

SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

**HONORABLE LEONARD B. AUSTIN**

Justice

**Motion R/D: 11-10-06**

**Submission Date: 11-10-06**

**Motion Sequence No.: 001/MOT D**

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**THE TYREE ORGANIZATION, LTD.**

**Plaintiff,**

**- against -**

**CASHIN ASSOCIATES, P.C.**

**Defendant,**  
\_\_\_\_\_

**COUNSEL FOR PLAINTIFF**

**Bleakley, Platt & Schmidt, LLP**

**One North Lexington Avenue**

**White Plains, New York 10601**

**COUNSEL FOR DEFENDANT**

**Clausen Miller, P.C.**

**One Chase Manhattan Plaza**

**New York, New York 10005**

ORDER

The following papers were read on Defendant's motion to dismiss the complaint:

Notice of Motion dated October 5, 2006;

Affirmation of Christopher T. Scanlon, Esq. dated October 5, 2006;

Defendant's Memorandum of Law;

Affirmation of Daniel W. Morrison, Esq. dated October 27, 2006;

Affidavit of Marilyn Hoyt sworn to on October 27, 2006;

Plaintiff's Memorandum of Law;

Affirmation of Christopher T. Scanlon, Esq. dated November 9, 2006;

Affidavit of Thomas Powell sworn to on November 9, 2006;

Defendant's Reply Memorandum of Law.

Defendant Cashin Associates, P.C. ("Cashin") moves to dismiss the complaint on the grounds that a defense is founded upon documentary evidence (CPLR 3211[a][1])

and the pleading fails to state a cause of action (CPLR 3211[a][7]).

### BACKGROUND

This is an action for breach of contract. Plaintiff, The Tyree Organization, Ltd. (“Tyree”), is an environmental contractor. Tyree performs construction, testing, and various other services in order to remedy contamination caused by hazardous materials, including petroleum products.

Tyree was hired by Award Petroleum (“Award”), the owner of a Mobil gas station at 562 West Merrick Road in Valley Stream, to conduct certain testing on the property. On July 29, 1992, Tyree notified the New York State Department of Environmental Conservation (“DEC”) that it had detected a “trace amount of free phase floating product” in a monitoring well at the Mobil station.<sup>1</sup> In September, 1992, DEC notified Award that it was required to conduct additional investigation to define the extent of groundwater contamination.

In October, 1992, Tyree installed additional monitoring wells on the property and along Cohill Road, a street located one block south of the gas station. Sampling analyses of the wells indicated that only one showed evidence of groundwater contamination. Tyree subsequently installed a “soil vapor extraction system” at the Award station to address the limited contamination.

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<sup>1</sup>Although Cashin has filed a motion to dismiss pursuant to CPLR 3211, it has submitted depositions from a prior litigation and other evidence that could be considered on a motion for summary judgment (CPLR 3211[c]). Some the facts forming the background to the present lawsuit have been taken from a letter written by the Regional Director of the DEC which was submitted on the motion.

When Tyree did not submit follow-up reports as to the extent of groundwater contamination, the DEC notified Award in July 1998 that it would be required to take action to complete the investigation and remediate the site. Award did not respond within the required time frame. Thus, DEC hired a contractor to conduct its own investigation, focusing particularly on the area south of the gas station. Air samples from inside a home on Cohill Road failed to indicate any indoor air impact from the spill. However, groundwater investigation revealed a plume of contamination extending south to Cohill Road. The contamination consisted of various substances which are fuel components of motor gasoline, including benzene and MTBE.<sup>2</sup>

On September 18, 1998, Award entered into a stipulation with DEC, agreeing to retain Tyree to conduct a full investigation and develop a remedial plan. In October, 1998, Tyree installed additional wells, conducted indoor air sampling in neighboring homes and implemented a plan for interim remediation. Tyree's investigation indicated that there was no vapor impact to surrounding homes. Although groundwater contamination extended to Cohill Road, the level of contamination appeared to be decreasing.

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<sup>2</sup>Benzene is a known carcinogen. Although methyl tetrabutyl ether, or "MTBE," is not classifiable as a human carcinogen, the health risks of MTBE are debatable. Since MTBE is an ether, it acts as an emulsifier, increasing the solubility of benzene and other harmful components of gasoline. Thus, MTBE may increase the risk of contamination by other compounds. Additionally, even low concentrations of MTBE will ruin the taste of drinking water.

Nonetheless, DEC required Award to conduct an additional investigation to determine the vertical extent of groundwater contamination. In April 1999, Award hired another contractor, Impact Environmental (“Impact”), to conduct this investigation. Impact gained access to homes on Cohill Road and also on Buscher Avenue, one block further south, and collected over 50 groundwater samples. Based upon testing the groundwater samples, Impact concluded that MTBE contamination had “traveled vertically” and that further investigation, south of Buscher Avenue, was necessary.

After gaining access to the Clearstream Avenue Elementary School (“Clearstream School”), which is located a half block south of Buscher Avenue, Impact collected additional groundwater samples beneath the school and from the school’s irrigation well on June 29, 1999. The water quality analysis from the irrigation well showed detectable levels of MTBE.

Meanwhile, during the Summer of 1998, Lawrence McGoldrick, the Superintendent of Schools in the Valley Stream Union Free School District (“School District”) in which the Clearstream School is located, learned of the gasoline spill and became concerned as to its effect upon the health and safety of students and faculty. In response to the water quality analysis, the School District turned off the irrigation well and retained Cashin, a firm of engineers and architects, to act as its “environmental consultant.”

Among the services which Cashin performed at Clearstream School was testing of the school’s indoor air. In testing the air at Clearstream School, Cashin used the

same method which it had been employing at another school in the School District, the Forrest Road School ("Forest Road"). Cashin had been testing the indoor air at Forrest Road in order to monitor the effects of an earlier, unrelated gasoline spill which had occurred near there. However, because gasoline-powered equipment was stored at Clearstream School, the air sample readings taken by Cashin overstated the air impact resulting from the gasoline spill at Award's Mobil station.

In reliance upon Cashin's advice, apparently exaggerating the contamination danger, the School District relocated kindergarten classes from Clearstream School to another facility, located at 150 Washington Avenue. Because the 150 Washington Avenue building had housed its administrative offices, the School District was required to reconfigure the facility to accommodate the kindergarten classes. The School District was also required to obtain new administrative offices at a building located at 175 North Central Avenue at additional expense.

In March, 2002, the School District commenced an action against Exxon Mobil, Tyree, Award Petroleum and certain other parties in Supreme Court, Nassau County (Index No. 5093/02).<sup>3</sup> In that action, the School District sought to recover \$225,000 in fees which it had paid Cashin for the air testing, as well as the costs associated with relocating the kindergarten classes and administrative offices.

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<sup>3</sup>The other named Defendants were David King, Morlan Homes, Ron Horowitz, and 100 unknown individuals. David King is a principal of Award Petroleum. It is unclear what the connection of the other defendants had to the litigation.

The School District's action was settled as to Exxon Mobil, Tyree, Award Petroleum, David King, Morlan Homes, and Ron Horowitz on December 7, 2004. Pursuant to the settlement agreement, Tyree paid \$550,000 to the School District and Exxon Mobil paid \$110,000 to the School District. There was no financial contribution from the other defendants. As part of the settlement, Tyree agreed to retain the services of a new environmental consultant, FPM Group, which was to assume the cost and performance of the "Air Quality and Soil Vapor Monitoring Program" which had been approved both by the Nassau County Department of Health and the DEC. Under Article III of the settlement agreement, entitled "subrogation rights," the School District promised to "assign any and all rights it may now or in the future have relative to Cashin, with respect to services performed in connection with the subject gasoline spill, to the settling Defendants...."<sup>4</sup> The School District also promised not to "impede" any lawsuit or proceeding that the settling Defendants, or any one of them, might commence against Cashin.

