

Teachers Coll.-Columbia Univ. v RCDolner LLC

2012 NY Slip Op 30390(U)

February 16, 2012

Supreme Court, New York County

Docket Number: 600318/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
TEACHERS COLLEGE - COLUMBIA UNIVERSITY

Plaintiff,

- against-

Index No.: 600318/2010
Submission Date: 11/30/11

RCDOLNER LLC,

Defendant.

----- X
RCDOLNER LLC,

Third-Party Plaintiff,

- against-

FILED

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MATRIX MECHANICAL CORP., MARTIN
ASSOCIATES, INC., PAR PLUMBING CO., INC.,
FEDERATED MECHANICAL CORP.,
COMMERCIAL ELECTRICAL CONTRACTORS
INC., PRINCE CARPENTRY, INC., DONALDSON
ACOUSTICS CO., INC., RPH, INC., HP
ELECTRICAL DESIGN, INC. and ADCO
ELECTRICAL CORP.

Third-Party Defendants.

----- X
For Defendant/Third Party Plaintiff:
Cozen O'Connor
45 Broadway, 16th Floor
New York, NY 10006

For Third Party Defendant ADCO Electrical Corp:
Murtagh, Cohen & Byrne
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Papers considered in review of this motion for summary judgment:

Notice of Motion 1
 Mem of Law in Support
 of Motion. 2
 Aff in Opposition. 3
 Reply Aff 4
 Reply Mem of Law. 5

HON. SALIANN SCARPULLA, J.:

In this action for contribution and indemnification, third-party defendant Adco Electrical Corp. (“Adco”) moves pursuant to CPLR § 3211(a)(7) to dismiss the third-party complaint against it.

In September 2002, defendant/third-party plaintiff RCDolner, LLC (“Dolner”) entered into a contract with plaintiff Teachers College, Columbia University (“Teachers College”), whereby Dolner agreed to act as the construction manager on two projects at Teachers College. The first project was for the construction of a dormitory and the second project was for the renovation of Teacher College’s library. Teachers College alleges that Dolner breached the terms of its agreement “in that Dolner permitted and/or failed to discover defective construction, [performed] the Work in an unworkmanlike, negligent and defective manner, and [performed the] Work not in accord with the Contract Documents.”

Thereafter, Dolner commenced this third-party action against, *inter alia*, Adco, alleging causes of action for contribution, indemnification and breach of contract. In its cause of action for contribution, Dolner alleges that any damages Teachers College

sustained were a result of Adco's "primary and active negligence, carelessness and recklessness." Dolner alleges in its indemnification claim that Adco is obligated to indemnify Dolner in the event Dolner is held liable because Teachers College's damages resulted from Adco's "breach of contract, primary and active negligence, carelessness and recklessness . . ." Lastly, Dolner alleges that Adco breached its contract with Dolner by failing to name Dolner as an additional insured on Adco's insurance policy.

Adco now moves to dismiss the third-party complaint against it. Adco argues that Dolner may not assert contribution claims against Adco because the underlying cause of action between Teachers College and Dolner is for breach of contract, and contribution claims only lie where the underlying action is for tort. Adco further maintains that the Court should dismiss Dolner's express indemnification and breach of contract causes of action because Adco never entered into a contract with Dolner or performed any work on the Teachers College library. Finally, Adco argues that Dolner was partially at fault for Teachers College's damages, thus it may not recover under a theory of common law indemnification.

In opposition, Dolner contends that Teachers College's complaint sounds in negligence, not breach of contract, thus Dolner may assert a contribution claim against Adco. Dolner maintains that it sufficiently pled causes of action for express indemnification and breach of contract, and that Adco's denial of a contractual relationship is insufficient to warrant dismissing of Dolner's third-party complaint.

Lastly, Dolner argues that it is premature to dismiss the common law indemnification claim because little discovery has been completed and it is still unclear which party was at fault for Teachers College's alleged damages.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. The sole inquiry is whether, according to the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out. *See Leder v. Spiegel*, 31 A.D.3d 266 (1st Dept. 2006) *aff'd* 9 N.Y.3d 836 (2007); *Franklin v. Winard*, 199 A.D.2d 220 (1st Dept. 1993).

Even giving the complaint the required liberal construction, Dolner has failed to state a cognizable cause of action against Adco for contribution. Claims for contribution under CPLR § 1401 apply to damages arising from personal injury, property damage and wrongful death, not purely economic damages arising from a breach of contract. *See Structure Tone, Inc. v. Universal Servs. Group, Ltd.*, 87 A.D.3d 909, 910 (1st Dept. 2011). Here, the crux of Teachers College's complaint is that Dolner "failed to fulfill all of its material contractual obligations and breached" the terms of the contract. Though Teachers College alleges that Dolner acted in a "negligent" manner, this is insufficient on its own to transform the cause of action from breach of contract to tort for purposes of § 1401. *See Clark-Fitzpatrick, Inc. V. Long Island R. Co.*, 70 N.Y.2d 382, 390 (1987) ("Merely charging a breach of a 'duty of due care', employing language familiar to tort

law, does not, without more, transform a simple breach of contract into a tort claim.”).

See also Board of Education v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21, 29 (1987). Accordingly, the Court dismisses Dolner’s contribution cause of action as to Adco.

However, the Court denies Adco’s motion to dismiss the indemnification and breach of contract causes of action. Adco maintains that it never subcontracted with Dolner or agreed to name Dolner as an additional insured. In support of its argument, Adco has provided an affidavit from its vice president, Erwin Moskowitz (“Moskowitz”), attesting that Adco never contracted with Dolner. In opposition, Dolner has not submitted a copy of any contract between Adco and Dolner.

This is a pre-answer motion to dismiss, which has not been converted to a motion for summary judgment. Thus, though the Court may consider an affidavit submitted on a motion to dismiss, it may not review the affidavit “for the purpose of determining whether there is evidentiary support for the pleading.” *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976). Here, Dolner sufficiently alleges that it contracted with Adco for indemnification and insurance. Moskowitz’s affidavit denying this allegation raises an issue of fact to be explored through discovery and to be tested on a summary judgment motion or at trial. At this stage, the Court denies Adco’s motion to dismiss Dolner’s causes of action for express indemnification and breach of contract.

Adco further maintains that Dolner may not recover under common law indemnification because Dolner was partially responsible for Teachers College's damages. *See Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449, 453 (1st Dept. 1985). Though Dolner does not contest that it was responsible under its contract for inspecting the work on the projects, it is too early to determine whether Dolner was partially responsible for Teachers College's damages or whether those damages are wholly attributable to Adco. *See Robinson v. Canniff*, 22 A.D.3d 219, 221 (1st Dept. 2005). Consequently, the Court denies Adco's motion to dismiss Dolner's cause of action for common law indemnification.

In accordance with the foregoing, it is hereby

ORDERED that third-party defendant Adco Electric Corp.'s motion do dismiss the complaint against it is granted to the extent that defendant/third party plaintiff RCDolner, LLC's cause of action for contribution is dismissed as to defendant Adco Electric Corp., and the motion is otherwise denied.

This constitutes the decision and order of the Court.

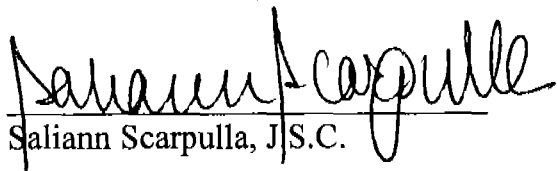
Dated: New York, New York
February 16, 2012

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Saliann Scarpulla, J.S.C.