

**Board of Mgrs. of Mill Pond Acres Condominium v
Sandy Hollow Assoc., LLC**

2012 NY Slip Op 30811(U)

March 22, 2012

Supreme Court, Nassau County

Docket Number: 12989-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**BOARD OF MANAGERS OF MILL POND ACRES
CONDOMINIUM, on behalf of Stanley Gerardas
the owner of .3375% interest in the Common Elements,
Richard Raskin as owner of .446% interest in the
Common Elements,**

Plaintiff,

-against-

**SANDY HOLLOW ASSOCIATES, LLC,
MICHAEL F. PUNTILLO, MICHAEL S. PUNTILLO
and ROBERT M. PASCUCCI,**

Defendants.

-----x
SANDY HOLLOW ASSOCIATES LLC,

Third-Party Plaintiff,

-against-

**J.D. POSILLICO, INC. and CAMERON
ENGINEERING & ASSOCIATES LLP,**

Third-Party Defendants.

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The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affidavit in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**
- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affidavit in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**

Motion Papers (Cont.)

Reply Affirmation.....X
Reply Memorandum of Law in Further Support.....X

This matter is before the Court for decision on 1) the motion filed by Third-Party Defendant Cameron Engineering & Associates, LLP (“Cameron”) on September 19, 2011 and 2) the motion filed by Third-Party Defendant J.D. Posillico, Inc. n/k/a Posillico Civil, Inc. (“Posillico”) on October 17, 2011, both of which were submitted on February 1, 2012. For the reasons set forth below, the Court 1) denies the motion by Cameron to dismiss the Third- Party Complaint; and 2) grants the motion by Posillico to dismiss the Third-Party Complaint.

A. Relief Sought

Cameron moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Third-Party Complaint (“TPC”) as against Cameron.

Posillico moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the TPC as against Posillico.

Defendant/Third-Party Plaintiff Sandy Hollow Associates, LLC (“Sandy Hollow”) opposes the motions.

B. The Parties’ History

In or about 1988, Sandy Hollow contracted to purchase a parcel of land in the Village of Port Washington North (“Property”) from Dallas Realty Company (“Dallas”). Dallas (as fee owner) and Sandy (as contract vendee) then applied to re-zone and subdivide the Property to build a senior citizen condominium development to be known as Mill Pond Acres Condominium (“Project”). Sandy Hollow retained Cameron, pursuant to a written agreement dated December 28, 2001, to provide civil engineering services for the development of the Property. In addition to those services, Cameron performed civil engineering services pursuant to the “Additional Engineering Services Proposal” which was approved by Sandy Hollow on December 6, 2002.

Sandy Hollow obtained zoning and subdivision approvals, in March and December 2002, respectively. Sandy Hollow hired Port North Construction LLC (“Port North”) as the general contractor for the Project in August 2003. Port North then entered into a sub-contract agreement with Posillico to construct, among other things, the common elements of the Project as designed by Cameron. Sandy Hollow obtained building permits in 2003 and Posillico started

construction on the Project. Sandy Hollow sold the units and Posillico completed construction around July 2006 with certain punch list items of work agreed to and completed by early 2007.

On September 29, 2010, Plaintiff, Board of Managers of Mill Pond Acres Condominium, on behalf of Stanley Gerardas and Richard Raskin (“Mill Pond”), commenced the main action against Sandy Hollow and its principals Michael F. Puntillo, Michael S. Puntillo and Robert M. Pascucci (“Principals”), by the filing of a Supplemental Summons and Amended Complaint (“Complaint”) (Ex. 1 to McAndrew Aff. in Supp.). The Complaint alleges four causes of action against Sandy Hollow and its principals. The first alleges that Sandy Hollow breached its contractual obligations as contained in the offering plan by failing to complete the construction of the common elements of the condominium in accordance with the approved plans and specifications as well as municipal requirements, and failing to correct the allegedly defective conditions (“Defects”), which are set forth in the Complaint. The second cause of action alleges that Sandy Hollow breached its express and implied warranties by allowing the Defects in the common areas to exist. The third cause of action alleges that Sandy Hollow negligently constructed the common elements of the Project by allowing the Defects to exist. The fourth cause of action alleges that the Principals breached their fiduciary duty to the Project and its homeowners.

Mill Pond alleges that the Defects include but are not limited to the following:

- (a) Providing improper and/or inadequate drainage of the roadways and common elements;
- (b) Defectively installing concrete sidewalks, aprons, steps and curbs throughout the Condominium, resulting in excessive deterioration, cracking and sinking;
- (c) Failing to properly support and/or construct the slabs and columns supporting the townhouse units, resulting in excessive settlement;
- (d) Defectively installing asphalt throughout the community;
- (e) Failing to comply with the grading required pursuant to the approved plans, causing flooding and ponding;
- (f) Failing to connect all dry wells to the corresponding catch basins;
- (g) Failing to provide a roadway crown as required pursuant to the approved plans;
- (h) Failing to provide adequate site lighting in the area of the trash bins relative to the Vineyard units;

- (i) Failing to provide adequate distance between units and berms at Buildings 22, 23, 24 and 26;
- (j) Failing to provide adequate drainage throughout the condominium;
- (k) Failing to provide adequate walkways and/or access to the parking lots from the Vineyard units;
- (l) Failing to install plantings in accordance with the approved plans;
- (m) Failing to provide a functioning irrigation system, resulting in the loss of substantial landscape materials;
- (n) Failing to properly stucco units 181 to 188;
- (o) Failing to properly construct the clubhouse including, but not limited to failing to provide proper equipment and ventilation in the pump room, failing to install proper air systems in the furnace room and failing to provide furnishings; and
- (p) Failing to install the venting / ducting of the clothes dryers appurtenant to the units in accordance with Plaintiff Condominium's Offering Plan, the manufacturer's specification, applicable laws and regulation and the requirements of the Village of Port Washington.

Complaint at ¶ 19.

Sandy Hollow and its Principals served an Answer to the Complaint in October of 2010 (Ex. A to Stevens Aff. in Supp.). In June of 2011, Sandy Hollow commenced the Third-Party Action against Posillico and Cameron (Ex. 2 to McAndrew Aff. in Supp.). The TPC contains two causes of action: (a) indemnification, and (b) contribution, against both Cameron and Posillico. Pursuant to a stipulation of discontinuance dated September 7, 2011 (*id.* at Ex. 3), entered into between Sandy Hollow and Cameron, Sandy Hollow discontinued the second cause of action, for contribution, against Cameron.

Paragraph 11(A) of the Posillico subcontract (Ex. A to Puntillo Aff. in Opp.) provides as follows:

(A) Indemnification. Subcontractor [Posillico] shall indemnify and hold harmless the Owner [Sandy Hollow] and the General Contractor [Port North] and their agents and employees from and against all claims, damages, losses and expenses including reasonable attorneys' fees arising out of or resulting from the performance of this Subcontractor's Work, provided that any such claim, damage, loss or expenses (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (**other than the Work itself**) [emphasis added] including the loss of

use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Subcontractor, any subcontractor of this Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. The General Contractor may retain any money due or to become due hereunder, sufficient to indemnify if against such injuries, claims, suits, actions, cost or damage should any such claim arise.

The TPC alleges that Sandy Hollow retained Cameron to design the plans and specifications for the common elements, including but not limited to 1) site grading, 2) paved roadways, 3) sidewalks, 4) curbing, 5) driveway aprons, and 6) storm water drainage facilities. It further alleges that Cameron designed many of the allegedly Defective items alleged in the Complaint.

In support of Cameron's motion, Kevin McAndrew ("McAndrew") affirms that he has been a landscape architect licensed and registered to practice in the State of New York since 1988, and has been employed by Cameron since 2000. He affirms that he has reviewed Cameron's written agreements with Sandy Hollow and other relevant documentation in Cameron's file (*see* Exs. 4 and 5 to McAndrew Aff. in Supp.) and submits that neither agreement obligated Cameron to defend, indemnify or hold harmless Sandy Hollow. He affirms, further, that Cameron did not enter into any additional agreements in connection with the Project. McAndrew submits that the Court should dismiss the TPC against Cameron on the grounds that 1) Plaintiff's claims against Sandy Hollow are necessarily premised on Sandy Hollow's active wrongdoing in failing to properly construct the Project; 2) Cameron was not obligated to defend, indemnify or hold harmless Sandy Hollow; and 3) Sandy Hollow voluntarily discontinued its cause of action against Cameron for contribution.

In his Affidavit in Opposition, Michael F. Puntillo ("Puntillo"), a Member and Manager of Sandy Hollow, affirms the truth of the allegations in the Complaint regarding the reasons that Sandy Hollow retained Cameron, and the fact that Cameron designed many of the items that are described as Defects in the Complaint. Puntillo affirms, further, that Sandy Hollow "did not perform any part of the design work in connection with the Project and, in fact, delegated such work entirely to Cameron Engineering by agreement" (Puntillo Aff. in Opp. at ¶ 14).

C. The Parties' Positions

Cameron submits that Sandy Hollow's third-party cause of action against Cameron for indemnification is not viable because, in light of the fact that Plaintiff sued Sandy Hollow for its

own active wrongdoing, Sandy Hollow is not entitled to common law indemnification from Cameron. Cameron argues, further, that it was not contractually obligated to defend, indemnify or procure insurance for Sandy Hollow or any other party. Thus, Sandy Hollow cannot, as a matter of law, establish the elements necessary to obtain indemnification from Cameron. As Sandy Hollow already discontinued its third-party cause of action against Cameron for contribution, the Court should dismiss the TPC against Cameron in its entirety.

Posillico submits that Sandy Hollow's first cause of action seeking contractual indemnification from Posillico is barred by the express terms of Posillico's subcontract, specifically the language in paragraph 11 which reflects Posillico's agreement to indemnify Sandy Hollow for claims arising from performance of the subcontractor's work "other than the Work itself." Posillico argues, further, that the Court should dismiss the indemnification and contribution claims against Posillico on the grounds that they are not viable because they seek recovery for purely economic loss resulting from the alleged breach of Sandy Hollow's contractual obligations. Posillico also contends that the TPC should be dismissed against Posillico because there is no privity of contract or any other legal duty owing from Posillico to Sandy Hollow.