This action was commenced by Tyree against Cashin on August 4, 2005. Tyree's claims arise out of the assignment of the School District's claims. In the first cause of

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<sup>4</sup>Although the School District merely promised, in the settlement agreement, to assign its claims against Cashin, the parties have proceeded as though the School District had made a complete assignment. Thus, Tyree alleges that the "District assigned to Tyree all of its rights relative to the services which had been performed and billed by Cashin"(Complaint ¶ 14). Although Cashin's answer denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in ¶ 14, Defendant's Statement of Material Facts proceeds upon the assumption that there was a completed assignment (Statement of Material Facts, ¶ 3).

action, Tyree asserts a claim against Cashin for breach of contract. Tyree alleges that Cashin “breached its obligations to the School District by failing to perform the services for which it had been retained pursuant to an agreement between the School District and Cashin.” No contract is annexed to the complaint. However, in a letter dated June 23, 2000, Gregory Greene (“Greene”), Director of Environmental Services at Cashin, wrote to Superintendent McGoldrick, submitting a “proposal for environmental consulting services” for the 2000-2001 school year. In the letter, Greene described the environmental services which Cashin had been providing at the Clearstream and Forrest Road Schools during the preceding school year. Greene referred to “monthly monitoring services and other technical assistance relating to underground gasoline spills in the general vicinity of each of the schools.” Greene further stated that the monitoring was being performed “as a safeguard to ensure that conditions at the schools [were] not affected by the spills.” In his letter, Greene also quoted prices for different services, including sampling, analysis and laboratory work.

In the second cause of action, Tyree asserts a claim against Cashin for negligence. Tyree alleges that Cashin, as an environmental consultant, had a duty to the School District to “employ testing protocols and analytical methods that were generally accepted and used among like professionals.” Tyree alleges that Cashin was negligent in failing to use such protocols and methods.

In the third cause of action, Tyree asserts that Cashin was unjustly enriched by virtue of having been paid in excess of \$225,000 for services performed, although

Cashin was in breach of its agreement. By stipulation dated September 7, 2006, Tyree discontinued the second (negligence) and third (unjust enrichment) causes of action in the complaint.<sup>5</sup>

### THIS MOTION

Cashin now moves to dismiss the complaint upon the grounds that a defense is founded upon documentary evidence (CPLR 3211 [a][1]) and the complaint fails to state a cause of action (CPLR 3211 [a][7]).

While a motion to dismiss the complaint on the ground of failure to state a cause of action may be made at any time, a motion to dismiss upon the ground of a defense founded upon documentary evidence must be made before service of the responsive pleading (CPLR 3211[e]). Because the parties have submitted Statements of Material Fact pursuant to Rule 19-a of the Rules of the Commercial Division, the Court will treat the motion as one for summary judgment (CPLR 3211[c]).

### DISCUSSION

Cashin argues that, as a matter of law, it did not breach the contract because (1) its testing was in compliance with Public Health Law § 502 and its implementing regulations; (2) its performance was consistent with the parties' course of dealing; and (3) the School District, Tyree's assignor, is estopped by the inconsistent position which it took in the prior litigation; namely, that the testing performed by Cashin was proper.

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<sup>5</sup>Because the stipulation does not state otherwise, the discontinuance was without prejudice (See, CPLR 3217[c]).

Before proceeding to the issues raised by Cashin, some preliminary considerations are in order.

A. Plaintiff's Standing

An assignment is a present transfer of an existing right (Calamari & Perillo, *Law of Contracts*, 4<sup>th</sup> Ed. § 18.3). Thus, the assignee of a cause of action has standing to bring an action upon the cause of action in his own name. General Obligations Law § 13-105; and RCR Services Inc. v. Herbil Holding Co., 229 A.D. 2d 379 (2<sup>nd</sup> Dept. 1996).

Any language, however informal, if it shows the intention of the owner of the cause of action to transfer it, will enable the transferee to sue upon the claim. American Banana Co. v. Venezolana Internacional, 67 A.D. 2d 613 (1<sup>st</sup> Dept. 1979). On the other hand, a promise to assign a claim creates only an equitable assignment. (Calamari & Perillo, *Law of Contracts*, 4<sup>th</sup> Ed. § 18.3). The holder of an equitable assignment has no standing to sue upon the cause of action. See, Waterman v. New York, 19 A.D. 2d 264, 268 (4<sup>th</sup> Dept. 1963). Under the equitable doctrine of subrogation, depending upon the facts and circumstances of the particular case, the holder of an equitable assignment may be granted standing to pursue the claim. Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N.Y. 137, 142 (1917).

Among the factors to be considered in determining whether an equitable assignee may be allowed to proceed are the rights of third parties who are not before the court. *Id.* Aside from Tyree, none of the other settling Defendants in the prior case have been joined in this action. Nevertheless, the other settling Defendants, and in

particular Exxon Mobil, which contributed \$110,000 to the settlement, have an interest in any potential recovery.

CPLR 1001(a) provides, “Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” CPLR 1001(b) provides, “When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned.”

Although Tyree received only an equitable assignment of the School District’s claims against Cashin, it should be granted standing to pursue these claims. However, the other settling Defendants were equitable co-assignees who may be affected by the judgment and should have been joined in the action. Kronman v. Palm Mgt. Assoc., 276 A.D. 2d 338 (1<sup>st</sup> Dept. 2000). Accordingly, Plaintiff should serve a summons, a copy of the complaint herein and a copy of this order upon all settling Defendants in the prior litigation to afford them an opportunity to appear and participate in this litigation.

B. Motion to Dismiss

In proceeding to the merits of Defendant’s motion, the Court is cognizant that the parties’ stipulation limits Plaintiff’s claim to its breach of contract action. However, “[t]he very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations.” New York Univ. v. Continental Ins. Co., 87 N.Y. 2d 308, 316

(1995). Because of the interrelationship between contractual and tort theories, particularly when the contract involves professional services, the contours of Cashin's duty of reasonable care are relevant to the merits of Plaintiff's contract claim.

1. *Malpractice*

Generally speaking, malpractice is the negligence of a professional toward a person for whom a service is rendered. Santiago v. 1370 Broadway Assoc., 264 A.D. 2d 624 (1<sup>st</sup> Dept. 1999). A professional will be liable for malpractice if he/she departs from the standard of care expected of members of the profession and the departure was a proximate cause of plaintiff's injury. Giambona v. Stein, 265 A.D. 2d 775 (3<sup>rd</sup> Dept. 1999). However, the professional may also be liable in negligence if the gravamen of the complaint is not negligence in furnishing the professional service, but the professional's failure in fulfilling a different duty. Weiner v. Lenox Hill Hospital, 88 N.Y. 2d 784, 788 (1996). Nevertheless, the distinction between malpractice and negligence is a "subtle one" because "no rigid analytical line separates the two" theories. *Id.* at 787.

A lawyer, for example, may be liable, not only for malpractice and negligence, but also for breach of contract, if the lawyer makes an express promise to the client to obtain a specific result or an implied promise to exercise due care in performing services required by the contract. Santulli v. Englert, Reilly & McHugh, 78 N.Y. 2d 700, 706 (1992). However, "a breach of contract claim premised on the lawyer's failure to exercise due care or to abide by general professional standards is nothing but a

redundant pleading of the malpractice claim.” Levine v. Lacher & Lovell-Taylor, 256 A.D. 2d 147, 151 (1<sup>st</sup> Dept. 1998).

Likewise, where a cause of action lies in medical malpractice, a breach of contract action may not be pursued unless, within the context of medical treatment, the doctor expressed a specific promise to effect a cure or to accomplish some definite result. Scalisi v. NYU Medical Center, 24 A.D. 3d 145, 147 (1<sup>st</sup> Dept. 2005).

Whether the theory of liability is premised upon tort or contract, the applicable statute of limitations and the measure of damages which are recoverable are implicated. However, the theory of liability does not necessarily limit the range of proof which is admissible in support of plaintiff’s claim.

## 2. *Breach of Contract*

In Sears, Roebuck & Co. v. Enco Assoc., Inc., 43 N.Y. 2d 389 (1977), the Court of Appeals considered the nature of an action against an architect for improper performance of architectural services which the architect had agreed to perform in a contract. The Court of Appeals reasoned that the breach of its obligations by the architect, whether characterized as tort for professional malpractice or contract for nonperformance of contractual provisions, arose out of the contractual relationship of the parties. *Id.* at 396. Thus, the “genesis” of the architect’s liability was based upon contract. *Id.* The Court held that the action would be governed by the six-year contract statute of limitations, except with regard to the owner’s claim for lost profits, which damages are allowable only in tort. The Court held that in support of the breach of

contract claim, plaintiff could offer evidence, including expert testimony, that the architect failed to use reasonable care in the performance of the contract or its performance fell short of applicable professional standards. *Id.*

In response to *Sears, Roebuck*, the Legislature amended CPLR 214(6) to provide that the limitations period in non-medical malpractice actions would be three years, irrespective of whether the complaint is cast in contract or tort. In Kliment v. McKinsey & Co., 3 N.Y. 3d 538 (2004), the Court of Appeals held that the three-year malpractice statute of limitations would apply to an action against an architect, even where the plaintiff alleged that the architect breached an express term of the architectural services agreement. Although the “genesis” of the architect’s liability was still based upon contract, the Court characterized the action as one for violation of the ordinary professional obligations of the architect. In ruling that the malpractice statute of limitations applied to a breach of contract action against an architect, the *Kliment* Court did not disturb *Sears Roebuck*’s holding with regard to the range of proof permissible in support of the contract claim.

### 3. *Cashin is a Professional*

For purposes of a malpractice action, a “profession” is an occupation usually associated with long-term educational requirements leading to an advanced degree, licensure evidencing qualifications met prior to engaging in the occupation and control of the occupation through standards of ethical conduct and malpractice liability rendered. Santiago v. 1370 Broadway Assoc., *supra* at 624. The field of “learned professions” as

to which malpractice liability has traditionally been imposed includes medicine, law, accountancy, architecture and engineering. *Id.*

It is unclear whether an “environmental consultant” is a professional who may be sued for malpractice for breach of professional obligations which the consultant has undertaken by contract. See, Ozelkan v. Tyree Brothers Environmental Services, Inc., 29 A.D. 3d 877 (2<sup>nd</sup> Dept. 2006), where an action was brought against an environmental consultant for negligence, professional malpractice and breach of contract based upon a failure to detect environmental contamination. The Appellate Division affirmed the dismissal of the action based on the statute of limitations and did not reach the legal sufficiency of the claim. See also, Neumann v. Carlson Environmental, Inc., 429 F. Supp. 2d 946 (N.D. Ill. 2006), where the District Court held that an environmental consultant could be liable for professional malpractice under Illinois law based upon the particularized knowledge and expertise of the consultant.

Cashin is a firm of engineers and architects. It has not submitted any proof, by affidavit or otherwise, that its professional obligations as an engineering and architectural firm are in any way diminished when it functions as an environmental consultant. Because Cashin is a professional, the standards of professional conduct of engineers are relevant in assessing the sufficiency of Plaintiff’s breach of contract claim.

4. *Customary Practice and the Standard of Care*

Section 502(2) of the Public Health Law provides, “No environmental laboratory may perform any examination on samples collected in the State of New York for which

the commissioner [of Health] issues a certificate of approval for such examination unless the laboratory has been issued such [a] certificate of approval.” Subdivision 2 further provides that the laboratory examination shall conform to any conditions under which the approval is granted. Subdivision 9 authorizes the Commissioner of Health to adopt rules and regulations to effectuate the provisions governing approved environmental laboratories. Cashin argues that the testing methods it used were approved by the Environmental Laboratory Approval program, 10 NYCRR § 55-2.1 *et seq.* Thus, as a matter of law, Cashin claims that it complied with customary practice and its contractual obligation.

Compliance with relevant industry standards, be they derived from customary business practice or government regulation, is some evidence that the defendant exercised due care and was not negligent. Trimarco v. Klein, 56 N.Y. 2d 98, 105-6 (1982). On the other hand, proof of a customary practice coupled with a showing that it was ignored and the departure was a proximate cause of plaintiff’s loss, may establish negligence. *Id.* at 106. “Proof of a common practice aids in formulating the general expectation of society as to how individuals will act in the course of their undertakings” /

The failure to comply with industry standards or regulations, however, does not in and of itself establish that defendant was negligent. Nor does compliance with regulations or other standards establish that the defendant was not negligent. See, Mercogliano v. Sears, Roebuck and Co., 303 A.D. 2d 566 (2<sup>nd</sup> Dept. 2003); and Duncan v. Corbetta, 178 A.D. 2d 459 (2<sup>nd</sup> Dept. 1991).

In the case of occupations other than professionals, the standard of care remains one of reasonableness. In the case of professionals, the standard remains one of good and accepted practice expected of members of the profession. Thus, while compliance with administrative regulations is some evidence that the professional engaged in good and accepted practice, it does not establish as a matter of law that the professional did not commit malpractice. *Id.* See also, Contini v. Hyundai Motor Co., 876 F.Supp. 540 (S.D.N.Y.1995).

Compliance with Public Health regulations does not necessarily establish that Cashin exercised due care in testing the indoor air samples taken from the Clearstream School. Nor does compliance with Public Health regulations establish that Cashin fully performed its contract with the School District. In particular, evaluating air quality by an approved method without allowing for vapor emanating from gas-powered equipment may not be good and accepted practice for an engineer functioning as an environmental consultant. On the other hand, it may have been totally appropriate for an environmental consultant to consider the contamination from the vehicles as a given and focus on the marginal effect of the gasoline spill, particularly since young children were effected.

The issue cannot be resolved without the assistance of expert testimony as to the standard of care required of an engineer functioning in the capacity of an environmental consultant. In any event, compliance with Public Health regulations is

but one factor bearing on whether Cashin complied with professional obligations and fully performed its contract.

5. *Course of Dealing*

In interpreting a contract, the court's role is to ascertain the intention of the parties at the time that they entered into the contract. Evans v. Famous Music Corp., 1 N.Y. 3d 452, 458 (2004). If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further. Greenfield v. Philles Records, Inc., 98 N.Y. 2d 562 (2002); and W.W.W. Assocs. v. Giancontieri, 77 N.Y. 2d 157 (1990). On the other hand, if the language of the contract is ambiguous, the court must look to extrinsic evidence for guidance as to which interpretation should prevail. Evans v. Famous Music Corp., *supra*. One form of extrinsic evidence is the parties' course of dealing; that is, the practical construction which the parties themselves have placed on the contract. See, Prince, *Richardson on Evidence* § 11-403 (11<sup>th</sup> Ed. Farrell).

Cashin argues that the air quality testing method which it used at the Forrest Road School establishes a course of dealing which should be utilized for determining the parties' intent with regard to the air quality monitoring to be performed at the Clearstream School. Defendant is correct that the meaning of the terms "environmental consulting services," "monitoring services" and "technical assistance," even with reference to a specific gasoline spill, is not discernible from the language of the parties' agreement. Thus, resort to extrinsic evidence is necessary. Because of the nature of a

professional services contract, the Court concludes that the parties' course of dealing is not an aid for determining their intent.

Restatement (Second) of Contracts § 223 states, "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Course of dealing is particularly appropriate in interpreting a contract for the sale of goods where the parties are each knowledgeable as to the goods and the market conditions under which they are sold. However, even with respect to a contract for the sale of goods, course of performance is relevant to determine the meaning of the contract only if a party has knowledge of the nature of the other party's performance. UCC § 2-208(1).

In a contract for professional services, the party for whom the services are performed ordinarily lacks knowledge of the appropriateness of the professional's services. Thus, the party is required "to repose confidence in the professional's ability...and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." Shumsky v. Eisenstein, 96 N.Y. 2d 164, 167 (2001). Because the School District lacked knowledge as to the appropriateness of the environmental consulting services performed by Cashin, the course of dealing with regard to the Forrest Road School is not relevant to determine the meaning of the Clearstream School contract. Rather, the meaning of the contract

will be determined with reference to the standard of good and accepted practice of engineers acting as environmental consultants.

6. *Estoppel by Inconsistent Positions*

Under the doctrine of judicial estoppel or estoppel by inconsistent positions, a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his favor will be precluded from assuming a contrary position in another action simply because his interests have changed. Baje Realty Corp. v. Cutler, 32 A.D. 3d 307 (1<sup>st</sup> Dept. 2006). Cashin argues that the School District and, by extension, Tyree, as assignee, are estopped by the inconsistent position which the School District took in the prior litigation; to wit: the testing which was done by Cashin was proper.

Neither the School District nor its assignees should be precluded from asserting that Cashin's testing methods were not appropriate. Absent an unusual factual situation, estoppel is not available against a governmental agency engaging in the exercise of its governmental functions. Advanced Refractory Technologies, Inc. v. Power Auth. of the State of New York, 81 N.Y. 2d 670 (1993). This rule is based upon "considerations of sovereign immunity, protection of the public fisc, and separation of powers." Daleview Nursing Home v. Axelrod, 62 N.Y. 2d 30, 34 (1984). Thus, an "unusual factual situation," in which an estoppel could arise against a governmental agency, would be one where none of these concerns was implicated.

School districts have long been recognized as independent governmental units on a par with general municipal corporations. Greater Poughkeepsie Library Dist. v.

