationship imposed a duty on the defendant to impart correct information to the plaintiff*; (2) the imparted information was actually correct; (3) the plaintiff reasonably relied on the information.” *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007) (emphasis added). Courts will find the first element satisfied if the record demonstrates the existence of “a relationship so close as to approach that of privity,” *Sykes v. RFD Third Ave. 1 Assocs., LLC*, 67 A.D.3d 162, 164 (1st Dep’t 2009), *aff’d*, 15 N.Y.3d 370 (2010), or, stated another way, the “functional equivalent of contractual privity.” *Ossining Union Free Sch. Dist.*, 73 N.Y.2d at 419.

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To satisfy this privity standard for negligent misrepresentation, the plaintiff needs to establish (1) an awareness by the maker of the statement (defendant) that the statement is to be used for a particular purpose; (2) reliance by a known party (the plaintiff) on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance. *Credit Alliance Corp.*, 65 N.Y.2d at 536-37.

Whether addressing professional negligence or negligent misrepresentation claims, courts tend to focus on whether the plaintiff was relying on the defendant-third party, who was providing the professional services or making the alleged misrepresentations, whether the defendant was aware of that reliance, and whether the plaintiff actually relied thereon. For example, in *Rides Unlimited of New York v. Engineered Energy Solutions*, 184 A.D.3d 695 (2d Dep't 2020), a plaintiff brought claims for professional malpractice and negligent misrepresentation against a defendant engineering firm hired by another. In affirming the dismissal of those claims, the court found it was not enough that the plaintiff's involvement in that project was known to the defendant. Instead, those claims failed because the defendant engineering company "did not engage in conduct linking it to the plaintiff or evincing its understanding of the plaintiff's reliance."

Commercial division application

In *85 Jane Realty v. Xhema of New York*, No. 650660/2022, 2022 WL 16856124 (N.Y. Co. Nov. 10, 2022), Justice Andrew Borrok of the New York County Commercial Division weighed whether to dismiss a professional negligence claim in a dispute involving a residential property development. The plaintiff real estate developer had hired defendant Xhema of New York (Xhema) as its construction manager for that project. Separately, the plaintiff retained Tectonic Engineering & Survey Consultants, P.C. to conduct project inspections. When the pile foundation section for the new building allegedly did not conform to the plans and specifications, the plaintiff brought suit against both Xhema and Tectonic.

In response, Xhema, as plaintiff's construction manager, brought cross-claims against Tectonic, plaintiff's special inspector, for professional negligence. Notably, while both had been retained by the plaintiff developer, no contractual relationship existed between Xhema and Tectonic. Tectonic moved to dismiss those claims asserting the absence of a privity-like relationship between it and Xhema.

In response, Xhema set forth a number of factors that, it argued, supported its allegations of a privity-like relationship: (1) Tectonic knew that Xhema would rely on Tectonic's engineering judgment as special inspector, (2) Xhema actually relied on Tectonic's reports, and (3) Tectonic was aware of such reliance. Xhema also relied on New York City Building Code §1704.1.1.2 (6), which set forth a special inspector's responsibilities and obligated a special inspector to report to the contractor any non-conformance with the project documents.

The court agreed with Xhema, finding the plaintiff had satisfied its burden at the motion to dismiss stage based on these allegations. The court appeared to place considerable weight on the fact that, under the Building Code, Tectonic "had a duty to inform the contractor when there [were] discrepancies between the inspected work and the approved construction documents," and the allegation that Tectonic provided regular reports to Xhema.

Board of Managers of 125 North 10th Condominium v. 125 North 10, No. 14982/2012, 2014 WL 223356 (Kings Co. Jan. 6, 2014), involved the sponsor defendants' development of a residential condominium project. In connection with that project, the sponsor defendants had disseminated an offering plan setting forth specific descriptions of the project. Following construction, the plaintiff board of managers brought suit alleging the sponsor defendants failed to deliver a building that conformed with the plans and specifications in the offering plan. In addition to suing the sponsor defendants, the plaintiff brought professional negligence and negligent misrepresentation claims against various construction professionals retained by the sponsor defendants, including their architectural firm.

Justice Carolyn Demarest of the Kings County Commercial Division observed that, to sustain a claim for professional malpractice, the plaintiff must demonstrate a "relationship approaching privity" and, for negligent misrepresentation, a "privity-like relationship." Finding that the complaint failed to adequately plead such, the court reasoned that "plaintiff fails to support, or even allege, facts that would establish that [defendant architect] was aware or intended that filings with the [Department of Buildings] would be relied upon by plaintiff, or that [defendant architect] evinced an understanding of plaintiffs' purported reliance." The court found the allegation that the plaintiff was a "known party" to the defendant alone to be inadequate. This case was markedly different from *Jane Realty* in which the cross-claim defendant sent reports to the cross-claimant on which the cross-claimant allegedly relied.

In *Willis Ave. Development v. Block 3400 Const.*, 984 N.Y.S.2d 635 (Kings Co. 2014), a real estate developer was developing a five-home project on a vacant lot on Staten Island. The developer entered into a contract of sale for that property in which it agreed to deliver to the purchaser all approvals required for that construction. The developer retained an architect to prepare the site plan for the project. The site plan was reviewed and certified by plaintiff's engineer, Lauria Associates, and filed with the Department of Buildings, which issued the required permits that the developer delivered to the purchaser.

Following the closing of that sale, the Department of Buildings issued a stop-work order on the basis that the site plan violated certain zoning regulations. The plaintiff purchaser brought against plaintiff's engineer Lauria a professional negligence claim, which the court found to be time-barred, and a claim for negligent misrepresentation, which the court found timely. In dismissing the latter claim on summary judgment, the court found that the second element of the *Credit Alliance* test, that Lauria knew that the purchaser intended to rely on its engineering work, was absent.

Claims for negligent misrepresentation were also made in *RKA Film Financing v. Kavanaugh*, No. 652592/2015, 2017 WL 2784999 (N.Y. Co. June 27, 2017). The plaintiff in that case loaned money to Relativity in connection with its release of major motion picture films. During the course of plaintiff's due diligence for that loan, various agents of Relativity, including its financial advisory firm, allegedly made a series of misrepresentations. The plaintiff later brought claims for negligent misrepresentations against those agents, with whom it had no contractual relationship. In dismissing those claims, Justice Charles E. Ramos of the New York County Commercial Division found the complaint failed adequately to plead a privity-like relationship. The court found the defendant's relationship with Relativity, alone, to be insufficient such that plaintiff's "reliance on the negligent misrepresentation is justified." The court held that defendant's "status as a non-executive director of Relativity, his prior investments in the corporation, or his relationship with Kavanaugh [one of Relativity's agents] are insufficient to put him in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified."

Conclusion

The lack of contractual privity does not necessarily preclude claims for professional negligence or negligent misrepresentation. Absent privity of contract, parties may still survive a motion to dismiss if they can demonstrate that there was a near-privity relationship, which is a very fact-specific determination. In analyzing whether a near-privity relationship exists, courts focus on the relationship between the plaintiff and defendant, the plaintiff's reliance on the defendant and, perhaps most importantly, the defendant's knowledge and understanding of that reliance by the plaintiff.



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US_46705 – 12/22