Sandy Hollow opposes the motions submitting, *inter alia*, that 1) the absence of an indemnification provision in the agreements between Sandy Hollow and Cameron does not preclude Sandy Hollow from asserting a valid implied, or common law, indemnification claim; 2) in light of the affirmations of Michael F. Puntillo, a Member and Manager of Sandy Hollow, that Sandy Hollow delegated certain work to Cameron, Sandy Hollow is entitled to indemnification from Cameron to the extent that any alleged failure by Cameron to comply with, *e.g.*, design standards referred to in the main action caused damage to Mill Pond; 3) the limited indemnification provision in the subcontract agreement with Posillico does not bar Sandy Hollow's implied, or common law, indemnification claim; 4) as Mill Pond asserts both a breach of contract and negligence claim in the main action, Sandy Hollow's common law indemnification claim against Posillico is not barred by the economic loss doctrine; and 5) even assuming *arguendo* that there was no privity of contract between Sandy Hollow and Posillico, that fact would not bar a common law indemnification claim because the liability is quasi-contractual.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Contribution and Indemnification

The rules governing contribution, as set forth in *Dole v. Dow Chem Co.*, 30 N.Y.2d 143, 147-153 (1972) and codified in CPLR Article 14, enable a joint tortfeasor who has paid more than his or her equitable share of damages to a plaintiff to recover the excess from the other tortfeasor. *O'Gara v. Alacci*, 67 A.D.3d 54, 57 (2d Dept. 2009). Ordinarily, the other tortfeasor's liability for contribution flows from a breach of a duty owed to the plaintiff. *Id.*

A party's right to indemnification may arise from a contract or may be implied based on the law's notion of what is fair and proper as between the parties. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d 369, 374-375 (2011), quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690 (1990). A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. *Baillargeon v. Kings County Waterproofing Corp.*, 936 N.Y.S.2d 298, 300 (2d Dept. 2012), citing *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 (1987), quoting *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 (1973). 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. *McCarthy*, 17 N.Y.3d at 375, quoting *Mas*, 75 N.Y.2d at 690, citing *McDermott v. City of New York*, 50 N.Y.2d 211, 216-217 (1980), *reh. den.*, 50 N.Y.2d 1059 (1980). Common law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer. *Id.*, quoting *Mas* at 690.

Claims for contribution and indemnification are not available in actions seeking recovery for purely economic loss resulting from the breach of contractual obligations. *Lawrence Devel. Corp. v. Jobin Waterproofing, Inc.*, 186 A.D.2d 634, 636 (2d Dept. 1992), citing *Board of Educ. v. Sargent, Webster Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987). In *Rockefeller University v. Tishman Construction Corp.*, 232 A.D.2d 155 (1st Dept. 1996), *reconsid. den.*, *app. den.*, 1996 N.Y. App. Div. LEXIS 13937 (1st Dept. 1996), *app. den.*, 89 N.Y.2d 811 (1997), the First Department affirmed the trial court's dismissal of third-party plaintiff's contribution causes of action where the complaint in the main action by the project owner sought damages for economic loss resulting from a breach of contract, concluding that, "the tort language notwithstanding" and absent some form of tort liability, contribution was unavailable. *Id.*

C. Application of these Principles to the Instant Action

The Court denies Cameron's motion to dismiss the Third-Party Complaint. The Court cannot conclude, as a matter of law, that Sandy Hollow is not entitled to common law indemnification where, as here, the main complaint seeks damages from Sandy Hollow flowing from the Defects, and Sandy Hollow has alleged that it retained Cameron to design the plans and specifications for the common elements of the Project, and that any damages incurred by Mill Pond resulting from those Defects were due to Cameron's conduct. Given that the factual allegations contained in the Third-Party Complaint, when given every favorable inference, constitute a cause of action cognizable at law, and the fact that those factual allegations were not definitively contradicted by the evidence submitted by Cameron, the Court denies Cameron's motion to dismiss the cause of action in the Third-Party Complaint for indemnification.

The Court grants Posillico's motion to dismiss the Third-Party Complaint against Posillico in light of the fact that the applicable subcontract specifically excludes indemnification for damages for the "work itself." Moreover, as the underlying action seeks damages for purely economic losses resulting from an alleged breach of contract, Sandy Hollow does not have a valid cause of action against Posillico for contribution.

All matters not decided herein are hereby denied.

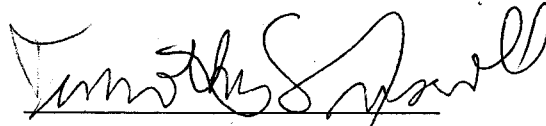
This constitutes the decision and order of the Court.

The Court reminds counsel for the remaining parties of their required appearance before the Court for a Certification Conference on April 16, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

March 22, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAR 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE