

**Dormitory Auth. of the State of N.Y. v A. Williams  
Trucking & Backhoe Trenching, Inc.**

2012 NY Slip Op 33322(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 450133/2011

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: Justice

PART 61

DONATORY AUTHORITY

INDEX NO. 450133/11

-v-

MOTION DATE

A. WILLIAMS TRUCKING

MOTION SEQ. NO. 003

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/9/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 61

-----X

Dormitory Authority of the  
State of New York,

Plaintiff,

Index Number:

-against-

450133/2011

A. Williams Trucking & Backhoe  
Trenching, Inc., Aspro Mechanical  
Contracting, Inc., CNA Surety  
Corporation d/b/a American  
Casualty Company of Reading, Pa.,  
Dierks Heating Company, Inc.,  
Future Tech Consultants of New  
York, Inc., Pyramid Fire  
Protection, Inc., Smi-Owen Steel  
Company, Inc., Stonewall  
Contracting Corporation, ADF  
South Carolina, Inc.,

Defendants.

-----X

**Anil C. Singh, J:**

CNA Surety Corporation d/b/a American Casualty Company of Reading, Pa. (American Casualty) moves, pursuant to CPLR 3211 (a) (7) and 3014, to dismiss the cross claim asserted against it by Dierks Heating Company, Inc. (Dierks).

**Parties and Their Allegations**

The action arises out the construction of the Bronx County criminal court complex (the Project) (complaint, ¶ 1). Plaintiff financed and managed the Project (*id.*). It alleges that it hired defendants to perform construction work and construction-related services and that they failed “to perform in accordance with their contractual obligations”, resulting in the Project’s completion being delayed from December 31, 2005 until February 2008 and causing increased

construction costs (*id.*, ¶ 2).

In March 2001, SMI-Owen Steel Company, Inc. (SMI-Owen) entered into contract number DA 78798/1380909999 (the SMI-Owen Contract) with plaintiff for structural steel work in connection with the Project (*id.*, ¶ 23). On March 25, 2002, American Casualty executed a performance bond (the Performance Bond) in connection with the SMI-Owen Contract in the amount of \$27,850,000 (*id.*, ¶ 25).

The complaint further alleges that, on December 10, 2003, SMI-Owen declared itself in voluntary default, that plaintiff accepted this default and demanded that American Casualty perform under the Performance Bond (*id.*, ¶ 27). Pursuant to its obligations, on January 29, 2004, American Casualty executed a takeover agreement (the Takeover Agreement), under which it agreed to hire A.J. McNulty & Co., Inc. (McNulty) to complete the outstanding work under the SMI-Owen Contract (*id.*, ¶¶ 29-31), but plaintiff asserts that the work was not completed in a timely and adequate manner (*id.*, ¶ 33).

In November 2001, plaintiff entered into contract number DA 84162/1380909999 with Dierks (the Dierks Contract) for HVAC-related work on the Project and plaintiff contends that Dierks failed to complete its work in a timely and adequate manner (*id.*, ¶¶ 35-36). Dierks interposed an answer to plaintiff's complaint, admitting that it entered into the Dierks Contract and that it agreed to complete the work required, but denying that it had breached its contractual obligations and including a cross claim against American Casualty for contribution and indemnification, asserting that American Casualty's, A. Williams Trucking & Backhoe Trenching, Inc.'s (Williams) and ADF South Carolina, Inc.'s (ADF) work at the project was responsible for any delay and that Article 13 of the Dierks Contract provides it a right to

contractual indemnity against other contractors and subcontractors.

### **Contractual Provisions**

Article 13.01 (E) of the SMI-Owen Contract and the Dierks Contract provide that “[s]hould any other contractor ... sustain damage through any act or omission of the Contractor or any subcontractor, the Contractor shall reimburse said other contractor for all said damages and shall indemnify and hold the Owner harmless from all said claims.”

The Takeover Agreement provides in Article V that “[t]he parties do not intend, and no provision herein shall be construed, to create any third-party beneficiaries, or to confer, any benefit, or enforceable rights hereunder, upon anyone other than the parties hereto.”

Dierks contends that, under these provisions, American Casualty agreed to contractual indemnity for the work performed by McNulty, its contractor.

### **Dismissal Standard**

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Dismissal based upon documentary evidence is appropriate only where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible, or that are flatly contradicted by the documentary evidence, are not accorded such favorable inferences, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

### **Contribution**

Dierks contends that it is entitled to seek contribution from American Casualty. However, “purely economic loss resulting from a breach of contract does not constitute ‘injury to property’ within the meaning of New York’s contribution statute” (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). The underlying claim in this action is plaintiff’s breach of contract claim against various contractors, including Dierks and American Casualty, based upon their purported failure to comply with their contractual obligations to perform timely and adequate work on the Project (complaint, ¶¶ 1-2). Since contribution is limited to apportioning responsibility in tort claims, the portion of Dierks’s cross claim that seeks contribution is dismissed (*Board of Educ.*, 71 NY2d at 28; *Whalen v 50 Sutton Place S. Owners*, 276 AD2d 356, 358 [1st Dept 2000]; *Tempforce, Inc. v Municipal Hous. Auth. of City of Schenectady*, 222 AD2d 778, 779-780 [3d Dept 1995], *lv denied* 87 NY2d 811 [1996]).

### **Common-Law Indemnity**

Common-law indemnification shifts responsibility from a party liable based upon its status to a party liable due to its fault (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). A party seeking common-law indemnity “must show that it may not be held responsible in any degree” (*Rosado v Proctor & Schwartz*, 66 NY2d 21, 25 [1985]). The predicate of common-law indemnity is vicarious liability without fault and Dierks’s cross claim does not allege that its liability is solely vicarious, but rather, that its liability should be shifted to American Casualty. Consequently, the portion of Dierks’s cross claim that seek common-law indemnity is dismissed (*Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*,

59 AD3d 311, 312 [1st Dept 2009]).

### **Contractual Indemnity**

The right to contractual indemnity depends upon the language of the contractual provision (*Smith v Broadway 110 Devs., LLC*, 80 AD3d 490, 491 [1st Dept 2011]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051-1052 [2d Dept 2007]). American Casualty signed the Takeover Agreement and this included an express provision stating that it did not create or confer any benefit on a third party.

The general rule is that construction contracts consider third-party beneficiaries to be incidental beneficiaries and not able to enforce contractual rights, such as indemnification provisions (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 [1976]; *Perron v Hendrickson/Scalamandre/Posillico (TV)*, 283 AD2d 627, 628 [2d Dept 2001]). Where, as in this case, there is an explicit provision barring third-party beneficiary enforcement, “that provision is decisive” (*Nepco Forged Prods. v Consolidated Edison Co. of N.Y.*, 99 AD2d 508, 508 [2d Dept 1984]; *Mendel v Henry Phipps Plaza W., Inc.*, 16 AD3d 112, 113 [1st Dept 2005]) *affd* 6 NY3d 783 [2006]. Accordingly, the portion of Dierks’s cross claim that seeks contractual indemnity against American Casualty is dismissed.

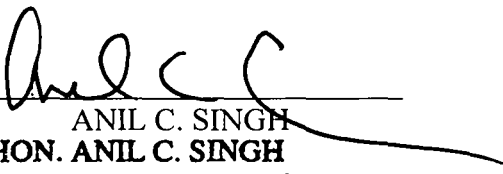
### **Order**

It is, therefore,

ORDERED that CNA Surety Corporation d/b/a/ American Casualty Company of Reading, Pa.’s motion to dismiss the cross claims asserted against it by Dierks Heating

Company, Inc. is granted and the said cross claims are dismissed.

Date: January 9, 2012

  
ANIL C. SINGH  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE