[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 601417/2006
49 EAST 21 LLC
VS.
AJS PROJECT MANAGEMENT
SEQUENCE NUMBER : 016
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

JAN 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
JAN 19 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 1/17/12

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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49 EAST 21 LLC and THE ELAD GROUP, LTD.,

Plaintiffs,

INDEX NO.
601417/06

-against-

AJS PROJECT MANAGEMENT, INC., MATRIX CONSTRUCTION, LLC, ROBERT C. HOHMANN, ANTHONY SCLAFANI, ULTIMATE PARTITIONS, INC., SILIGHT LIGHTING, INC., OCEAN-BREEZE AIR CONDITIONING CORP., K-VENT, INC., OAKWOOD CLASSIC & CUSTOM WOODWORKS, INC., NORTHLAND CONSTRUCTION, LLC, CASTLE MASONRY, INC., B&B IRON WORKS CORP., ARCADE CONTRACTING & RESTORATION, INC., A.U.M. A&C, LTD., MAKUNA TILE, INC., DANICA PLUMBING & HEATING LLC, U.S. ELECTRIC CORP., KING FREEZE MECHANICAL CORP., SERVTECH CORP., KUDOS CONSTRUCTION CORP., EAST COAST ELECTRIC, INC. and DOES 1 TO 10,

Defendants.

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KING FREEZE MECHANICAL CORP.,

Third-Party Plaintiff,

INDEX NO.
590757/06

-against-

AVALANCHE AIR ENTERPRISES, INC. and AVALANCHE COOLING CORP.,

Third-Party Defendants.

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AJS PROJECT MANAGEMENT, INC., MATRIX CONSTRUCTION, LLC, ROBERT C. HOHMANN, ANTHONY SCLAFANI,

Second Third-Party Plaintiffs,

INDEX NO.
591080/06

-against-

ROTAVELE ELEVATOR INC., C.H. SCHMITT & CO., INC., SERVTECH CORP., CETRA/RUDDY INC., DUN RITE FLOORING, NORTHLAND CONSTRUCTION, U.S. ELECTRIC CORP., EL-AD PROPERTIES NY LLC, THOMAS ELLIOT and MIKI NAFTALI,

Second Third-Party Defendants.

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----------X
AJS PROJECT MANAGEMENT, INC., MATRIX CONSTRUCTION, LLC, ROBERT C. HOHMANN, ANTHONY SCLAFANI,

Third Third-Party Plaintiffs,

-against-

OCEAN-BREEZE AIR CONDITIONING CORP,

Third Third-Party Defendant.

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INDEX NO. 590647/08

LOUIS B. YORK, J.:

Defendant Arcade Contracting & Restoration, Inc., ("Arcade") moves pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims against it.

Plaintiffs 49 East 21 LLC ("49 East") and the Elad Group, Ltd. ("Elad"), respectively the owner and developer of a Manhattan building, brought this action to recover for damages allegedly incurred during the construction, renovation and conversion of the building from commercial use to a residential condominium. Defendant AJS Project Management, Inc. ("AJS") d/b/a Matrix Construction, LLC ("Matrix") was the general contractor (collectively, "AJS/Matrix") on the project. Arcade was the roofing, masonry and concrete subcontractor.

Only two causes of action in the complaint are aimed at the subcontractors: the fifth, which asserts claims for breach of contract, and the sixth, which alleges that the subcontractors performed their work negligently. Arcade now moves to dismiss those causes of action and the cross-claims against it. Arcade relies primarily on two arguments in support of its motion to dismiss: its lack of privity with plaintiffs and the doctrine of collateral estoppel, based on this court's prior dismissal of the same claim against defendant Danica Plumbing & Heating LLC ("Danica") (see mot. seq. no. 006).

In opposition to Arcade's motion, plaintiffs argue that the only evidence submitted by Arcade is its counsel's affirmation, who, without personal knowledge, "purports to identify a purchase order agreement" between Arcade and AJS/Matrix. Things are further confused,

plaintiffs argue, since in its response to Arcade's notice to admit, AJS/Matrix admitted entering into a purchase order contract with Arcade, but not the one proffered by Arcade's counsel. Plaintiffs also argue that Arcade cannot rely on collateral estoppel because the issues and contracts germane to this motion are not the same as those in Danica's motion.

Defendant Ultimate Partitions II, Inc., s/h/a Ultimate Partitions, Inc. ("Ultimate"), while taking no position on Arcade's motion, object to plaintiffs' attempt to nullify this court's prior holding in connection with Danica's motion for summary judgment (mot. seq. nos. 006 and 008) that plaintiffs could not recover damages based on the claim of negligent construction from parties with which they were not in privity (sixth cause of action). Ultimate argues that since plaintiffs never pursued their appeal of the court's decision, they are now precluded from relitigating the issue.

AJS/Matrix and co-defendants Anthony Sclafani and Robert C. Hohmann ("Hohmann") oppose Arcade's motion to the extent that Arcade seeks summary judgment dismissing their cross-claims by virtue of collateral estoppel based on the grant of summary judgment to Danica. AJS/Matrix argues that Arcade cannot rely on collateral estoppel because it has not sought leave to amend its answer to assert that affirmative defense, which must be pleaded (see CPLR 3018[b]). Relying on *Menorah Nursing Home, Inc. v Zukov* (153 AD2d 13 [2d Dept 1989]), it further argues that even if Arcade could evoke collateral estoppel now, it would not provide a basis for dismissal of Matrix's indemnification claim since the court did not dismiss that claim against Danica. In addition, AJS/Matrix argues that Arcade's motion violates CPLR3212(b) since it is not supported by an affidavit from someone with personal knowledge of the facts, and Arcade's exhibits C, D and E, which purportedly buttress counsel's affirmation, are not in proper evidentiary form and must be rejected. In his opposing affidavit, Hohmann avers that Arcade was exclusively responsible for the roof and its shoddy roof work caused $275,000 in damages. In support of this contention, AJS/Matrix proffers an excerpt from a report in which an expert details the problems with Arcade's work (exhibit 1) and copies of complaints to Arcade

about its work (exhibit 2).

In reply to both plaintiffs' and AJS/Matrix's opposition, Arcade argues that no one has produced any other agreement executed by Arcade, and the issues raised in Arcade's motion are identical to those decided in Danica's motion so collateral estoppel applies. In reply to AJS/Matrix's opposition to the dismissal of its cross-claims, Arcade argues that AJS/Matrix cannot rely on the court's failure to dismiss the indemnification claim against Danica because Danica had a signed, binding contract with Matrix and Arcade does not.

At the outset, the court finds that Arcade's reliance on collateral estoppel is misplaced. For collateral estoppel to exist, "there must be proof that the issue in the prior action is identical, and thus decisive, of that issue in the current action" (*Young v GSL Enterprises, Inc.*, 170 AD2d 401 [1st Dept 1991], citation omitted). Here, it is more accurate to say that Arcade's situation is the opposite of Danica's. Arcade's position is based on the fact that it had no contract mentioning plaintiffs, whereas Danica's signed contract with Matrix was a standard form contract between a contractor and subcontractor which contained multiple references to Matrix's contract with 49 East. However, all the references to 49 East in the form contract had been specifically eradicated (see this court's decision in mot. seq. no. 008). Thus, while Arcade's lack of privity ensues from an omission, Danica's lack of privity was the result of an affirmative disavowal. Given this finding, it is not necessary to discuss Arcade's failure to plead collateral estoppel as an affirmative defense (see CPLR 3018[b]).

Nonetheless, the court finds that Ultimate is correct in its argument with respect to the sixth cause of action. Although the court finds collateral estoppel is unavailable to Arcade as a defense, this court's ruling that plaintiffs cannot recover damages for economic loss based on the negligent performance of subcontractors not in privity with them (see *Ossining Union Free School District v Anderson Larocca Anderson*, 73 NY2d 417, 424 [1989]) cannot be disturbed since it has become law of the case. "The purpose of the law of the case doctrine is to prevent relitigation of legal issues that have already been determined at an earlier stage of the

proceeding.... The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision.... Where a party has been afforded a full and fair opportunity to litigate an issue, a court's decision on that issue becomes the law of the case, precluding further litigation" (*Travelers Casualty and Surety Company v Honeywell International, Inc.*, 26 Misc 3d 1202(A), *8, 906 NYS2d 734 [Sup Ct, NY Co, Tolub, J, 2006], affd 48 AD3d 225 [1st Dept 2008], citations omitted).

The fifth cause of action alleges that each subcontractor breached its contract with AJS and Matrix, and plaintiffs were intended third-party beneficiaries of those contracts.

