

**Board of Mgrs. of 500 4th Ave. Condominium v Park
Slope Group, LLC**

2017 NY Slip Op 30854(U)

April 24, 2017

Supreme Court, Kings County

Docket Number: 504403/2016

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the **24th** day of April, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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**BOARD OF MANAGERS OF 500 4TH AVENUE
CONDOMINIUM, on behalf of individual unit owners,**

Plaintiff,

- against -

DECISION AND ORDER

Index # 504403/2016

PARK SLOPE GROUP, LLC, et. al.,

Defendant(s).

-----X

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,

Third-Party Plaintiff,

- against -

AVTEC SPECIALTIES INC., et. al.,

Third-Party Defendant(s).

-----X

INDUSTRIAL WINDOW CORP.,

Fourth-Party Plaintiff,

- against -

**TRI CITY ALUMINUM COMPANY f/k/a THREE
RIVERS ALUMINUM COMPANY d/b/a TRACO and
LYNX SUPPLY & CONSULTING GROUP, INC.,**

Fourth-Party Defendant(s).

-----X

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1, 2
Opposing Affidavits (Affirmations)_____	3, 4
Reply Affidavits (Affirmations)_____	5
_____Affidavit (Affirmation)_____	_____

Fourth-Party Defendant, Tri-City Aluminum Company f/k/a Three Rivers Aluminum Company d/b/a TRACO (hereinafter referred to as “TRACO”), moves to dismiss the Fourth-Party Complaint pursuant to CPLR 3211[a][1] and/or [a][7]. Third-Party Defendant/Fourth-Party Plaintiff, Industrial Window Corp. (“IWC”) opposes.

Background

On or about April 1, 2016, Plaintiff, Board of Managers of 500 4th Avenue Condominium, commenced this action seeking damages as a result of alleged construction and design defects associated with the building of the condominium complex located on 500 4th Avenue in Brooklyn, New York (hereinafter referred to as the “Project”).

On or about July 13, 2016, Defendant/Third-Party Plaintiff, Hudson Meridian Construction Group, LLC (“HMCG”), the Project’s construction manager, commenced a third-party action against, among others, IWC. According to the Third-Party Complaint, IWC was responsible for the installation of windows, terrace/balcony doors and balcony glass windows at the Project.

On or about October 6, 2016, IWC commenced a fourth-party action against TRACO and another entity. IWC alleges that it entered into an agreement with TRACO pursuant to which TRACO agreed to supply windows needed for IWC’s contract with HMCG. IWC asserts four causes of action against TRACO: (1) breach of contract; (2) contractual indemnification; (3) contribution; and (4) common law indemnification.

Now, by way of its motion to dismiss IWC’s Fourth-Party Complaint, TRACO argues that IWC’s breach of contract claim against it is time-barred because the six-year statute of limitations

accrues upon substantial completion of the work. That the Project's Final Certificate of Occupancy, which is furnished *after* substantial completion of the work, was issued on August 12, 2010. That accordingly, IWC's claim for breach of contract must have been commenced by August 12, 2016. However, that IWC filed its Fourth-Party Complaint on October 6, 2016, nearly two months past the statute of limitations.

Secondly, TRACO argues that IWC's claim for contractual indemnification must be dismissed because the contract between TRACO and IWC does not contain an indemnification provision.

Thirdly, TRACO contends that IWC's claim for contribution is precluded because it is well established that contribution cannot be sought for economic loss resulting from a breach of contract.

Lastly, TRACO argues that IWC cannot seek common law indemnification against it because HMCG, in its Third-Party Complaint, alleges that IWC itself was negligent, not that IWC was vicariously responsible for defects in the windows supplied by TRACO. Because it is alleged that IWC is the actual wrongdoer, TRACO argues that IWC cannot seek common law indemnification.

In opposition, IWC asserts that it would be entitled to contribution to the extent that it is held liable for the property damage alleged by Plaintiff. It is IWC's position that the prerequisite of tort liability is satisfied via Plaintiff's claim of negligence and HMCG's claim for contribution from IWC.

IWC also contends that it is entitled to seek common law indemnity from TRACO to the extent that it is found that Plaintiff or HMCG incurred damages due to defective windows being supplied to the Project. IWC claims that it is not a window manufacturer nor does it hold itself out to be one, unlike TRACO, who alone had exclusive responsibility of manufacturing the Project's windows.

Discussion

As a preliminary matter, IWC failed to oppose that portion of TRACO's motion seeking dismissal of IWC's breach of contract and contractual indemnification claims. Accordingly, that portion of TRACO's motion is granted without opposition.

The Court thus turns to IWC's remaining claims for contribution and common law indemnification.

It is well established that "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 Education v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26[1987]; see CPLR 1401). Accordingly, under the economic loss doctrine, contribution under CPLR 1401 is not available where the damages sought are exclusively for breach of contract (*Galvin Bros., Inc. v Town of Babylon, N.Y.*, 91 AD3d 715, 715 [2d Dept 2012][*citations omitted*]), i.e., "where the only potential liability to the plaintiff is for the contractual benefit of the bargain" (*Schottland v Brown Harris Stevens Brooklyn, LLC*, 137 AD3d 997, 998 [2d Dept 2016]). Some form of tort liability is a prerequisite to application of CPLR 1401 (*Galvin Bros., Inc. v Town of Babylon, N.Y., supra*).

Here, contrary to the arguments put forth by IWC, there is no tort claim asserted by Plaintiff in the main action. Plaintiff, who is comprised of individual condominium unit owners, brings the instant action to recover monies expended by them to make repairs allegedly necessitated by Defendants' construction and design defects. To the extent that Plaintiff alleges negligence on behalf of Defendants, it is well established that recovery for negligent performance of a contractual duty is limited to an action for breach of contract (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 256 [2007]). Accordingly, IWC's claim for contribution from TRACO is legally untenable and must be dismissed.

As to IWC's claim for common law indemnification against TRACO, its claim remains viable. "Indemnity... involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer" (*County of Westchester v Welton*

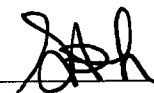
Becket Associates, 102 AD2d 34, 46-47 [2d Dept 1984]). “Common-law indemnification is warranted where a defendant’s role in causing the plaintiff’s injury is solely passive, and thus its liability is purely vicarious” (*Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792 [2d Dept 2007][*citation omitted*]). “[A] party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [of indemnification]” (*17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass’n of Am.*, 259 AD2d 75, 80 [1st Dept 1999][*citation omitted*]). “Thus, to be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought” (*Id.*).

Here, TRACO does not dispute that it had sole responsibility for manufacturing the windows at issue for the Project. Thus, to the extent that IWC is found liable to HMCG for defective windows, its liability would be vicarious as IWC indisputably had no part in the windows’ manufacturing. Accordingly, IWC’s claim against TRACO for common law indemnity survives.

In conclusion, it is hereby ORDERED that TRACO’s motion to dismiss pursuant to CPLR 3211 is GRANTED as to IWC’s claims for breach of contract, contractual indemnification, and contribution but DENIED as to IWC’s claim for common law indemnification.

This constitutes the Decision and Order of the Court.

E N T E R,



SYLVIA G. ASH, J.S.C.