Nassau County v Richard Dattner Architect, P.C.
2006 NY Slip Op 30739(U)
December 22, 2006
Supreme Court, Nassau County
Docket Number: 2750-04
Judge: Leonard B. Austin
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NO. 2750-04

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 9-15-06
Submission Date: 9-21-06
Motion Sequence No.: 004/MOT D

NASSAU COUNTY,
Plaintiff,

- against -

RICHARD DATTNER ARCHITECT, P.C., DORMITORY AUTHORITY OF THE STATE OF NEW YORK, EMPIRE STATE DEVELOPMENT CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, MARIANO D. MOLINA, P.C., COUNSILMAN HUNSAKER & ASSOCIATES, SEVERUD ASSOCIATES, A. JAMES DEBRUIN & SONS, FEDERMAN DESIGN & CONSTRUCTION CONSULTANTS, INC., ROBERT SCHWARTZ & ASSOCIATES, ROY KAY, INC., KEYSPAN CORPORATION, ANRON HEATING AND AIR CONDITIONING, INC., DECTRON INTERNATIONALE, STONEWALL CONTRACTING CORP., NORBERTO & SONS, INC., CENTURY-MAXIM CONSTRUCTION CORP., METROPOLITAN STEEL INDUSTRIES, INC. and HATZEL & BUEHLER, INC.,
Defendants,

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RICHARD DATTNER ARCHITECT, P.C., MARINO D. MOLINA, P.C., COUNCILMAN HUNSAKER, FEDERMAN DESIGN & CONSTRUCTION CONSULTANTS, INC., ROBERT SCHWARTZ & ASSOCIATES, ROY KAY, INC., KEYSPAN CORPORATION and ANRON HEATING AND AIR CONDITIONING INC.,

Third-Party Plaintiffs,

– against –

SEVERUD ASSOCIATES,

----------x
Third-Party Defendants,

(for Hatzel & Buehler, Inc.)
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ORDER

The following papers were read on the motion of Defendant Robert Schwartz and Associates for summary judgment dismissing the cross-claims and counterclaims seeking contributions and indemnification:

Notice of Motion dated August 11, 2006;
Affirmation of Jessica L. Jamron, Esq. dated August 11, 2006;
Defendant's Memorandum of Law;
Affirmation of Cornelia Mogor, Esq. dated September 8, 2006;
Affirmation of Susan M. Pascale, Esq. dated September 7, 2006;
Affirmation of Steven G. Rubin, Esq. dated September 5, 2006;
Affirmation of Marisa Lanza, Esq. dated September 1, 2006;
Affirmation of Daniel C. Gibbons, Esq. dated August 22, 2006;
Memorandum of Law of Tishman Construction in Opposition;
Affirmation of Jessica L. Jamron, Esq. dated September 14, 2006.

Defendant, Robert Schwartz & Associates ("Schwartz") moves for summary judgment dismissing the cross-claims and counterclaims seeking contribution and indemnification.

BACKGROUND

This action arises out of alleged design, development and construction defects in the Nassau County Aquatic Center ("Aquatic Center").

Defendant Richard Dattner Architect, P.C. ("Dattner") was the architect on the project. Dattner retained Schwartz as a consultant pursuant to the terms of a written contract dated October 9, 1995.

Plaintiff Nassau County's ("Nassau") complaint alleges three causes of action against Schwartz and the other design professionals, sounding in breach of contract, negligence and fraud.

The answers interposed by Dattner, Defendant Mariano D. Molina, P.C. ("Molina"), Defendant Dormitory Authority of the State of New York ("DASNY"), Defendant Empire State Development Corporation ("ESDC"), Defendant Tishman Construction Corporation of New York ("Tishman"), Defendant Councilman Hunsaker Severud Associates ("Councilman"), Defendant Roy Kay, Inc., Defendant Keyspan Corporation ("Keyspan") and Defendant Anron Heating and Air conditioning, Inc. ("Anron") assert cross-claims or counterclaims against Schwartz for contribution and/or indemnification.

In response to a demand for interrogatories, Nassau averred that Schwartz' involvement in the Aquatic Center related to the design, specifications and installation of rubber flooring material and defective design, supply or installation of the ceiling and/or HVAC system and/or moisture barrier system.

Nassau seeks to recover the costs incurred to repair and replace the flooring material and revenue lost as a result of having to close the Aquatic Center to remedy alleged defects or conditions relating to the moisture barrier.

In April 2006, the County settled its claims against Schwartz. In exchange for the settlement payment, the County discontinued the action against Schwartz with prejudice and issued a general release in favor of Schwartz.

Schwartz seeks summary judgment asserting that General Obligations Law §15-108 bars any claim for contribution and that the claims brought against it and the parties seeking indemnification bar such claims.

DISCUSSION

A. Contribution

General Obligations Law §15-108(b) provides that a release given in good faith by an injured party to a tort-feasor relieves the settling party from any clam for contribution under CPLR Article 14. Any counterclaims or cross-claims against the settling party for contribution are statutorily barred and must be dismissed. Williams v. New York City Transit Auth., 9 A.D.3d 308 (1st Dept. 2004); Williams v. New York City Health and Hospitals Corp., 262 A.D.2d 231 (2nd Dept. 1999); and Brown v. Singh, 222 A.D.2d 392 (2nd Dept. 1995).

If Plaintiff establishes the liability of any of the non-settling Defendants, the non-settling Defendants may then establish the liability of the settling party to obtain the reduction of damages for which the non-settling Defendant is responsible. Maione v. Pindyck, 32 A.D.3d 827 (2nd Dept. 2006). Any reduction in damages will be made by the court (See, CPLR 5433-b) in the amount required by General Obligations Law §15-108(a). See, Siegel, *New York Practice 4th* §176.

By settling with Nassau, Schwartz bought itself repose from any claim for contribution. Therefore, any cross-claims or counterclaims against Schwartz for contribution must be dismissed. Singh v. Brown, *supra.*

B. Indemnification

General Obligations Law §15-108 does not bar a cause of action for indemnification. McDermott v. City of New York, 50 N.Y.2d 211 (1980); and Bailer v. Perez-Verdiano, 266 A.D.2d 249 (2nd Dept. 1999).

Indemnification may be contractual or imposed under common law.

A party seeking contractual indemnification must establish the existence of a written agreement between itself and the party from whom it is seeking indemnification. Moss v. McDonald's Corp., -A.D.3d-, 2006 WL 3378321 (2nd Dept. 2006). Contractual indemnity can be obtained if the agreement specifically so provides or if "...the intention to indemnify can be clearly implied from the language and purpose of the entire agreement, and the surrounding facts and circumstances." Margolin v. New York Life Ins. Co., 32 N.Y.2d 149, 153 (1973); and Watral & Sons, Inc. v. OC Riverhead 58, LLC, -A.D.3d-, 824 N.Y.S. 2d 392 (2nd Dept. 2006).

A party to a contract to construct a building cannot be contractually indemnified for its own negligence. General Obligations Law §5-322.1.

Only Dattner has a contract with Schwartz. The contract between Dattner and Schwartz does not contain a contractual indemnification provision. Therefore, any cross-claims or counterclaims seeking contractual indemnification from Schwartz must be dismissed.

The right to implied or common law indemnification arises "...in favor of one who is compelled to pay for another's wrong." Margolin v. New York Life Ins. Co., *supra.* at 152. See, 23 NY Jur2d *Contribution, Indemnity and Subrogation* §§2, 87. "In the classic indemnity case, the one entitled to indemnity from another had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party." D'Ambrosio v. City of New York 55 N.Y.2d 454, 461 (1982); and Glaser v. M. Fortunoff of Westbury Corp., 71 N.Y.2d 643 (1988). Stated differently, "... one who is liable for an injury vicariously or by imputation of law may seek common-law indemnification from a person primarily liable for the injury." 23 NY Jur2d *Contribution, Indemnity and Subrogation* § 90.

One whose liability is premised upon active negligence cannot obtain common law or implied indemnity. D'Ambrosio v. City of New York, *supra.* "The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee." Kagan v. Jacobs, 260 A.D.2d 442 (2nd Dept. 1999). See, Barry v. Hildreth, 9 A.D.3d 341 (2nd Dept. 2004); and Tulley v. Strauss, 265 A.D.2d 399 (2nd Dept. 1999).

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One may not avoid the effect of General Obligations Law §15-108 by designating an action for contribution as an action for indemnification. Rosado v. Proctor & Schwartz, Inc., 66 N.Y.2d 21 (1985).

In this case, Nassau is not seeking to hold Dattner or any of the other parties who seek indemnification from Schwartz vicariously liable for Schwartz negligence. All of Nassau's causes of action against the parties who seek indemnification from Schwartz are predicated upon establishing these parties' active fault. Therefore, their claims against Schwartz are claims for contribution and not indemnification. Such counterclaims or cross-claims are barred by General Obligations Law §15-108.

Accordingly, it is,

ORDERED, that the motion of Defendant Robert Schwartz & Associates for summary judgment dismissing the cross-claims and counterclaims asserted against it for contribution and/or indemnification is **granted** and said cross-claims and counterclaims are dismissed.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
December 22, 2006

Hon. LEONARD B. AUSTIN, J.S.C.