"A non-party may sue for breach of contract only if its is an intended, and not a mere incidental, beneficiary" (*LaSalle National Bank v Ernst & Young LLP*, 285 AD2d 101, 108 [1st Dept 2001]). Arcade contends that plaintiffs cannot assert a breach of contract claim against it because they are not intended beneficiaries of its agreement with AJS and Matrix, which consists of a work proposal and purchase order (see Arcade's exhibits C and D) and various plans and specifications (see *id.*, exhibit E). Plaintiffs argue that Arcade's motion is defective because it is not supported by an affidavit from someone with personal knowledge of the facts (CPLR 3212[b]), and Arcade's exhibits C, D and E, attached to its counsel's affirmation, must be rejected because they are not in proper evidentiary form.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.... Once that initial burden has been satisfied, the burden of production shifts to the party opposing the motion to produce sufficient evidence of the existence of a material issue of fact requiring a trial of the action" (*Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]). Arcade has produced documentary evidence of its agreement with AJS and Matrix which contains no provision making plaintiffs third-party beneficiaries of that accord. That evidence suffices to meet its initial burden on this motion. Although plaintiffs take issue with Arcade's documentary evidence, they have offered

none of their own. Discovery, supervised by Special Referee Howard Leventhal, has been completed. No document executed by Arcade making either 49 East or Elad a third-party beneficiary has surfaced. Therefore, plaintiffs' opposition to the dismissal of their fifth cause of action against Arcade amounts to nothing more than speculation and wishful thinking. "[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], citations omitted).

Plaintiffs' sixth cause of action alleges that the subcontractors were negligent because they breached their duty to perform their respective contractual obligations "in a skillful and workmanlike manner."

Plaintiffs argue that this cause of action should not be dismissed against Arcade because plaintiffs have "properly alleged damages beyond the replacement of bargained-for consideration ... [and] suffered consequential damages resulting from the acts of Arcade. In their opposition, plaintiffs stress the magnitude of their damages while remaining silent about Arcade's lack of a duty to them. "Because a finding of negligence must be based on the breach of a duty... [the key question here] is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contractors*, 98 NY2d 136, 138 [2002]). There is no evidence that Arcade owed any duty to plaintiffs, and the only duty allegedly breached by Arcade is the duty to competently perform its contractual obligations. It is "well established that mere breach of a contract does not give rise to a tort cause of action unless a legal duty independent of the contract has been violated" (*Feinman v Parker*, 252 AD2d 869 [3d Dept 1998]). The court disagrees with plaintiffs' contention that they "have sufficiently alleged damages beyond standard economic loss." "Here, [plaintiffs] seek[] only pecuniary damages resulting from the defective condition of the roof. No legal duty independent of [Arcade's]

contractual obligations ... is claimed to have been breached" (*Board of Education of the Hudson City School District v Sargent, Webster, Crenshaw & Foley*, 71 NY2d 21, 29 [1987]). Even if the alleged negligence in performance of contractual obligations is gross negligence, economic damages stemming from that negligence are not recoverable (*Clark-Fitzpatrick, Inc. v Long Island Railroad Co.*, 70 NY2d 382, 389-390 [1987]). That is exactly what plaintiffs seek to recover here – damages which are not unexpected as a result of roofing work as shoddy as Arcade's is alleged to be.

Under our scheme of laws, however, plaintiffs are not without recourse and Arcade is not without liability. Plaintiffs may recover their damages from AJS/Matrix, the party with which they had a contractual relationship and which hired and retained Arcade, and AJS/Matrix can in turn recover from Arcade. Arcade seeks to dismiss AJS/Matrix's cross-claims against it arguing that it cannot be liable for contractual indemnification because there is no signed contract providing for indemnification, and AJS/Matrix cannot sustain common-law indemnification and contribution claims against Arcade because plaintiffs have alleged that AJS/Matrix is negligent.

The court finds that Arcade is correct only with respect to AJS/Matrix's claim for contractual indemnification. With respect to the common-law claims, however, Arcade apparently misapprehends the distinction between allegations and proof. At this juncture, no negligence has been proven against AJS/Matrix. If and when it is, Arcade may have a defense to the cross-claims (see *Edge Management Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006], app dism 7 NY3d 864 [2006]; *Johnson City Central School District v Fidelity and Deposit Co. of Maryland*, 272 AD2d 818, 819-820 [3d Dept 2000]), it does not have one now.

Accordingly, Arcade's motion for summary judgment is granted to the extent that it seeks dismissal of plaintiffs' fifth and sixth causes of action against it and of AJS/Matrix's cross-claim for contractual indemnification. To the extent Arcade seeks dismissal of AJS/Matrix's cross-claims for common-law indemnification and contribution, its motion is

denied.

[redacted]

This decision constitutes the order of the court.

DATED: Jan. 17, 2012

J.S.C.

LOUIS B. YORK
J.S.C.