United Church Ins. Assn. v Axis Design Group Intl., LLC
2017 NY Slip Op 30742(U)
April 17, 2017
Supreme Court, New York County
Docket Number: 151873/15
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

UNITED CHURCH INSURANCE ASSOCIATION a/s/o CHURCH OF THE COVENANT PRESBYTERIAN,

Plaintiff,

-against-

AXIS DESIGN GROUP INTERNATIONAL, LLC; JOSEPH V. LIEBER, P.E., PERSONALLY AND AS MANAGING MEMBER OF AXIS DESIGN GROUP INTERNATIONAL LLC; AND ULM II HOLDING CORP.,

Defendants.

Index No: 151873/15
DECISION/ORDER
Motion sequence 4

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant ULM II Holding Corp.'s (ULM) motion to convert its cross-claims into a third-party complaint against defendants Axis Design Group International, LLC, and Joseph V. Lieber, PE (the Axis defendants) and in reviewing the Axis defendants' cross-motion to dismiss ULM's cross-claims under CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

Papers	**Numbered**
ULM's Notice of Motion	1
ULM's Affirmation in Support	2
The Axis Defendants' Notice of Cross-Motion	3
Affidavit of Joseph V. Lieber	4
The Axis Defendants' Memorandum of Law	5
ULM's Affirmation in Further Support of Motion	6

Law Offices of Robert A. Stutman PC, New Jersey (Thomas Paolini of counsel), for plaintiff.
Byrne & O'Neill, LLP, New York (Navid Ansari of counsel) for defendants Axis Design Group International LLC and Joseph V. Lieber, P.E.
Haworth Coleman & Gerstman, LLC, New York (Barry Gerstman of counsel), for defendant ULM II Holding Corp.

Gerald Lebovits, J.:

Defendant ULM II Holding Corp. (ULM) moves to convert into a third-party complaint its cross-claims for contribution and indemnification against defendant Axis Design Group International, LLC (Axis), and Joseph V. Lieber, PE (collectively, the Axis defendants).

The Axis defendants cross-move to dismiss ULM's cross-claim under CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

I. Background

On February 25, 2015, plaintiffs United Church Insurance Association a/s/o Church of the Covenant Presbyterian (Covenant), sued ULM and the Axis defendants, for negligence with respect to damage to real property located at 310 East 42nd Street (the premises). ULM, the owner of a building neighboring the premises located at 300 East 42nd Street, hired Axis Design Group International[1] to inspect its building under New York City Administrative Code RCNY § 103-04, Chapter 100, a regulation intended to keep buildings safe. According to plaintiff's complaint, nine months after the inspection, a brick detached from the façade of ULM's building and caused damage to plaintiff's premises. Plaintiff alleged that the Axis defendants negligently inspected the building's façade. Plaintiff also alleged that ULM permitted the inspection to be performed negligently and that ULM failed properly to maintain the façade of its building. (ULM Notice of Motion, Covenant Complaint.)

ULM asserted cross-claims against the Axis defendants for contribution, contractual indemnification, and common-law indemnification.

The Axis defendants then moved to dismiss the complaint on the ground that they were not in privity of contract with plaintiffs. Hon. Paul Wooten granted the Axis defendants' motion to dismiss plaintiff's complaint against the Axis defendants; the court severed plaintiff's action and allowed plaintiff's complaint against ULM to survive. (Order of Dismissal, Hon. Paul Wooten, Nov. 13, 2015.)

In a settlement agreement dated March 9, 2016, plaintiffs resolved its dispute with ULM. Plaintiffs agreed to discontinue with prejudice their case against ULM. In its stipulation of settlement, ULM expressly reserves its right to pursue claims against the Axis defendants. The stipulation provides that

> "[p]laintiffs and ULM will sign a Stipulation of Discontinuance with Prejudice of all claims filed against each other in the Church Claim except that all claims by ULM against Axis for any cause of cation including contribution, indemnification, negligence, breach of contract and/or breach of express and implied warranties arising out of the Church claim shall survive this release and is hereby preserved by ULM." (ULM II Affirmation in Further Support, Settlement Agreement and Release, ¶ 5.)

All parties were notified on June 9, 2016, that plaintiffs' claims against ULM were settled. (Axis defendants' Notice of Cross-Motion, Exhibit F.)

ULM now contends that its cross-claims for contribution and contractual and common-law indemnification against the Axis defendants should survive because Judge Wooten's order

[1] Joseph V. Lieber, a named defendant, is a licensed professional engineer and a principal of Axis.

did not dispose of ULM's cross-claims and because the Axis defendants did not move to dismiss ULM's cross-claims. (ULM Notice of Motion, Affirmation in Support, ¶ 18.)

As explained below, ULM's motion to convert its cross-claim to a third party complaint with respect to contractual indemnification, common-law indemnification, and contribution against Axis defendants is denied. The Axis defendants' cross-motion to dismiss ULM's cross-claims is granted.

Because the Axis defendants' cross-motion is dispositive, the court addresses the cross-motion before discussing ULM's motion.

II. Axis Defendants' Cross-Motion to Dismiss

The Axis defendants' cross-motion to dismiss is granted. ULM's claims for contractual indemnification, common-law indemnification, and contribution are dismissed.

To prevail on a CPLR 3211 (a) (1) motion to dismiss, a defendant has the "'burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Fimat Futures USA. Inc.*, 290 AD2d 383, 383 [1st Dept 2002]; *accord Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Blonder & Co. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006].) The documentary evidence must clearly negate an essential element of the cause of action. (*Blonder & Co.*, 28 AD3d at 187.) To be considered "documentary," the evidence must be unambiguous and of undisputed authenticity. (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014].) Written contracts, leases, mortgages, and judicial records are documentary evidence. (*Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22.)

In support of its cross-motion, the Axis defendants provide documentary evidence in the form of a stipulation of discontinuance, a service-agreement contract, an inspection report, and Judge Wooten's November 13, 2015, decision. The service agreement provides that ULM hired the Axis defendants to conduct an inspection report under RCNY § 103-04, Chapter 100. (ULM Affirmation in Further Support, Standard Conditions for Structural Design Services.) The Axis defendants also provide as documentary evidence Covenant's underlying complaint. (Axis Notice of Cross-Motion, Exhibit A.) The Axis defendants' documents resolve all factual issues raised by ULM.

A. ULM's Claim for Contractual Indemnification

Whether a party has a valid claim for contractual indemnification depends on the specific language of a contract. (*Suazo v Maple Ridge Assoc., LLC*, 85 AD3d 459, 460 [1st Dept 2011].) A promise to indemnify should not be found unless it can be "clearly implied from the language and purpose of the entire agreement and the surrounding circumstance." (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009].) No liability for contractual indemnification exists unless it is explicitly assumed. (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]

[finding that where an obligation to indemnify is assumed under a contractual agreement, "that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed"]; *accord Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 27 [1985].)

Based on the language in the service agreement between ULM and the Axis defendants, and without implying into the contract a duty the parties did not intend to assume, ULM's claim for contractual indemnification against the Axis defendants is dismissed. The Axis defendants were not required to indemnify ULM. The service agreement's "Standard Conditions" section provides that ULM will indemnify the Axis defendants but that it will not indemnify the Axis defendants for the Axis defendants' own negligence under paragraph 3 (c) and paragraph 11.[2] The agreement provides that Axis would be liable for its sole negligence and that ULM would indemnify the Axis defendants. The contract did not impose a duty on Axis to indemnify ULM. (Axis Affidavit in Support of Cross-Motion, Exhibits 1 and 2.) Therefore, the Axis defendants do not have a contractual duty to indemnify ULM for damages. Therefore, ULM's claim for contractual indemnification is dismissed.

B. ULM's Claim for Contribution

A claim for contribution is distinct from indemnification in that it enables a joint tortfeasor that has paid more than its equitable share of damages to recover the excess from other tortfeasors. (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 555–57 [1992].) The factfinder will apportion the loss against the tortfeasor in terms of relative culpability. (*Id.*; *accord Rosado*, 66 NY2d at 24–25.) The goal of contribution is fairness to tortfeasors who are jointly liable. (*Sommer*, 79 NY2d at 555–57.) Whether a party has a viable claim for contribution from another party turns on a finding of culpability and the measure of damages sought. (*See Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dept 2003]; *accord Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341, 343 [1st Dept 1997].)

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[2] The service agreement, "[Axis] Standard Conditions for Structural Design Services":

> "3. To the Fullest extent permitted by law, Client [ULM] shall hold harmless, defend and indemnify [Axis] and its consultants and each of their owners, directors, employees, heirs successors and assigns from any and all claims, damages, losses, judgments, and expenses arising out of (a) Client's negligence on the project; (b) Contractor's negligence in performing the work and/or supplying the materials; or (c) the negligence of any other party except that [Axis] shall be liable for claims, damages, judgments and expenses due to . . . [Axis'] negligence . . . the owners, directors, employees, and consultants."
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> 11."[t]hese standard conditions shall not be construed to indemnify [Axis] for its own negligence if not permitted by law, or to provide any indemnification which would as a result thereof, make the provisions of these Standard Conditions void, or to eliminate or reduce any other indemnification or right which [Axis] has by law." (Axis Defendants Affidavit, Exhibit 1.)

Claims for contribution from other parties are barred under General Obligations Law (GOL) § 15-108 (c) when tortfeasors obtain their own release from liability. Waiver of contribution under GOL § 15-108 (c) provides that "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." In other words, when a defendant settles with a plaintiff for the underlying claims, claims for contribution from third parties are barred. (*A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486, 486 [1st Dept 2009] [holding that the trial court should have dismissed defendant's claims for contribution against third parties under § GOL 15-108 [c] because plaintiff settled the underlying personal injury action with defendants]; *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 647 [1st Dept 1988] [finding defendant's settlement with plaintiff was a bar to its third-party action under GOL § 15–108 [c]].)

