Nassau County v Richard Dattner Architect P.C.
2006 NY Slip Op 30740(U)
March 24, 2006
Supreme Court, Nassau County
Docket Number: 2750-04
Judge: Leonard B. Austin
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SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 12-26-05
Submission Date: 1-17-06
Motion Sequence No.:002/mot d

NASSAU COUNTY,

Plaintiff,

- against -

RICHARD DATTNER ARCHITECT P.C., DORMITORY AUTHORITY OF THE STATE OF NEW YORK, EMPIRE STATE DEVELOPMENT CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, MARIANO D. MOLINA, P.C., COUNCILMAN HUNSAKER, SEVERUD ASSOCIATES, A JAMES DEBRUIN & SONS, FEDERMAN DESIGN & CONSTRUCTION CONSULTANTS, INC., ROBERT SCHWARTZ & ASSOCIATED, ROY KAY, INC., KEYSPAN CORPORATION, ANRON HEATING AND AIR CONDITIONING, INC., DECTRON INTERNATIONALE, STONEWALL CONTRACTING CORP., NORBERTO & SONS, INC., CENTURY-MAXIM CONSTRUCTION CORP., METROPOLITAN CORP., METROPOLITAN STEEL INDUSTRIES, INC., and HATZEL & BUEHLER, INC.,

Defendants,

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ORDER

The following papers were read on Defendant Severud Associates Consulting Engineers, P.C. unopposed motion to dismiss the cross-claims interposed against it:

Notice of Motion dated December 7, 2005;
Affidavit of Jeffrey T. Yick sworn to on December 5, 2005;
Petitioner's Memorandum of Law.

Defendant Severud Associates Consulting Engineers, P.C. ("Severud") moves for an order pursuant to CPLR 3211(a) (1) and (7), dismissing the cross-claims interposed against it based upon documentary evidence and the failure to state a cause of action.

BACKGROUND

On February 1, 1996, Plaintiff Nassau County ("Nassau") entered into a written contract with Defendant Empire State Development Corporation ("ESDC") to design, develop and construct the Aquatic Center for Nassau. ESDC then entered into a written contract ("ESDC/DASNY Agreement") with the Dormitory Authority of the State of New York ("DASNY"). The ESDC/DASNY Agreement apportioned the responsibility for the projects so that ESDC would supervise and coordinate the design area and DASNY would supervise and coordinate the construction phase.

ESDC retained Defendant Richard Dattner Architect P.C. ("Dattner") to provide architectural services and Defendant Tishman Construction Corporation of New York ("Tishman") to provide contract management services for the project as follows: Dattner retained six consultants for additional professional services for the project, Mariano D.

Molina P.C. ("Molina") was retained to provide professional engineering services for the heating, ventilation and air conditioning requirements of the project; Defendant Councilman Hunsaker & Associates ("Hunsaker") was retained to provide design services in connection with the swimming pool; Severud was retained to provide structural engineering services; Defendant Federman Design & Construction Consultants, Inc. ("Federman") was retained as the cost estimator; Defendant Robert Schwartz & Associates ("RSA") was retained to prepare the specifications; and A. James DeBruin & Sons, LLP ("DeBruin") was retained to provide civil engineering services.

DASNY entered into five construction contracts for the project. They were: Defendant Roy Kay, Inc. ("Roy Kay") n/k/a Defendant Keyspan Corporation ("Keyspan") was retained to install the HVAC System; Defendant Anron Heating and Air Conditioning Inc. ("Anron") was retained to manufacture and install the ductwork; Defendant Stonewall Contracting Corp. ("Stonewall") was retained as the General Contractor; Defendant Hatzel & Buehler, Inc. ("Hatzel") was retained to furnish the electrical work; and Defendant Norberto & Sons, Inc. ("Norberto") was retained to construct the pool.

Construction on the project began in 1996 and was completed in March 1998. Subsequently, there was corrosion in the ductwork. Nassau alleges either a poor, defective or negligent design resulting in hardware joining sections of the ductwork, and

the system, to fail without warning. It is further alleged that the design also caused the stainless steel support wire, which hold the light fixtures over the pool, to fail; the eyebolts to corrode and fail; and excessive condensation to form between the metal roof deck and the ceiling tiles, causing damage to the insulation and all other related roof/ceiling materials.

Plaintiff's action was commenced in July 2004. By stipulation of discontinuance without prejudice dated August 25, 2005, Nassau discontinued its action against Severud. Subsequently, both ESDC and DASNY agreed to and executed the stipulation of discontinuance as to Severud.

In answering the verified complaint, many defendants brought cross – claims for indemnification and/or contribution against their co-defendants including Severud.

Severud now moves to dismiss the cross-claims pending against it pursuant to CPLR 3211(a)(1)(7). There is no opposition to this motion. Roy Kay n/k/a Keyspan originally submitted an affirmation in opposition on December 30, 2005. That opposition was subsequently withdrawn.

