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Damages Available For Architectural Malpractice


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Historically, the damages available in actions against architects for malpractice differed depending on the theory of recovery. If the action was rooted in contract, damages were limited to the cost of correcting the defective condition; consequential damages, such as lost profits, might not be recoverable.[1] If the action was rooted in tort, evidence of lost profits was allowable,[2] provided the plaintiff suffered personal injury or property damage.[3] Because of the different categories of damages recoverable under each of the two theories, plaintiffs were required to plead their claims carefully in order to avoid the risk that they would not be able to recover a particular type of damage suffered.

Courts have since moved away from such strict application of the theories underlying architectural malpractice claims and toward the view that, because malpractice is a hybrid claim rooted in both contract and tort, damages available under either theory should be available to the malpractice plaintiff.

Historical Treatment of Claims

In 1977, the Court of Appeals addressed the distinction between architectural malpractice claims rooted in tort and those claims rooted in contract in *Sears, Roebuck & Co. v. Enco Associates Inc.*[4] The Court noted that all of an architect's obligations arise from the contract between the architect and the client because, without that contract, no services would have been performed nor any professional duties owed. Claims for breach of those obligations, while always arising from the contract, can be "verbalized as in tort for professional malpractice or as in contract for nonperformance of particular provisions of the contract[.]"[5] The theory behind the claim mattered, stated the Court, because it affected both the type of damages available and the applicable statute of limitations: a plaintiff bringing an architectural malpractice claim within the six-year statute of limitations for contract actions but outside the three-year limitations period for tort actions could recover only damages under the contract theory, because tort damages, such as lost profits (in appropriate circumstances), were barred by the limitations period.

For 20 years following *Sears, Roebuck*, plaintiffs strictly pleaded their claims to ensure that whatever damages they may have suffered from an architect's malpractice were recoverable under the appropriate theory of contract or tort.[6] In 1996, the state Legislature, through an amendment to CPLR Section 214(6), overruled *Sears, Roebuck's* holding that differing statutes of limitations governed the damages available in architectural malpractice suits grounded in tort instead of contract.[7]

This legislative action swept away the notion that tort damages were available only during a three-year limitations period but that contractual damages were available for six years. However, the amendment left open the question of whether, once that distinguishing feature (for statute of limitations purposes) between malpractice claims sounding in tort and those sounding in contract was removed, plaintiffs needed to continue to separate contract and tort theories in their malpractice claim or risk losing the ability to recover under both theories.

The Modern Method

Claims for professional malpractice generally assert either that a professional breached a contract by performing negligently or that the professional did not satisfy applicable professional standards of care. Courts have long recognized—and sometimes been confounded by the fact that—such malpractice claims lie within a borderland between tort and contract, which "make[s] their practical separation somewhat difficult."[8] However, since the rejection of *Sears, Roebuck*, courts have moved toward abandonment of any pretense of distinguishing between architectural malpractice claims sounding in tort and those sounding in contract.

The history of *Brushton-Moira Central School District v. Fred H. Thomas Assocs., P.C.*, a Third Department case affirmed by the Court of Appeals,[9] encapsulates this evolving view of architectural malpractice. The plaintiff in that case (Brushton) had engaged the defendant architectural firm to design the renovations for Brushton's high school building. Brushton's architect recommended that Brushton replace its glass windows with a certain brand of insulated panels, which should have conserved energy by reducing wintertime heat loss, and Brushton took the architect's advice. When the panels began to deteriorate within months of installation, Brushton sued the architect for both breach of contract and malpractice.

The *Brushton-Moira* trial court dismissed the plaintiff's malpractice claim because the plaintiff asserted only economic harms, but granted Brushton summary judgment on its breach of contract claim.[10] In upholding this finding, the Third Department stated that when the only damages the plaintiff seeks

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to recover are those available in contract, the plaintiff was not harmed by an order to proceed only on a breach of contract claim. Given that only a contract claim survived, the Third Department noted that the economic costs of repair or replacement were "an appropriate measure of damages" for the plaintiff's claim.[11] In other words, both the trial court and the Third Department found that the plaintiff's malpractice theory sounded in tort, but the plaintiff had failed to show tort damages, and thus recovery in malpractice was not available.

The case was then remanded for a trial on damages, and another appeal ensued over the issue of pre-judgment interest.[12] *Brushton-Moira* ultimately reached the Court of Appeals, which affirmed the breach of contract claim but described the claim in terms of the architect's professional duty of care:

> Initially, we reject defendant's claim that the Appellate Division erred in holding it liable for breach of contract…. [T]he plaintiff owner may introduce evidence, including expert testimony, to demonstrate that the architect failed to use due care in the performance of its contract obligations or that the architect's performance fell short of the applicable professional standards… We thus affirm on the liability issue.[13]

On the issue of damages the Court held:

> It has long been recognized that the theory underlying damages is to make good or replace the loss caused by the breach of contract (see, e.g., *Reid v. Terwilliger,* 116 N.Y. 530, 532, 22 N.E. 1091). Damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed (see, e.g., *Goodstein Corp. v. City of New York*, 80 N.Y.2d 366, 373, 590 N.Y.S.2d 425, 604 N.E.2d 1356; Haig, "Commercial Litigation in New York State Courts," §51.3[c], at 31 [4 West's New York Practice Series, 1995]; Restatement [Second] of Contracts §347, comment a; §344).[14]

The Court then concluded that the appropriate measure of damages is the cost to repair the defects, but noted that if the defects are not remediable, the loss of property value as a result of defendants' breach could be recovered. "This rule is merely a recognition of the precept that damages are intended to place the injured party in the same position as if there had been no breach."[15]

Inasmuch as Brushton recovered for breach of contract, the economic damages awarded are not surprising. However, the suggestion of the Court of Appeals that the breach of contract claim was, in essence, a malpractice claim for failure to perform the contract in accord with professional standards—that is, a malpractice claim sounding in tort—makes an award for purely economic loss peculiar, given the long-standing rule that purely economic losses are not recoverable in tort in the absence of personal injury or property damage.[16]

One way to understand *Brushton-Moira* is as an evolution in architectural malpractice theory: In 1993, the Third Department sharply delineated between contract and malpractice claims, but by 1998, the Court of Appeals treated the action as a hybrid and merged contract and tort theories.

This view of malpractice claims was embraced by the First Department in a 1999 case, *17 Vista Fee Associates v. Teachers Insurance & Annuity Association of America*.[17] In *17 Vista*, the trial court found that the plaintiff had no malpractice claim because it only alleged economic loss and no legal duty outside the contract was alleged to have been breached. The First Department rejected that finding, noting that "in claims against professionals, a legal duty independent of contractual obligations may be imposed by law as incident to the parties' relationship… for failure to exercise reasonable care[.]"[18] It was irrelevant that the plaintiff may not have suffered tort damages because the fact that it "suffered pecuniary losses only is of no significance in this malpractice claim against a professional" because "[m]any types of malpractice actions…will frequently result in economic loss only."[19] Thus, regardless of the underlying theory, both contract and tort damages were recoverable.

Conclusion

In the past, plaintiffs asserting architectural malpractice claims had to exercise care in pleading their claims, making sure to assert both contract and tort theories to ensure that both contract and tort damages would be available to them. Cases such as *Brushton-Moira* and *17 Vista* indicate that plaintiffs no longer need to expressly define the theory under which their malpractice claims are brought, and if the claim is properly pled and proven, they will be able to recover both contract and tort damages for architectural malpractice.

1. *Sears, Roebuck & Co. v. Enco Associates Inc.*, 43 N.Y.2d 389, 397 (1977).
2. Id.
3. See *532 Madison Ave. Gourmet Foods Inc. v. Finlandia Center Inc.*, 96 N.Y.2d 280 (2001).
4. 43 N.Y.2d 396-397.
5. Id.
6. See, e.g., *Rothberg v. Reichelt,* 293 A.D.2d 948 (3d Dept. 2002) (in action for breach of contract and architectural malpractice, plaintiff only proved contractual damages, not tort damages, and thus tort remedy of apportionment among defendants was inappropriate); *Bd. of Educ. of Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 125 A.D.2d 27, 30 (3d Dept. 1987) ("there are no remedies afforded under the law of torts where a plaintiff's claim is… solely for the benefit of the bargain, economic loss damages arising from a breach of contract"); *Lake Placid Club Attached Lodges v. Elizabethtown Builders Inc.*, 131 A.D.2d 159, 162 (3d Dept. 1987) ("direct and consequential nonaccidental economic loss" has "no recovery in negligence"); *N.R.S. Constr. Corp. v. Bd. of Educ., Cent. Sch. Dist. No. 2*, 82 A.D.2d 876 (2d Dept. 1981) (where action against architect asserted alternative claims of breach of contract and malpractice, a question of fact existed as to the completion of the project and thus the accrual of the claims, and thus court could not dismiss damages under either claim without trial); *Hotel Utica Inc. v. Ronald G. Armstrong Engineering Co.*, 62 A.D.2d 1147 (4th Dept. 1978) (in action against architect for breach of contract and negligence, addressing whether trial court properly dismissed contract claim because the action was for malpractice).
7. See *Chase Scientific Research v. NIA Group*, 96 N.Y.2d 20, 27 (2001) ("in response to Sears and its progeny, the Legislature amended 214(6) to clarify that the limitations period in nonmedical malpractice claims is three years, whether the underlying theory is based in contract or tort") (quotation marks and citations omitted).
8. *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 550-51 (1992) (quoting *Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 390 (1882); additional citations omitted)
9. *Brushton-Moira Cent. Sch. Dist. v. Alliance Wall Corp.*, 195 A.D.2d 801 (3d Dept. 1993), modified sub nom by *Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C.*, 230 A.D.2d 228 (3d Dept. 1997), aff'd as modified, 91 N.Y.2d 256 (1998).
10. 195 A.D.2d at 801-02.
11. 195 A.D.2d at 803.
12. 230 A.D.2d at 229.
13. 91 N.Y.2d at 260-61.
14. 91 N.Y.2d at 262.
15. 91 N.Y.2d at 263.
16. *532 Madison Ave. Gourmet Foods Inc. v. Finlandia Center Inc.*, 96 N.Y.2d 280 (2001).
17. 259 A.D.2d 75 (1st Dept. 1999).
18. 259 A.D.2d at 82-83.
19. 259 A.D.2d at 83 (quotation marks, alteration, and citation omitted).