The purpose of GOL § 15-108 (c) is to prevent non-settling parties from being exposed to contribution claims by a tortfeasor that chooses to settle. (*BDO Seidman LLP v Strategic Res. Corp.*, 70 AD3d 556, 559 [1st Dept 2010] [explaining the functions of GOL § 15-108 [a]–[c]].) A stipulation that would allow a settling party the benefit of a settlement without forcing the settling party to give up anything in return would contrave § 15-108 (c). (*Gonzalez v Armac Indus., Ltd.*, 756 F Supp 165, 168 [SD NY 1991] [finding that the settling defendants did not have a claim for contribution against a third party on the ground that the settling defendants would enjoy the benefit of knowing the top limit of its liability while at the same time preserving its ability to seek contribution against a third party; "The Stipulation therefore allows [defendants] the benefits of settlement without forcing it to give up anything in return, in contravention of the purposes of § 15–108(c)."].)

ULM waived its right to contribution under GOL § 15-108 (c) when ULM settled with Covenant on March 10, 2016, for the property damage to the premises. (ULM Affirmation in Further Support, Exhibit B, Settlement Agreement.) ULM nonetheless contends that it should be entitled to contribution from the Axis defendants because in its settlement agreement with Covenant, ULM expressly reserved its right to seek contribution against the Axis defendants. (ULM Affirmation in Further Support, Settlement Agreement at ¶ 5.) But stipulating that a settling party could seek contribution from a non-settling party would be contrary to the General Obligations Law's purposes. (*Gonzalez*, 756 F Supp at 168.) That ULM stipulated it would be entitled to contribution from the Axis defendants is contrary to the General Obligations Law. ULM cannot gain the benefits of settlement without forcing it to give up anything in return. Because ULM obtained its own release from liability when it settled with Covenant, ULM is not entitled to seek contribution from the Axis defendants. ULM's claim against the Axis defendants for contribution is dismissed.

C. ULM's Claim for Common-Law Indemnification

The Axis defendants' motion to dismiss ULM's claim for common-law indemnification is granted. Common-law, or implied, indemnification applies even in absent contractual indemnification when a vicarious-liability relationship exists between a third party and a tortfeasor or by an obligation imposed by law. (*Rosado*, 66 NY2d at 24–25.) Implied indemnity is a restitution concept and is meant to provide relief in fairness to a party that should not bear a loss and allow that party to recover from a party who is actually at fault. (*Mas v Two Bridges Assocs. by Nat. Kinney Corp*, 75 NY2d 680, 690–91 [1990].) A claim for common-law

indemnity is viable when one party is held vicariously liable solely on account of another's negligence to shift the entire burden of the loss to the real wrongdoer (*Id.* at 690; *accord 17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass'n of Am.*, 259 AD2d 75, 80 [1st Dept 1999].)

Claims for common-law indemnity are barred where "the party seeking indemnification was itself at fault, and both tortfeasors violated the same duty to plaintiff." (*Monaghan v SZS 33 Assocs., L.P.*, 73 F3d 1276, 1284 [2d Cir 1996]; *accord 110 Cent. Park S. Corp. v 112 Cent. Park S., LLC*, 970 NYS2d 681, 688 [NY County Sup Ct 2013], citing *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [finding that common-law indemnification is predicated on "vicarious liability without fault" and dismissing common-law indemnity claim against third-party defendant where "plaintiff alleged direct, not vicarious liability for negligence."].)

ULM's claims under common-law indemnification are not viable. First, the Axis defendants and ULM did not owe the same duty to plaintiff Covenant. Judge Wooten determined that the Axis defendants did not owe a duty to Covenant. Second, Covenant asserted only direct claims for negligence against ULM and the Axis defendants. Covenant did not allege that ULM is vicariously liable or that the Axis defendants are vicariously liable. Third, the Axis defendants' duty to ULM cannot be construed as vicarious; the Axis defendants' duty to ULM was limited to conducting an inspection and writing a report about the then-existing conditions on the building façade pursuant to Local Law 11. The Axis defendants' duty did not extend to maintaining or repairing ULM's building.

Therefore, the Axis defendant's cross-motion under CPLR 3211(a) (1) to dismiss ULM's claims for contractual indemnification, common-law indemnification, and contribution is granted.

The court need not consider the Axis defendants' CPLR 3211 (a) (7) argument.

III. ULM's Motion to Convert

Because the Axis defendants' motion to dismiss ULM's cross-claims is granted, ULM's motion to convert its cross-claims against the Axis defendants into a third-party complaint is denied as academic.

Accordingly, it is

ORDERED that ULM II Holding Corporation's motion to convert its cross-claims against Axis Design Group International, LLC and Joseph V. Lieber, P.E., into a third-party complaint is denied; and it is further

ORDERED that Axis Design Group International, LLC and Joseph V. Lieber, P.E.'s motion dismissing ULM II Holding Corporation's cross-claims against it for contractual indemnification, common law indemnification, and contribution is granted; and it is further

ORDERED that Axis Design Group International, LLC and Joseph V. Lieber, P.E., must serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: April 17, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.