DISCUSSION

A. Legal Standard

In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference. Goshen v. Mutual Life

Ins. Co. of NY, 98 N.Y.2d 314 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); and Paterno v. CYC, LLC, 8 A.D.3d 544 (2nd Dept. 2004). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining the motion. The inquiry is restricted to whether "the relevant allegations of the complaint liberally construed state a theory on which relief can be granted." CAE Indus. Ltd. v. KPMG Peat Marwick, 193 A.D.2d 470, 472 (1st Dept. 1993). See also, Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). Legal conclusions or factual claims which are either inherently incredible or flatly contradicted by documentary evidence need not be accepted as true. Greene v. Doral Conference Center Assocs., 18 A.D.3d 429 (2nd Dept. 2005).

Dismissal based upon documentary evidence is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims asserted as a matter of law. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144(2002); Montes Corp. v. Charles Freihofer Banking Co., Inc., 17 A.D.3d 330 (2nd Dept 2005); and Berger v. Temple Beth-El of Great Neck, 393 A.D.2d 346 (2nd Dept. 2003).

In determining dismissal based on the failure to state a cause of action, the court must determine whether the plaintiff has a cognizable cause of action and not whether the action has been properly pled. Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); Guggenheimer v. Ginzburg, supra. 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 v.

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

B. Documentary Evidence

The documentary evidence presented by Severud is the stipulation of discontinuance. This evidence conclusively resolves all factual issues as to Plaintiff and ESDC and DASNY, the two defendants discontinued their cross-claims.

The stipulation of discontinuance does not conclusively resolve all factual issues of the remaining defendants who have asserted cross-claims. The remaining defendants with cross-claims are Molina, Hunsaker, RSA, Roy Kay/Keyspan and Anron. The Court cannot speak to any cross-claims made by Stonewall because the Court was not furnished with a copy of Stonewall's Verified Answer. These remaining defendants with cross-claims did not choose to discontinue their claims for identification by Severud. Thus, the stipulation of discontinuance alone does not resolve all factual issues as a matter of law.

Therefore, Severud's motion to dismiss pursuant to CPLR 3211(a)(1) must be denied.

C. Failure to State a Cause of Action

Before discussing whether any remaining defendants with cross-claims against Severud have a cognizable claim for either contribution or indemnification, the Court must determine whether it is appropriate to convert the remaining cross-claims into third- party actions.

1. Conversion of Cross-Claims into Third-Party Actions

The court has the power to convert a cross-claim against a co-defendant into a third-party claim when the co-defendant against whom the cross-claim was asserted is removed as a co-defendant from the action since it would serve no purpose to compel a formal impleader. Cusick v. Lutheran Med. Center, 105 A.D. 2d 681 (2nd Dept. 1984); and Javitz v. Slatus, 93 A.D.2d 830 (2nd Dept. 1983). In this case, Severud, which has been a party to the main action since its commencement, has been removed from the main action by the stipulation of discontinuance. Therefore, the remaining cross-claims against Severud are hereby converted to third-party claims.

2. Claims for Contribution and Indemnification

There is a distinction to be made between a claim for contribution and one for indemnification. Whether it is indemnity or contribution that applies depends not upon what the parties designate in their pleadings, but rather on a "careful analysis of the theory of recovery against each tort-feasor." Fox v. County of Nassau, 183 A.D.2d 746 (2nd Dept. 1992). A right to contribution does not arise from any contract and the party is seeking only a ratable or proportional reimbursement from defendant. County of Westchester v. Welton Becket Assoc., 102 A.D.2d 34, 42 (2nd Dept. 1984). The basic requirements for contribution, as outlined in Dole v. Dow Chem. Co., 30 N.Y.2d 143 (1972), and codified in CPLR Article 14, is that the culpable parties must be subject to liability for the same personal injury, injury to property or wrongful death. Nassau

Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 71 N.Y.2d 599, 603 (1988). The underlying principle for contribution is that any tortfeasor who pays more than its fair share of a judgment, as determined by the fact finder, may recover the excess from the other tortfeasors subject to the same judgment. Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 556 (1992).

Contribution is appropriate even if dissimilar theories are employed to recover against culpable parties. Crow-Crimmins-Wolff & Munier v. County of Westchester, 90 A.D.2d 785 (2nd Dept. 1982); Raquet v. Braun, 90 N.Y.2d 177, 183 (1997); Nassau Roofing & Sheet Metal Co., *supra* at 603; and Comi v. Breslin & Breslin, 257 A.D.2d 754, 756 (3rd Dept. 1999). The critical prerequisite for apportionment under CPLR Article 14 is that the breach of duty by the contributing party must have had a part in causing the injury for which contribution is sought. Nassau Roofing & Sheet Metal Co., *supra*; Jakobleff v. Cerrato, Sweeney & Cohn, 97 A.D.2d 786 (2nd Dept. 1983), Further, contribution may be sought from a joint wrongdoer despite any defense that the joint wrongdoer may have as to the plaintiff's claim. Sommer v. Federal Signal Corp, *supra*.

