

**Liberman v Cayre Synergy 73rd LLC**

2011 NY Slip Op 33975(U)

November 18, 2011

Supreme Court, New York County

Docket Number: 590067/11

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 602321/2009

**LIBERMAN, ANDREA V.**

vs.

**CAYRE SYNERGY 73RD LLC**

SEQUENCE NUMBER : 005

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1 2

2 3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the annexed opinion and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/18/11 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
ANDREA V. LIBERMAN and TREVOR R. GURWICH,

Plaintiffs,

-against-

Index No. 602321/09  
Decision & Order

CAYRE SYNERGY 73<sup>RD</sup> LLC, CAYRE 73<sup>RD</sup> LLC,  
SYNERGY 73<sup>RD</sup> STREET DEVELOPMENT LLC,  
JACK CAYRE, JOE CAYRE, DAVID MALLEBAUM,  
STEVEN CAYRE, CORE MARKETING LLC,  
THOMAS POSTILLO and MICHAEL HADDAD,

Defendants.

-----X  
CAYRE SYNERGY 73<sup>RD</sup> LLC,

Third-Party Plaintiff,

-against-

Index No. 590067/11

MG NEW YORK ARCHITECT PLLC, MICHAEL J.  
GADALETA, HHF DESIGN CONSULTING, LTD.,  
HELMUT HANS FENSTER, FOREMOST  
CONTRACTING, LLC, ALCON BUILDERS GROUP  
INC. and DARRAGH COLLINS,

Third-Party Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Motions bearing sequence numbers 005, 006 and 007 are consolidated for disposition.

This is an action for fraud, negligence, breach of contract and nuisance, arising from plaintiff Andrea Liberman's purchase of two condominium units. In January of 2011, Cayre commenced a third-party action for contribution and indemnification against, among others, Foremost Contracting, LLC (Foremost) (005), Alcon Builders Group Inc. (Alcon) and Darragh

Collins (006) and HHF Design Consulting, Ltd. (HHF) and Helmut Hans Fenster (007).

Foremost, Alcon, Collins, HHF and Fenster now move to dismiss the third-party complaint for failure to state a cause of action.

For the reasons stated below, the motions are granted in part and denied in part.

### *Background*

On August 22, 2006, plaintiff Andrea Liberman purchased units 5E and 5W in the Blanca Condominium (the Condominium) at 206 East 73 Street, New York, New York, for \$4.1 million. Complaint ¶ 22. Defendant Cayre Synergy 73<sup>rd</sup> LLC (Cayre) was the sponsor and defendant Core Group Marketing LLC (Core Group) was the selling agent.<sup>1</sup>

According to Cayre, the Condominium was created by combining and rehabilitating two adjacent four-story residential buildings into one building with nine residential units and one community facility. On October 20, 2002, Cayre retained Foremost to be the general contractor in connection with the construction, conversion and rehabilitation of the Condominium. Third Party Complaint ¶ 14. Foremost's responsibilities included implementing the mechanical, electrical, structural and plumbing plans submitted by the architect and engineer. *Id.* Foremost also was responsible for implementing plans related to the air conditioning and sprinkler systems. *Id.*

On November 20, 2002, Cayre retained HHF "to perform engineering services in connection with the construction, conversion and rehabilitation of the Building, specifically relating to the HVAC, electrical, sprinkler & plumbing systems of the Building, including the spaces located within Plaintiffs' units." Third-Party Complaint ¶ 22. Fenster is a licensed

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<sup>1</sup> The individual defendants are associated in various capacities with Cayre and/or Core Group.

engineer and principal of HHF. Third-Party Complaint ¶ 21.

Among other things, HHF was required to “(a) prepare revised HVAC, electrical, sprinkler & plumbing design contract drawings and specifications; (b) review and inspect the contractors’ shop drawings and submissions; [and] © review and inspect contractors’ work to determine compliance with the design contract drawings and specifications and applicable governmental requirements, including the requirements of the New York City Building Code...” Third-Party Complaint ¶ 24.

In October of 2006, Cayre hired defendant Alcon to succeed Foremost as the general contractor with respect to the construction, conversion and rehabilitation of the Building. Third-Party Complaint ¶ 31. Collins is a principal of Alcon.

Lieberman and her husband, plaintiff Trevor Gurwich, commenced the main action in July of 2009, alleging that the units were uninhabitable due to extensive and repeated flooding, water leakage and seepage, extensive mold, poor workmanship and inferior materials and installations. Complaint ¶ 1. The complaint sets forth causes of action for, among other things, fraud, negligence, breach of contract and nuisance.

### *Discussion*

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and give the plaintiff the benefit of every favorable inference. *EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 (2005). However, “allegations consisting of bare legal conclusions as well as factual claims either inherently or flatly contradicted by the documentary evidence are not entitled to such

consideration.” *Stuart Lipsky, P.C. v Price*, 215 AD2d 102 (1st Dept 1995).

### *Contribution*

CPLR 1401 provides that, with certain exceptions, “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.” However, CPLR 1401 does not allow for contribution between parties whose liability is grounded on economic loss from a breach of contract. *Bd. of Ed. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 24 (1987); *Structure Tone, Inc. v Universal Servs. Grp., Ltd.*, \_\_Ad3d\_\_, 929 NYS2d 242, 245 (1st Dept 2011). Thus, “[t]o sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries.” *Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d at 1703, quoting *Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 (2d Dept 2010).

Movants argue that contribution would be inappropriate here because the plaintiffs’ alleged damages are purely economic losses related to Cayre’s breach of the contract of sale of the condominium units. This is unpersuasive.

The complaint in the main action asserts claims for more than purely economic losses. It also alleges that the plaintiffs suffered physical and mental injuries which required medical care, including allegedly jeopardizing Liberman’s pregnancy. Complaint ¶ 76. As such, this would not

be adequate grounds for dismissing Cayre's claims for contribution. Nonetheless, the contribution claims cannot stand.

Here, Cayre seeks contribution from the various third-party defendants on the ground that plaintiffs' allegations in the main action "arise from and relate to the construction, conversion and rehabilitation work" performed by the various third-party defendants. Third-Party Complaint ¶¶ 17, 26, 32. Cayre has not adequately alleged any facts to demonstrate that any of the movants breached a duty of care independent of their contracts, either to Cayre or to plaintiffs. *See Cinque v Schieferstein*, 292 AD2d 197 (1st Dept 2002)(plaintiff failed to demonstrate that defendant architect owed duty beyond the parties' contractual relationship). Rather, the third-party complaint alleges only that if Cayre is eventually found liable to the plaintiffs in the main action, it will be because one or more of the third-party defendants failed to fulfill their contractual obligations in connection with the conversion and rehabilitation of the Condominium.

In general, "[a] contractor hired to perform work is...not liable in tort to a non-contracting third-party when he or she breaches a contract and said breach causes injury to that third party." *Izzo v Proto Constr. & Dev. Corp.*, 81 AD3d 898, 899 (2d Dept 2011). "However, the Court of Appeals has identified three exceptions to the general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.' *Id.*, quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 (2002). Cayre has not demonstrated any of these exceptions. Again, the third-

party complaint alleges only that, if Cayre is found liable to the plaintiffs in the main action, it will be because one or more of the third-party defendants failed to fulfill their contractual duties in connection with their work on converting and rehabilitating the Condominium. See Third Party Complaint ¶¶ 18, 27, 33.

*Indemnification*

Indemnification may arise from contract or may be implied “based upon the law's notion of what is fair and proper as between the parties.” *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 (2011), quoting *Mas v Two Bridges Assoc*, 75 NY2d 680, 690 (1990). “Implied [or common-law] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other.” *Id.*

Common-law indemnification is applied when a party is deemed to be vicariously liable, solely due to the negligence of another. *Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 (4<sup>th</sup> Dept 2011). Where a party is even partially negligent, common-law indemnification is

foreclosed. *Id.*; *Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 556 (1st Dep: 2009); *Edge Mgt Consulting, Inc. v Blank*, 25 AD3d 364, 367 (1st Dept 2006).

Here, the third-party complaint specifically alleges that if Cayre is eventually found liable to the plaintiffs in the main action, it will be because one or more of the third-party defendants failed to fulfill their contractual duties in connection with the conversion and rehabilitation of the Condominium, rather than because of Cayre’s own actions.

The movants argue that this claim must be dismissed because Cayre was actively involved in the design and construction of the Condominium. They contend that Cayre hired each of the



parties and had final control over the rehabilitation process. As such, they contend that Cayre cannot assert a claim for indemnification.

Assuming the truth of the allegations in the third-party complaint for the purposes of this motion, the court finds that Cayre has sufficiently pled a cause of action for common-law indemnification. At best, questions of fact may exist as to whether Cayre participated in the rehabilitation process in such a way as to preclude an indemnification claim. Therefore, the motions to dismiss the claims for indemnification are denied. Accordingly, it is

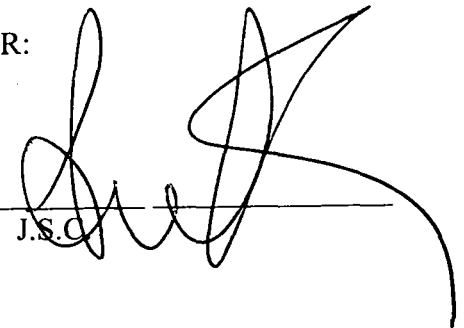
ORDERED that defendant Foremost Contracting, LLC's motion to dismiss (005) is granted to the extent that the third-party claim for contribution is dismissed and the motion is otherwise denied; and it is further

ORDERED that Alcon Builders Group Inc.'s and Darragh Collins' motion to dismiss (006) is granted to the extent that the third-party claim for contribution is dismissed and the motion is otherwise denied; and it is further

ORDERED that HHF Design Consulting, Ltd.'s and Helmut Hans Fenster's motion to dismiss (007) is granted to the extent that the third-party claim for contribution is dismissed and the motion is otherwise denied.

DATED: November 18, 2011

ENTER:



J.S.C.