

***Dormitory Auth. of the State of N.Y. v Samson Constr. Co.***

Court of Appeals of New York

February 15, 2018, Decided

No. 8

**Reporter**

2018 N.Y. LEXIS 218 \*; 2018 NY Slip Op 01115 \*\*

[\*\*1] Dormitory Authority of the State of New York, et al., Respondents, v Samson Construction Co., & c., et al., Defendants, Perkins Eastman Architects, P.C., Appellant. (And other actions)

**Notice:** THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

**LexisNexis® Headnotes**

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Incidental Beneficiaries

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

**[HNI](#) Types of Third Party Beneficiaries, Incidental Beneficiaries**

A third party may sue as a beneficiary on a contract made for its benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular

contracts. The cases have sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was an intent to permit enforcement by the third party.

Business & Corporate

Compliance > ... > Contracts Law > Types of Contracts > Construction Contracts

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Incidental Beneficiaries

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

**[HN2](#) Types of Contracts, Construction Contracts**

With respect to construction contracts, the cases have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party to enforce a promisee's contract with another. In the absence of express language, such third parties are generally considered mere incidental beneficiaries. This rule reflects the particular nature of construction contracts and the fact that there are often several contracts between various entities, with performance ultimately benefitting all of the entities involved. Although the

performance of a construction-related contract may benefit a third-party end-user, that does not in itself establish enforcement rights in that third party.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Malpractice & Professional Liability > Professional Services

### [HN3](#) [↓] **Types of Losses, Economic Losses**

A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. Put another way, where the damages alleged were clearly within the contemplation of the written agreement, merely charging a breach of a duty of due care, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim. A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Several types of defendants — including professionals — can be held liable in tort for failure to exercise reasonable care, irrespective of their contractual duties. In certain circumstances, this independent duty has been imposed based on the nature of the services performed and the defendant's relationship with its customer — specifically, where the defendant performs a service affected with a significant public interest and where the failure to perform the service carefully and competently can have catastrophic consequences. To determine whether a tort claim lies, courts have also evaluated the nature of the injury, how the injury occurred and the harm it caused. However, where the plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Malpractice & Professional

Liability > Professional Services

### [HN4](#) [↓] **Types of Losses, Economic Losses**

When the rights and obligations of an owner and architect arise out of their contractual relationship, the owner may sue in contract or tort and the scope of evidence admissible on the issue of liability under either theory is the same. A plaintiff fails to state a malpractice cause of action against an architect where the plaintiff seeks only economic damages which are recoverable under a breach of contract cause of action. Clearly, there are circumstances where a professional architect may be subject to a tort claim for failure to exercise due care in the performance of contractual obligations. In seeking to disentangle tort and contract claims, the case law has focused both on potential catastrophic consequences of a failure to exercise due care and on the nature of the injury, the manner in which it occurred, and the resulting harm. A distinction has been drawn between the situation where the harm was an abrupt, cataclysmic occurrence not contemplated by the contracting parties and one where the plaintiff was essentially seeking enforcement of contract rights.

**Counsel:** [\*1] Mark C. Zauderer, for appellant.

Benjamin Welikson, for respondents.

**Judges:** DiFIORE, Chief Judge. WILSON, J. (dissenting in part). RIVERA, J. (dissenting).

**Opinion by:** DiFIORE

### **Opinion**

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DiFIORE, Chief Judge:

The two questions on this appeal are whether plaintiff City of New York (the City) is an intended third-party beneficiary of the architectural services contract between plaintiff Dormitory Authority of the State of New York (DASNY) and defendant Perkins Eastman Architects, P.C. (Perkins) and

whether DASNY's negligence claim against Perkins is duplicative of its breach of contract claim. We hold that summary judgment should have been granted in defendant Perkins' favor on both issues.

This action arose out of a construction project to build a forensic biology laboratory at 26th Street and First Avenue in Manhattan, adjacent to Bellevue Hospital, for use by the Office of the Chief Medical Examiner (OCME). The City (on behalf of OCME) and DASNY entered into a Project Management Agreement (PMA), which provided that DASNY would finance and manage the design and construction of the laboratory (the Project). DASNY was authorized to enter into contracts with the necessary contractors and consultants including, as relevant [\*2] here, the architect, Perkins.