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Poughkeepsie, 81 N.Y. 2d 574, 580-81 (1993). While school districts are not insurers of students' safety, they have a responsibility to protect the health and safety of their students to the same extent as a reasonably prudent parent would under similar circumstances. Oakes v. Massena Central School District, 19 A.D. 3d 981 (3<sup>rd</sup> Dept. 2005). Thus, the School District was clearly exercising a governmental function in retaining Cashin to investigate the danger of environmental contamination and then proceeding against Tyree when it determined that the environmental contractor had not fulfilled its professional responsibility *vis-a-vis* the remediation of the Award gas spill.

A settlement agreement between a school district and an environmental contractor is not an unusual situation by which the school district should be precluded from subsequently proceeding against its environmental consultant on an inconsistent legal theory. Although sovereign immunity is not a concern, precluding a school district in these circumstances would implicate the public fisc and the separation of powers. Since the School District cannot be precluded under the doctrine of inconsistent positions, neither can Tyree be precluded since it "stands in the shoes" of its assignor. Panish v. Rudolph, 298 A.D. 2d 237 (1<sup>st</sup> Dept. 2002).

Furthermore, preclusion doctrines require a judgment on the merits as opposed to merely a stipulation of settlement. Ott v. Barash, 109 A.D. 2d 254 (2<sup>nd</sup> Dept. 1985). Since the stipulation of settlement between Tyree and the School District has not been incorporated into a judgment and was not "so-ordered" by the Court, the School District cannot be precluded from asserting an inconsistent position in an action against Cashin.

Nor can the settlement preclude the assertion of an inconsistent position by the School District's assignee.

7. *Summary Judgment/Dismissal*

Summary judgment is a drastic remedy which will be granted only when the movant established that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361 (1974). See also, Mosheyev v. Pilevsky, 283 A.D.2d 469 (2<sup>nd</sup> Dept. 2001); and Akseizer v. Kramer, 265 A.D.2d 356 (2<sup>nd</sup> Dept. 1999).

The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York 49 N.Y.2d 557 (1980). See also, Aiello v. Garcia, 224 A.D.2d 467 (2<sup>nd</sup> Dept. 1996).

Once the movant has established a *prima facie* entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, *supra*; Davenport v. County of Nassau, 279 A.D.2d 497 (2<sup>nd</sup> Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2<sup>nd</sup> Dept. 1991).

The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). A motion for summary judgment should be denied if

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the court has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513 (2<sup>nd</sup> Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2<sup>nd</sup> Dept. 1984).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2<sup>nd</sup> Dept. 2001). However, mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. Banco Popular North America v. Victory Tax Mgt., Inc., 1 N.Y.3d 381 (2004). Since Cashin has not made a *prima facie* showing that it is entitled to judgment as a matter of law, the motion for summary judgment dismissing the complaint must be denied. Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 324 (1986).

Defendant moved to dismiss on the grounds the complaint fails to state a cause of action. See, CPLR 3211(a)(7). When deciding a motion made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cause of action, not whether it has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976). If from the facts alleged in the complaint and the inferences which can be drawn from the facts the court determines that the pleader has a cognizable cause of action, the motion must be denied. Sokoloff

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v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Stucklen v. Kabro  
Assocs., 18 A.D.3d 461 (2<sup>nd</sup> Dept. 2005).

Here, the complaint alleges facts sufficient to sustain a cause of action for breach of contract. See, Furia v. Furia, 116 A.D.2d 695 (2<sup>nd</sup> Dept. 1986). Thus, Defendant's motion must be denied.

Accordingly, it is,

**ORDERED**, that Defendants' motion to dismiss the action for summary judgment is **denied**; and it is further,

**ORDERED**, that Plaintiff shall serve a copy of this Order, and the summons and complaint upon each of the settling Defendants, pursuant to CPLR 308(1) or (2) or CPLR 311, as appropriate. Such settling Defendants shall be given an opportunity to intervene as party Plaintiffs herein at the status conference to be held herein; and it is further,

**ORDERED**, that counsel for the parties and, the settling Defendants desiring to intervene herein, shall appear for a status conference on March 2, 2007 at 9:30 a.m.

This constitute the decision and Order of the Court.

Dated: Mineola, NY  
January 22, 2007

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Hon. LEONARD B. AUSTIN, J.S.C.