IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THE WASHINGTON HOUSE CONDOMINIUM, ASSOCIATION OF UNIT OWNERS, et al.	)	
Plaintiffs,	)	
v.	)	C.A. No. N15C-01-108 WCC CCLD
ENVIRONMENTAL MATERIALS, LLC d/b/a ENVIRONMENTAL STONEWORKS, a Delaware Limited Liability Company,	)	
Defendant/Third-Party Plaintiff,	)	
v.	)	
DAYSTAR SILLS, INC., a Delaware Corporation, et al.	)	
Third-Party Defendants.	)	

Submitted: June 21, 2019
Decided: October 31, 2019

Defendants' Architectural Concepts, P.C.'s and Avalon Associates of Maryland, Inc.'s Motions to Dismiss the Third-Party Complaint GRANTED IN PART - DENIED IN PART

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Defendant Architectural Concepts, P.C.'s ("AC") Motion to Dismiss Environmental Materials, LLC d/b/a Environmental StoneWorks' ("ESW") Third-Party Complaint. Defendant Avalon Associates of Maryland, Inc. ("Avalon") adopts and joins in AC's Motion to Dismiss for the same facts and grounds presented in AC's Motion, as they are in like position with regard to the Third-Party Complaint.

For the reasons set forth in this Opinion, AC and Avalon's Motions to Dismiss the Third-Party Complaint are **GRANTED IN PART AND DENIED IN PART.**

I. FACTUAL & PROCEDURAL BACKGROUND

The Court has rehashed the factual background of this case several times in prior Opinions, and it will only provide a brief recitation of the facts most relevant to the pending Motions.[1] This litigation arises from the allegedly defective design and construction of Washington House Condominium ("Washington House") in Newark, Delaware.[2] On January 14, 2015, Washington House Condominium Association of Unit Owners ("Plaintiffs") filed a complaint (the "Complaint")

[1] *See Washington House Condo. Ass'n of Unit Owners v. Daystar Sills, Inc.*, 2018 WL 6046714 (Del. Super. Ct.); *Washington House Condo. Ass'n of Unit Owners v. Daystar Sills, Inc.*, 2017 WL 3412079 (Del. Super. Ct.); *Washington House Condo. Ass'n of Unit Owners v. Daystar Sills, Inc.*, 2015 WL 6750046 (Del. Super. Ct.).
[2] Compl. ¶ 1.

against six defendants to recover more than $7 million in repair costs and related expenses arising from design and construction defects at Washington House.[3]

Daystar Sills, Inc. ("Daystar") served as the developer, builder, and general contractor for the condominium project, and was one of the six defendants named in Plaintiffs' Complaint.[4] Daystar hired ESW to install the exterior masonry veneer, which is the primary construction issue, at Washington House.[5] ESW hired subcontractors AC and Avalon, among others, to perform the work done at the condominium project.[6]

On January 30, 2009, ESW instituted a mechanics' lien action against Daystar because it had not been paid for its exterior work on the condominium.[7] In response, Daystar filed a counterclaim against ESW, alleging breach of contract, breach of express and implied warranties, and negligence.[8] The parties entered into arbitration to resolve their dispute, agreeing that it would serve as a final adjudication on the matter.[9] On January 6, 2012, the arbitrator entered a final order requiring ESW to pay $400,000 to Daystar, which was satisfied on March 2, 2012.[10]

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[3] *Washington House Condo. Ass'n of Unit Owners*, 2018 WL 6046714, at *1.
[4] *Id.*
[5] *Id.*
[6] Third-Party Compl. ¶ 26.
[7] *Washington House Condo. Ass'n of Owners*, 2018 WL 6046714, at *1.
[8] *Id.*
[9] *Id.*
[10] *Id.*

A. Instant Litigation

On January 14, 2015, Plaintiffs filed their Complaint and named ESW as one of the six defendants.[11] This Court initially dismissed Plaintiffs' Complaint against Defendant ESW on the basis of res judicata in its October 28, 2015 Opinion.[12] Plaintiffs executed settlement agreements with the Defendants, other than ESW, on October 27, 2017.[13] On November 13, 2018, this Court granted Plaintiffs' Motion for Revision of the Court's Interlocutory Order Dismissing Plaintiffs' Complaint Against ESW.[14] New evidence, which was not available to the Court at the time of its 2015 decision, refuted a finding of privity between Plaintiffs and Daystar for res judicata purposes.[15]

On December 7, 2018, ESW filed a Third-Party Complaint against AC and Avalon, as well as other subcontractors. The Third-Party Complaint includes allegations of negligence, breach of contract, breach of warranties, and seeks contribution and indemnification.[16] AC filed a Motion to Dismiss the Third-Party Complaint on the basis of the release that was executed as part of their settlement agreement with the Plaintiffs. Avalon joined in AC's Motion to Dismiss for the same

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[11] *Id.* at *1-2.
[12] *Id.* at *2.
[13] Third-Party Def. Architectural Concepts, P.C.'s Mot. to Dismiss the Third-Party Compl., [hereinafter "AC's Mot. to Dismiss"] ¶ 3.
[14] *Washington House Condo. Ass'n of Owners,* 2018 WL 6046714, at *1.
[15] *Id.* at *4.
[16] Third-Party Pl. ESW's Resp. in Opp'n to Third-Party Defs.' Mot. to Dismiss Third-Party Compl., [hereinafter "ESW's Resp."] ¶ 26.

facts and grounds presented in AC's Motion, as they are in like position with regard to the Third-Party Complaint. This is the Court's decision on AC and Avalon's Motions to Dismiss.

II. STANDARD OF REVIEW

When considering a Rule 12(b)(6) motion to dismiss, the Court "must determine whether the claimant 'may recover under any reasonably conceivable set of circumstances susceptible of proof.'"[17] It must also accept all well-pleaded allegations as true, and draw every reasonable factual inference in favor of the non-moving party.[18] At this preliminary stage, dismissal will be granted only when the claimant would not be entitled to relief under "any set of facts that could be proven to support the claims asserted" in the pleading.[19]

III. DISCUSSION

A. §6306(b) as a Bar to Independent Action for Contribution

In Delaware, 10 Del. C. §6306 governs third-party practice. It provides:

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[17] *Sun Life Assurance Co. of Can. v. Wilmington Tr., Nat'l Ass'n*, 2018 WL 3805740, at *1 (Del. Super. Ct.) (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).
[18] *Id.*
[19] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct.) (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

(b) A pleader may either:

> (1) State as a cross-claim against a coparty any claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or
>
> (2) Move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tortfeasors one of whom has discharged the judgment by payment or has paid more than his or her pro rata share thereof.
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> If relief can be obtained as provided in this subsection no independent action shall be maintained to enforce the claim for contribution.[20]

AC and Avalon assert that the final sentence of §6306(b) prevents ESW from bringing an independent action for contribution.[21] They argue that ESW had the ability to obtain relief under one of the permissive alternatives presented by §6306(b), but failed to "file cross-claims in the underlying action when it had the ability to do so."[22] The Defendants contend that ESW "remained a co-party in the Plaintiffs' original action" and "could have filed a cross-claim at any point between January 2015 and March 2018."[23] By failing to do so, Defendants allege the claim is barred by the "mandatory aspect" of the last sentence of §6306(b).[24]

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[20] 10 Del. C. §6306(b).
[21] AC's Mot. to Dismiss ¶ 8.
[22] *Id.* ¶ 5.
[23] *Id.* ¶ 8.
[24] *Id. See also Farrall v. A.C. & S. Co., Inc.*, 586 A.2d 662, 666 (Del. Super. Ct. 1990).

In response, ESW maintains that the dismissal of Plaintiffs' claims against ESW in 2015 "prevented ESW from asserting any claims against other parties, including for indemnification and/or contribution."[25] It is ESW's position that it was not a co-party to the litigation after its dismissal and §6306(b) is not applicable.[26] As such, only upon this Court's 2018 revision of the interlocutory order dismissing ESW did the claims become ripe.[27] Accordingly, ESW argues its "only way to assert those claims" is through a third-party complaint.[28]

The Court agrees with ESW. It was not a party to the litigation during the 2015-2018 time frame after it was dismissed from the suit on October 28, 2015. Until the revised order in November 2018, ESW was no longer involved in the litigation and could not have brought cross claims against the other parties. Within one week of filing its Answer to Plaintiffs' Complaint, ESW filed its Third-Party Complaint against AC and Avalon. As such, ESW's ability to file an independent action is not restricted by §6306(b).

B. §6304(b) and the Effect of the Release

In Delaware, 10 Del. C. §6304 governs the release of a tortfeasor. It provides:

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[25] ESW's Resp. ¶ 7.
[26] *See id.* ¶ 20.
[27] *Id.* ¶ 10.
[28] *Id.*

> (a) A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasor unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.
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> (b) A release by the injured person of one joint tortfeasor does not relieve the one joint tortfeasor from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.[29]

AC and Avalon contend that their 2017 settlement agreements bar ESW's Third-Party Complaint for contribution because they meet the conditions of §6304(b).[30] The settlement agreements entered into by AC and Avalon provide for a reduction of Plaintiffs' damages "to the extent of the pro rata share" of the settling Defendant's liability."[31] AC and Avalon also claim that their releases were "given before the right of ESW to secure a money judgment for contribution" had accrued."[32] Further, they contend that ESW's "claim never accrues" because Plaintiffs agreed to reduce any future award by the pro rata share of their liability so "no one will be paying the released party's share of liability."[33]

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[29] 10 Del. C. §6304
[30] *See* AC's Mot. to Dismiss ¶ 5.
[31] *See* AC's Mot. to Dismiss, Ex. A ¶ 6. See also S*ee also* Third-Party Def. Avalon Assoc. of Maryland, Inc.'s Joinder to Third-Party Def. Architectural Concepts, P.C.'s Mot. to Dismiss the Third-Party Compl. of Environmental StoneWorks, [hereinafter "Avalon's Joinder to AC's Mot. to Dismiss"] Ex. A ¶ 6.
[32] *See* AC's Mot. to Dismiss ¶ 11.
[33] *Id.*

Instead of seeking contribution, AC and Avalon assert that the proper remedy is for ESW to "seek a reduction of any award Plaintiffs may obtain against it" per the settlement agreement between the Plaintiffs and them.[34] ESW can enforce Plaintiffs' agreement to reduce its recovery as a third-party beneficiary and "the jury can be asked, on the basis of the release, to apportion liability" and reduce the award as necessary.[35]

In response, ESW asserts that §6304(b) applies only to claims among joint tortfeasors and "does not encompass contractual or breach of warranty claims.[36] It maintains that its Third-Party Complaint was "not solely based on claims for contribution," and, therefore, §6304(b) does not apply.[37]

Generally, there is a right to contribution among joint tortfeasors.[38] However, the right to contribution among joint tortfeasors can be limited. This occurs when a plaintiff agrees to release a tortfeasor and reduce his award from other tortfeasors to the extent of the released tortfeasor's share of liability. [39] The right to contribution is only eliminated if the agreement is executed before any tortfeasor's right to secure

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[34] *Id.* ¶ 12; Ex. A ¶ 6. S*ee also* Avalon's Joinder to AC's Mot. to Dismiss, Ex. A ¶ 6.
[35] AC's Mot. to Dismiss ¶ 13.
[36] ESW's Resp. ¶ 26.
[37] *Id.*
[38] 10 Del. C. §6302(a).
[39] *See In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 223 (Del. Ch. 2014), *appeal dismissed,* 105 A.3d 990 (Del. 2014); *Roca v. Riley*, 2008 WL 1724259, at *2 (Del. Super.); *Farrall v. A.C. & S. Co., Inc.*, 586 A.2d 662, 664 (Del. Super. Ct. 1990).

judgment for contribution has accrued.[40] By entering such an agreement, the plaintiff grants the released tortfeasor "complete peace" from suits for contribution.[41] Accordingly, it is the plaintiff who bears the risk "that the released tortfeasor's pro rata share of recovery is greater than the settlement amount and they agree to reduce any recovery against the non-released tortfeasor by the amount of the released tortfeasor's pro rata share."[42] In such an agreement, the non-released tortfeasor has no right to contribution because the plaintiff has agreed not to seek any further payment for the released tortfeasor's share of liability.[43]

In the instant matter, Plaintiffs executed a settlement agreement with AC, and a similar agreement with Avalon, in which they agreed to "a reduction of the Plaintiff's [sic] damages recoverable against any other tortfeasors, whether or not a party to the Action, to the extent of the pro rata share, if any, of the Settling Defendant."[44] If Plaintiffs had not agreed to this reduction, ESW's right to recover contribution would be unaffected by the release.[45] However, because they agreed to the reduction, any future award against ESW relating to the negligence of AC and

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[40] *See id.*
[41] *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d at 223.
[42] *See In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d at 223–24 (quoting *Roca v. Riley*, 2008 WL 1724259, at *2 (Del. Super.) ("In essence, the non-released tortfeasor's right to recover contribution from the released tortfeasor is protected unless the plaintiff agrees to reduce his recovery against the non-released party by the amount he chose not to collect from the released party.").
[43] *See id.*
[44] AC's Mot. to Dismiss ¶ 12; Ex. A ¶ 6. For the text of Plaintiffs' agreement with Avalon, see Avalon's Joinder to AC's Mot. to Dismiss, Ex. A.
[45] *See In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d at 223–24 (quoting *Roca v. Riley*, 2008 WL 1724259, at *2 (Del. Super.)).

Avalon will be reduced by their pro rata share and ESW will not have a claim for contribution. This is true even if the pro rata share of liability assigned to AC and Avalon is determined to be greater than the settlement amount because Plaintiffs assumed this risk in their settlement agreements by consenting to reduce their award.[46] ESW will not be compelled to pay for any of AC and Avalon's share and, consequently, has no basis for a contribution claim. Because Plaintiffs agreed to this reduction, AC and Avalon are relieved of contribution obligations.

Furthermore, AC's settlement agreement expressly states that it has been "executed before the right of any other alleged tortfeasors to secure a money judgment for contribution has accrued."[47] The Court acknowledges that Avalon's settlement agreement does not have similar language, but the Court believes that this distinction is without consequences.[48] There is nothing to suggest that this right had accrued prior to the execution of the settlement agreements. This Court finds that §6304(b), as applied to the settlement agreements with AC and Avalon, operates to bar ESW's claims for contribution.

However, as discussed above, §6304 applies only to joint tortfeasors. Joint tortfeasors are defined as "two or more persons jointly or severally liable in tort for

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[46] *Farrall,* 586 A.2d at 664 ("Where a plaintiff has released a tortfeasor for an amount less than its pro rata share the nonreleased tortfeasor is protected against having to bear the portion of the released tortfeasor's share which plaintiff failed to collect in the settlement . . . the risk that the pro rata share of recovery attributable to the released tortfeasor is greater than the settlement amount must be assumed by the plaintiff . . . .").
[47] AC's Mot. to Dismiss ¶ 12; Ex. A ¶ 6.
[48] Avalon's Joinder to AC's Mot. to Dismiss, Ex. A ¶ 6.

the same injury to person or property, whether or not judgment has been recovered against all or some of them."[49] ESW, AC, and Avalon are joint tortfeasors with respect to claims made by Washington House, but not with respect to ESW's claims against AC and Avalon, other than contribution. Accordingly, the Court finds that ESW has no right to contribution against AC or Avalon as to their liability for work performed at Washington House. Since this is the only issue raised in the Motions, the Court has not addressed the effect this decision may have on the other claims made by ESW in its Third-Party Complaint.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss the Third-Party Complaint are **GRANTED IN PART AND DENIED IN PART.**

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[49] 10 Del. C. §6302(a).