Pursuant to the contract between DASNY and Perkins (the Perkins Contract), Perkins was to provide design, architectural, and engineering services for the Project and supervise its construction. Perkins was also responsible for providing a site plan for the location of the laboratory in relation to the hospital. The contract further provides that Perkins would "indemnify and hold harmless" DASNY and the "Client" (that is, OCME, and the NYC Police and Fire Departments) from any claims arising out of Perkins' negligent acts or omissions and that extra costs or [\*\*2] expenses incurred by DASNY and the Client as a result of Perkins' "design errors or omissions shall be recoverable from [Perkins] and/or its Professional Liability Insurance carrier."

Pursuant to a separate contract, DASNY retained Samson Construction Co. (Samson), which is not a party to this appeal, as the contractor to provide excavation and foundation work for the Project. Significantly, the contract executed between DASNY and Samson provides that the Client — i.e., the City — "is an intended third party beneficiary of the Contract for the purposes of recovering any damages caused by [Samson]."

Although [\*3] there are passing references to the Client in the Perkins Contract, no analogous language providing that the City is an intended third-party beneficiary appears there.

Work began on the foundation in May 2002, but the failure to properly install an excavation support system led to substantial damage and delays. In particular, this failure caused the adjacent C & D building on the Bellevue campus to "settle" by as much as eight inches, damaged other adjacent structures (including sidewalks, sewers and water mains), and required emergency repairs. These issues caused the Project to be delayed by more than 18 months at an additional cost of \$37 million dollars.

Plaintiffs commenced this action against Samson in August 2006. Perkins was added as a defendant in February 2007 through the filing of a supplemental summons and complaint, which contained two causes of action against Perkins — one alleging breach of contract and the other alleging negligence. The breach of contract claim alleges that Perkins breached the contract by:

"failing to provide adequate designs for the Project, by failing to properly supervise the subcontractors and subconsultants that it retained with regard to the Project, [\*4] by failing to monitor the progress of the Work to ensure that it was being completed properly and in substantial compliance with the design recommendations, specifications and their intent, by failing to ascertain the actual field conditions, including the subsurface conditions at the Site and the foundations beneath [the C & ]D Building and by failing to advise DASNY of the risks to the [C & ]D Building posed by the installation of the [excavation support system] and taking precautions against such risks."

The allegations set forth in the negligence cause of action are virtually identical in every respect, but with an introductory phrase that references Perkins' failure "to comply with professional standards of care" instead of breach of contract. The damages for both claims are described as the "significant

additional expenses" necessary to complete the project. Although the complaint's ad damnum clause states a figure for Perkins' negligence that is \$4 million dollars higher than for its breach of contract, there is no basis given for the additional amount. During early discovery, plaintiffs produced a binder and provided testimony showing that the total cost of fixing the damage [\*5] was approximately \$37 million, including repairs to the project site and the adjacent structures, with no distinction drawn between the two claims.

Perkins moved for summary judgment to dismiss the City's breach of contract and negligence claims and to dismiss DASNY's negligence claim as duplicative of its breach of contract claim. Supreme Court granted the motion in part, dismissing the City's breach of contract and negligence claims. The court held that the City was not an intended third-party beneficiary of the Perkins Contract and that the City's claim for simple negligence was therefore time-barred. The court allowed both of DASNY's claims to proceed, finding that its negligence claim was not duplicative of its contract claim.

The Appellate Division modified by denying Perkins' motion for summary judgment on the City's breach of contract claim and, as so modified, affirmed ([137 AD3d 433, 27 N.Y.S.3d 114 \[1st Dept 2016\]](#)). The Court held that the City had raised an issue of fact whether it was an intended third-party beneficiary of the parties' contract. The Court also denied Perkins' motion for summary judgment to dismiss DASNY's negligence claim as duplicative of its breach of contract claim. The Court held there was an issue [\*6] of fact whether Perkins assumed a duty of care to perform in accordance with professional standards that was independent of its contractual obligations.

One Justice dissented in part, and would have dismissed DASNY's negligence claim as duplicative. The Appellate Division granted Perkins' motion for leave to appeal to this Court, certifying the following question: "Was the order of

this Court, which modified the order of Supreme Court, properly made?" We answer the certified question in the negative.

### *Intended Third*

### *Party Beneficiary*

[HNI](#) [↑] "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" ([Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 655, 357 N.E.2d 983, 389 N.Y.S.2d 327 \[1976\]](#) [citations omitted]). We have previously sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was "an intent to permit enforcement by the third party" ([Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 45, 485 N.E.2d 208, 495 N.Y.S.2d 1 \[1985\]](#)).

[HN2](#) [↑] With respect to construction contracts, we have generally required [\*7] express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party "to enforce [a promisee's] contract with another" ([Port Chester, 40 NY2d at 656](#)). In the absence of express language, "[s]uch third parties are generally considered mere incidental beneficiaries" ([40 NY2d at 656](#)). This rule reflects the particular nature of construction contracts and the fact that — as is the case here — there are often several contracts between various entities, with performance ultimately benefitting all of the entities involved.

Here, the parties were aware that the laboratory was being built for OCME's use. However, neither ground set out in *Fourth Ocean* exists for finding

the City an intended third-party beneficiary (see [66 NY2d at 45](#)). As to the first ground, the City is not the only entity that can recover under the Perkins Contract; indeed, DASNY — the contracting party — has brought its own breach of contract claim. As to the second ground, the Perkins Contract does not expressly name the City as an intended third-party beneficiary nor authorize the City to enforce any obligations thereunder; in contrast, the contract between DASNY and Samson expressly reserves third-party enforcement [\*8] rights to the City. Notably, the Restatement uses a fact pattern that is nearly identical to this one to provide an illustration of an incidental (as opposed to intentional) third-party beneficiary — recognizing the fact that, although the performance of a construction-related contract may benefit a third-party end-user, that does not in itself establish enforcement rights in that third party (see Restatement [Second] of Contracts § 302, Comment e, Illustration 19). The City fails to raise an issue of fact concerning its status as a third-party beneficiary and Perkins' motion for summary judgment on this issue should have been granted.

#### *Duplicative Negligence Claim*

"It is a well-established principle that [HN3](#) [↑] a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, [70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 \[1987\]](#)). Put another way, where the damages alleged "were clearly within the contemplation of the written agreement . . . [m]erely charging a breach of a duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim ([70 NY2d at 390](#)).

We have also recognized that "[a] legal duty independent of contractual [\*9] obligations may be imposed by law as an incident to the parties' relationship" and that several types of defendants — including professionals — can be held liable in

tort "for failure to exercise reasonable care, irrespective of their contractual duties" (*Sommer v Federal Signal Corp.*, [79 NY2d 540, 551, 593 N.E.2d 1365, 583 N.Y.S.2d 957 \[1992\]](#)). In certain circumstances, this independent duty has been imposed based on the nature of the services performed and the defendant's relationship with its customer — specifically, where the defendant "perform[s] a service affected with a significant public interest [and where the] failure to perform the service carefully and competently can have catastrophic consequences" ([79 NY2d at 553](#)). To determine whether a tort claim lies, we have also evaluated the nature of the injury, how the injury occurred and the harm it caused (see [79 NY2d at 552](#)). However, we have made clear that "where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory" ([79 NY2d at 552](#)).

Here, the negligence allegations in the complaint are, as we held in *Clark-Fitzpatrick*, "merely a restatement, albeit in slightly different language, of the implied' contractual obligations asserted in the cause of action for breach of contract" ([70 NY2d at 390](#)). Indeed, as noted [\*10] above, in this case, the factual allegations set forth in each cause of action are identical, except that the negligence claim is framed in terms of Perkins' failure to comply with professional standards of care. Moreover, despite the fact that the complaint seeks an additional unspecified \$4 million in damages under the negligence cause of action, it fails to include a single allegation that contains any distinction between the damages applicable to either claim. The only damages alleged under either theory of recovery are the additional expenses required to complete the project, including the costs to repair the damage to adjacent structures. Significantly, in the contract itself, the parties contemplated Perkins' responsibility for additional costs or expenses incurred by DASNY or the Client (in effect, the City) as a result of the architect's design errors or omissions, and addressed it in the contract terms. Likewise, during discovery, the total amount of

damages was detailed by DASNY, with no distinction between the "additional expenses" incurred based on one claim or the other.

The cases relied upon by the dissent — [Santulli v Englert, Reilly & McHugh](#) (78 NY2d 700, 586 N.E.2d 1014, 579 N.Y.S.2d 324 [1992]), [Sears, Roebuck & Co. v Enco Assoc.](#) (43 NY2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 [1977]) and [Robins v Finestone](#) (308 NY 543, 127 N.E.2d 330 [1955]) — are inapposite. Each of those cases was focused on what [\*11] statute of limitations applied to a given claim. In none of them did the defendant argue, as Perkins does here, that the tort claim should be dismissed on summary judgment because it was wholly duplicative of the contract claim in both its allegations and the specific damages sought.

There is nothing in *Sears* to suggest that a completely duplicative professional malpractice claim (identical in nearly every respect to the owner's contract claim) should be permitted to proceed against an architect simply because the defendant is an architect. [Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C.](#) (91 NY2d 256, 692 N.E.2d 551, 669 N.Y.S.2d 520 [1998]) makes that clear. In *Brushton-Moira*, we reiterated the holding in *Sears* that [HN4](#) [↑] "when the rights and obligations of an owner and architect arise out of their contractual relationship, the owner may sue in contract or tort and the scope of evidence admissible on the issue of liability under either theory is the same" (91 NY2d at 260-261 [emphasis added]). Indeed, in *Brushton-Moira*, the Supreme Court held, and the Appellate Division affirmed, that the "plaintiff failed to state a malpractice cause of action [against the architect] because plaintiff sought only economic damages which are recoverable under the breach of contract cause of action" (91 NY2d at 260).

Clearly, there are circumstances [\*12] where a professional architect may be subject to a tort claim for failure to exercise due care in the performance of contractual obligations. In seeking

to "disentangle tort and contract claims," we focused in *Sommer* both on potential catastrophic consequences of a failure to exercise due care and on the nature of the injury, the manner in which it occurred, and the resulting harm (79 NY2d at 552). We distinguished between the situation where the harm was an "abrupt, cataclysmic occurrence" not contemplated by the contracting parties and one where the plaintiff was essentially seeking enforcement of contract rights (79 NY2d at 552). Here, the C & D building settled during the course of several months, damaging adjacent structures. However, even if any "abrupt" or "catastrophic" consequences either could have or did result from Perkins' alleged negligence, the fact remains that the only damages alleged appear to have been within the contemplation of the parties under the contract — and, indeed, as set forth above, are identical for both claims. Put another way, there was no injury alleged here that a separate negligence claim would include that is not already encompassed in DASNY's contract claim. In these circumstances, [\*13] DASNY "is essentially seeking enforcement of the bargain, [and] the action should proceed under a contract theory" (*Sommer*, 79 NY2d at 552). Thus, we hold that the negligence claim is duplicative of the breach of contract cause of action and Perkins' motion for summary judgment to dismiss that cause of action should have been granted.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant Perkins' motion insofar as it sought summary judgment dismissing the fifth cause of action for breach of contract and dismissing the sixth cause of action for negligence should be granted, and the certified question should be answered in the negative.

**Dissent by:** WILSON (In Part); RIVERA

## **Dissent**

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WILSON, J. (dissenting in part):

I agree with the majority that the City may not sue Perkins for breach of the DASNY-Perkins contract on the theory that the City is an intended third-party beneficiary of that contract, to which it is not a party<sup>1</sup> However, I disagree with the determination that DASNY cannot maintain its sixth cause of action. The claim is one for professional malpractice, not ordinary negligence. We have held that professionals have an independent duty to perform within professional standards of care, [\*14] regardless of any contractual duties, and that injured plaintiffs may maintain both professional malpractice and breach of contract claims against them. Of course, DASNY cannot double-recover for its losses, but it is entitled to pursue both its claims for breach of contract and professional negligence.

New York recognizes a distinct claim for professional malpractice and allows parties to pursue simultaneously a professional malpractice claim and a breach of contract claim (see [\*15] [Santulli v Englert, Reilly & McHugh](#), 78 NY2d 700, 586 N.E.2d 1014, 579 N.Y.S.2d 324 [1992]); [Sears, Roebuck v Enco](#), 43 NY2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 [1977]; see also [Robins v Finestone](#), 308 NY 543, 127 N.E.2d 330 [1955]). That is because, as the majority recognizes, a tort claim may be maintained in addition to a contract claim where there is a "breach of a legal duty independent of the contract" (see [Sommer v Federal Signal Corp.](#), 79 NY2d 540, 551, 593 N.E.2d 1365, 583 N.Y.S.2d 957 [1992]). Such an independent legal duty "may be imposed by law as an incident to the parties' relationship.

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<sup>1</sup> Here, the City and DASNY are highly sophisticated parties. As described in its brief, DASNY's *raison d'être* is "to help finance and construct public projects for New York's higher education, health care, and public institutions." In the contract between DASNY and the general contractor, Samson, DASNY and the City specifically provided that the City could sue for breach, but in the DASNY contract with Perkins, DASNY and the City omitted any such right. Those facts weigh very heavily here; I do not take our decision to suggest that, absent the sophistication of the parties or the clear difference in the City's right to sue under contracts concerning a single project, dismissal would nevertheless have been proper.

Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*id.*). Under the clear language of *Sommer*, architects, by their status as professionals, have the requisite independent legal duty. Of course, a contract might incorporate that duty and the standards of professional negligence, and might or might not include other requirements. Whether the contract includes terms beyond the duty of care owed by a professional in the field, a plaintiff can elect to bring a claim for professional malpractice, breach of contract, or both.

In *Santulli*, we reversed the Appellate Division's grant of summary judgment on plaintiff's breach-of-contract claim, allowing him to proceed at trial on both a legal malpractice and a breach-of-contract claim arising from the same alleged misfeasance, rejecting [\*16] defendant's argument that a breach-of-contract action may lie against a professional only where "there is either a specific promise by the attorney to perform and there is a complete failure of any performance or where the attorney has undertaken a specific task and has failed to perform that task" (78 NY2d at 706). In *Sears, Roebuck*, although the case came to us on a motion to dismiss, not a motion for summary judgment, we held that "inasmuch as the relationship between Sears, Roebuck as property owner and Enco Associates as architects had its genesis in the contract between them . . . the owner may recover contract damages against the architects either on the theory of breach of a particular contract provision or on the theory of failure to exercise due care in the performance of the contract services" (43 NY2d at 392-393).

Contrary to the majority's contention, [Brushton-Moira Cent. School Dist. v Thomas Assoc.](#) (91 NY2d 256, 692 N.E.2d 551, 669 N.Y.S.2d 520 [1998]) has nothing to do with a plaintiff's ability to bring both claims simultaneously. The sole issue in that case [\*\*3] was whether damages should be measured at the time of breach or the time of trial. Moreover, the majority mischaracterizes the

Appellate Division's decision in that case. The Appellate Division did not hold — or even suggest — that a party may [\*17] not simultaneously pursue both a malpractice claim and a contract claim through the conclusion of trial. Instead, the plaintiff in *Brushton-Moira* had pursued both such claims through trial. Supreme Court denied recovery to the plaintiff on both theories. The Appellate Division reversed and awarded judgment to the plaintiff on its contract claim, and held that, because the proof and damages on the malpractice claim were identical, the plaintiff was not aggrieved by Supreme Court's dismissal of the malpractice claim, because recovery on the contract claim fully compensated the plaintiff ([195 AD2d 801, 801-802, 600 N.Y.S.2d 511 \[3d Dept 1993\]](#); see [Parochial Bus Sys., Inc. v Bd. of Educ. of City of New York, 60 NY2d 539, 544, 458 N.E.2d 1241, 470 N.Y.S.2d 564 \[1983\]](#) ["Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal"]). Thus, *Brushton-Moira* supports DASNY's ability to pursue both theories through the completion of trial, and certainly contains no implication that a pretrial dismissal on the ground of duplication is appropriate. Today's decision cannot be squared with our prior precedents.

The majority also misapplies *Sommer* by confusing the test that applies when a plaintiff seeks to maintain a claim for ordinary negligence — not professional [\*18] negligence — alongside a claim for breach of contract. Because no professional, and hence no special standard of care, is involved, we have refused to let a plaintiff proceed simultaneously with both when the gravamen is essentially for breach of contract, relegating the plaintiff to its contract claim alone, unless the alleged breach affects a significant public interest and failure to perform the service carefully could have catastrophic consequences (see [Sommer at 552-553](#)). The "public interest" and "catastrophic consequences" analyses apply only to ordinary negligence claims that duplicate contract claims,

not to professional malpractice claims<sup>2</sup> In professional malpractice cases, the independent legal duty is established by law; there is no need to search further for one, and it exists independent of any contract. So long as that duty is asserted by the plaintiff, he or she can maintain both contract and professional malpractice causes of action. Here, DASNY asserts that Perkins failed to comply with professional standards of care. Because of its status as an architect, Perkins has an independent legal duty to comply with those professional standards, contract or no, and without any application [\*19] of the public interest/catastrophic consequences test. DASNY's alleged damages on each claim are the same \$37 million. It cannot recover \$74 million even if successful on both the contract and malpractice claims, but under our prior caselaw, it is free to pursue both theories to judgment. Accordingly, I dissent from the dismissal of DASNY's malpractice claim against Perkins.

RIVERA, J. (dissenting):

Defendant Perkins Eastman Architects P.C. is not entitled to summary judgment. Material issues of fact, which should go to the jury, exist as to whether plaintiff City of New York (City) is a third-party beneficiary of [\*\*4] defendant's contract with plaintiff Dormitory Authority of the State of New York (DASNY), and with respect to DASNY's tort claim for professional malpractice. The [\*20] Appellate Division thus correctly determined that summary judgment was unwarranted, and we should answer the certified question in the affirmative.

The drastic remedy of summary judgment may only be granted where, viewing the facts in the light

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<sup>2</sup> [Clark-Fitzpatrick, Inc. v Long Is. R.R. Co. \(70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 \[1987\]\)](#), does not support the majority's position. In that case, we held that the plaintiff could not maintain its negligence claims against the Long Island Railroad Company because "plaintiff has not alleged the violation of a legal duty independent of the contract" (*id.* at 390). The defendant in *Clark-Fitzpatrick* was not a professional, and therefore only a claim of ordinary negligence, not professional malpractice, was at issue.

most favorable to the non-movant, "the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact," and the non-moving party has subsequently "fail[ed] to establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 [2012] [citations omitted]). When deciding such a motion, "the court's role is limited to issue finding, not issue resolution" (*Kriz v Schum*, 75 NY2d 25, 33, 549 N.E.2d 1155, 550 N.Y.S.2d 584 [1989]). Summary judgment disposition is inappropriate where varying inferences may be drawn, because in those cases it is for the fact finder to weigh the evidence and resolve any issues necessary to a final conclusion (see *id.* at 33-34).

With respect to the City's claim, the majority's standard is perilously close to requiring that a contract expressly name a nonparty as a third-party beneficiary. Yet this is not the law. A nonparty that "is not a stranger to the contract," and whose relationship with the defendant is the "functional equivalent of privity," [\*21] may assert a breach (see *Town of Oyster Bay v Lizza Industries, Inc.*, 22 NY3d 1024, 1030, 981 N.Y.S.2d 643, 4 N.E.3d 944 [2013], quoting *District of City of Newburgh v Hugh Stubbins & Associates, Inc.*, 85 NY2d 535, 538-539, 650 N.E.2d 399, 626 N.Y.S.2d 741 [1995]; see also § 8:11 Enforcement of the contract - Third-party beneficiary, 28 NY Prac, Contract Law § 8:11; 22 NY Jur 2d Contracts § 303). Here, the Appellate Division properly concluded an issue of fact exists as to whether the City is an intended third-party beneficiary of the DASNY-Perkins contract, because "[t]he contract expressly states that a city agency will operate the DNA laboratory, and the City retained control over various aspects of the project, including participation in and approval of the design of the building, the budget for the project, the selection of contractors, including Perkins, and the construction of the building" (*Dormitory Auth. of State v Samson Const. Co.*, 137 AD3d 433, 434, 27 N.Y.S.3d 114 [1st Dept 2016]).

I would add that DASNY is a "public benefit corporation," whose stated mission, helping finance and construct public projects, and established role, serving as project manager for government entities on projects similar to the City's DNA lab, suggest Perkins understood the real beneficiary was DASNY's named governmental client: the City. The contract also stipulated that the City was an insured on Perkins' general liability insurance policy, and that in the case of litigation Perkins would "indemnify and hold harmless [DASNY and] the Client . . . against [\*22] all claims arising out of the negligent acts, alleged negligent acts, or failure to act, by [Perkins]." Given that these contractual provisions suggest Perkins knew the City was the project's intended beneficiary, questions of fact foreclose the drastic remedy of summary judgment.

With respect to DASNY's professional malpractice claim, the majority misreads our case law. In *Sommer v Federal Signal Corp.*, this Court stated that professionals "may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (79 NY2d 540, 551, 593 N.E.2d 1365, 583 N.Y.S.2d 957 [1992] [internal citations omitted]). Thus, for the reasons thoroughly discussed in Judge Wilson's dissent, in which I join, summary judgment dismissing that cause of action should not have been granted.

Order reversed, with costs, and defendant Perkins Eastman Architects, P.C.'s motion, insofar as it sought summary judgment dismissing the fifth cause of action for breach of contract and dismissing the sixth cause of action for negligence, granted and certified question answered in the negative. Opinion by Chief Judge DiFiore. Judges Stein, Fahey, Garcia and Feinman concur. Judge Wilson dissents in part in an opinion, in which Judge Rivera [\*23] concurs in part in a separate dissenting opinion.

Decided February 15, 2018