ARGUMENTS IN SUPPORT OF DESIGN PROFESSIONAL'S REQUEST FOR A VOLUNTARY DISCONTINUANCE OR MOTION TO DISMISS

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Shortly after the commencement of a lawsuit against a design professional, the design professional and their counsel have an opportunity to discuss the project at issue, liability exposure of the various parties, damages, and defenses available to the design professional. During such discussions, it is often determined that viable defenses exist sufficient to support a request for a voluntary discontinuance of all claims against the design professional or, if necessary, a motion to the Court seeking dismissal of such claims.

In those instances where it is agreed between the design professional and their counsel that there exist sufficient grounds to pursue a voluntary discontinuance or motion to dismiss, the following is a list of potential arguments to be set forth in support of the requested relief:

1. Design Professional Owed No Duty to Plaintiff:
In order to successfully plead and prove a cause of action for negligence against a design professional, the plaintiff must establish the existence of a duty on the part of the design professional to the plaintiff. Further, absent an explicit duty in the contract, an architect or engineer is not liable to third parties with respect to construction services unless the architect or engineer has been affirmatively negligent. An example of a lack of duty owed by the design professional to plaintiff at a project often involves the

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situation where a worker [plaintiff] is injured while performing services at the project. Significantly, often is the case where the design professional was not retained to perform, nor did it perform, any services at the project involving direction, supervision or control of the means and methods of construction implemented by the workers, or for site safety. Therefore, if no such services were required by the design professional, or actually performed by the design professional, an argument may be made that the design professional owed no duty to the plaintiff and as such there can exist no negligence on behalf of the design professional toward the plaintiff.

2. Lack of Proximate Cause:
Often a design professional may argue that the services they performed at a project, or the failure to perform certain services, played no role in causing the injury or damage claimed by the plaintiff. In such circumstances, an argument may be made that the lack of proximate cause between the design professional's actions or inaction, and the plaintiff's claimed incident, precludes the plaintiff from pursuing a negligence claim against the design professional.

3. Lack of Contractual Privity:
To hold an architect or engineer liable for injuries or damages to a third party, with whom the design professional had no contract, the Courts routinely hold that there must exist a relationship between the design professional and the third party (i.e., an injured construction worker) that is either contractual privity or so close as to be the functional equivalent of privity, in order for a duty running from the design professional to the plaintiff to exist. Therefore, if there is no contract between the plaintiff and the design professional, as is often the case when the design professional contracts with the owner of a building and the plaintiff is an injured employee of one of the contractors, and there is no duty owed to the plaintiff by the design professional based on the design professional's scope of services at the project, an argument may be made that a voluntary discontinuance or dismissal of such claims is appropriate.

4. Design Professional is Not Within the Class of Persons to be Held Liable Under the Labor Law:
In New York, and other jurisdictions, the Labor Law is quite specific as to who is to be held responsible for injuries and damages resulting at a project. For example, under New York Labor Law §241(6), liability may exist on the part of the owner, lessee, or agent at a project. Notably, the Courts in New York have held that those who perform solely architectural services, and not that of an owner or a contractor, cannot be held liable

under New York Labor Law §241(6). It has also been held by the Courts that New York Labor Law §241(6) and §200 may not serve as a basis for imposing liability against a project architect as an "agent" of the owner, unless the project architect controls and supervises the work or has the authority to direct construction procedures or safety measures implemented at a project. As such, while a design professional may perform certain services at a project, those services may not result in the design professional being identified within the class of persons who may be held liable under the Labor Law. Therefore, an argument may be made that such claims should be voluntarily discontinued or, if necessary, dismissed by the Court.

5. Plaintiff Failed to Establish a Triable Issue of Fact against the Design Professional:

Unless the plaintiff has established through evidentiary proof that a genuine issue of fact exists with respect to the material issues in the case against a design professional, the Courts have routinely held that dismissal of claims is appropriate. Therefore, when a design professional provides the Court with sufficient evidence to demonstrate that there exists no such material issue of fact, the burden then shifts to the plaintiff who is opposing the motion to produce such proof in order to establish the existence of material issues of fact requiring a trial. Notably, the Courts have also routinely held that a plaintiff's unsubstantiated allegations or mere speculation and conclusions are insufficient to raise a necessary triable issue of fact to pursue a claim against a design professional. As such, an argument may exist that no triable issue of fact exists when the design professional can establish that they had no relationship with the plaintiff, contractual or otherwise, and did not assume any such relationship with respect to the services performed by the design professional at a project.

6. Failure to State a Cause of Action:

The Courts have held that absent active wrongdoing by an architect or engineer, or an express contractual duty which was breached causing damages, as a matter of law an architect or engineer cannot be found liable for property damage or personal injury to a third-party in negligence. Therefore, if a plaintiff is injured at a worksite and a design professional was under no obligation to direct, supervise or control the work performed by the contractors or for site safety, and has otherwise not been affirmatively negligent in the performance of its services, thereby resulting in plaintiff's claimed damages an argument may be made by the design professional that the plaintiff has failed to state a cause of action against the design professional in negligence.

CONCLUSION

While the above list of grounds supporting a request for a voluntary discontinuance or, if necessary, a motion to dismiss is extensive it is by no means exhaustive. Rather, a design professional should discuss these potential defenses as well as any others that may exist with their legal counsel during the early stages of litigation. Proceeding in this manner often assists the design professional and their counsel in promptly identifying the strengths and weaknesses of their case in order to assist them in jointly determining the preferred course of action to pursue in order to resolve the matter in the most prompt manner and on the best possible terms to the design professional.

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