In a claim for indemnification, the party held legally liable is seeking to shift the entire loss to the actual wrongdoer and seeks full reimbursement. Rosado v. Proctor & Schwartz, Inc., 66 N.Y.2d 21, 24 (1985). Indemnity arises out of some form of contract, whether it be express or implied by law. *Id.*; County of Westchester v. Welton Becket Assoc., *supra*; and Fox v. County of Nassau, *supra*.

There are two types of indemnification claims – – contractual and common law. A contractual indemnification claim is viable where the parties have an express contract outlining the agreement that one party will hold the other harmless under stated circumstances.

The predicate for common law indemnity is "vicarious liability without fault on the party of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." Kagan v. Jacobs, 260 A.D.2d 442, 442 (2nd Dept. 1999); and Tulley v. Straus, 265 A.D.2d 399, 401 (2nd Dept. 1999). Further, where the plaintiff alleges all defendants to be actively negligent and does not allege that any one defendant was liable only vicariously, a claim for common law indemnification is not viable. Carter v. Farmington Sportservice, Inc., 233 A.D.2d 840 (4th Dept. 1996); and County of Westchester v. Welton Becket Assoc., *supra* (where the plaintiff alleges defendants [contractors, subcontractors, and design professionals] to be actual wrongdoers and no defendant to be merely vicariously liable, no common law claim for indemnification is viable.)

a. The Remaining Claims for Contribution

Upon a review of the pleadings provided to the Court, the Court finds the following defendants to have asserted entitlement to contribution from Severud: Dattner, Molina, Hunsaker, RSA, Anron, Federman, Roy Kay/Keyspan and Tishman. It should be noted that, while Hunsaker's claim states "indemnification," a careful reading of the

claim reveals it is truly one for contribution. Federman included its claim for contribution in its fifth affirmative defense.

These defendants have a cognizable claim for contribution from Severud. While Nassau's action against Severud has been discontinued, that alone does not bar the complaining co-defendants from seeking contribution from it. While Nassau, ESDC, and DASNY have agreed to discontinue their claims against Severud, this is not a determination of the merits of any claim against Severud by the remaining defendants nor can it serve to cut off their right to recovery via contribution.

The contribution claims by the remaining co-defendants are viable because the requisite elements of the claim have been established. These Defendants are all subject to liability for the same damages to the Aquatic Center and merely seek apportionment from Severud.

Thus, Severud's motion to dismiss pursuant to CPLR 3211(a)(7) must be denied as to the contribution claims of Dattner, Molina, Hunsaker, RSA, Anron, Federman, Roy Kay/Keyspan and Tishman which are now third-party claims.

b. The Remaining Claims for Indemnification

Upon the pleadings, the following defendants to have asserted entitlement to indemnification: Dattner, Molina, RSA, Anron, Roy Kay/Keyspan and Tishman. Dattner is the only defendant that could assert entitlement to both a contractual and common law indemnification claim because it is the only defendant having an express contract

with Severud; to wit: the "Agreement Between Architect and Structural Engineer". That contract has an indemnification/hold harmless clause in paragraph 15. No other defendant seeking indemnification has an express contract with Severud.

No cognizable cause of action for common law indemnification exists as between the other defendants asserting such claim and Severud. Nassau alleges that all of the defendants asserting a claim for indemnification were "actual wrongdoers" and not just merely vicariously liable for the acts of another. Thus, a claim for common law indemnification cannot be sustained. Carter v. Farmington Sportservice, Inc., *supra*; and County of Westchester v. Welton Becket Assoc., *supra*.

Therefore, Severud's motion to dismiss pursuant to CPLR 3211(a)(7) should be granted as to Molina, RSA, Anron, Roy Kay/Keyspan and Tishman's claim for indemnification; and is denied as to Dattner's claim for indemnification.

Accordingly, it is,

ORDERED, that on the Courts' motion, the remaining cross-claims are hereby converted to third-party actions for contribution and indemnification consistent herewith and the third-party complaints deemed **denied**; and it is further,

ORDERED, that Defendant Severud's motion to dismiss the contribution cross-claims of the remaining co-defendants is **denied;** and it is further,

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ORDERED, that Defendant Severud's motion to dismiss the indemnification cross-claims of the remaining co-defendants is **granted** as to Defendants Molina, RSA, Anron, Roy Kay/Keyspan, and Tishman's claim and **denied** as to Defendant Dattner's claim for indemnification.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
March 24, 2006

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

ENTERED

MAR 29 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE