Nassau County v New York State Urban Dev. Corp.
2011 NY Slip Op 33392(U)
December 19, 2011
Sup Ct, Nassau County
Docket Number:
Judge: Ira B. Warshawsky
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[* 1]

ORIGINAL

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

NASSAU COUNTY

Plaintiff,

- against -

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, RICHARD DATTNER ARCHITECT, P.C., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, CSA GROUP NY ARCHITECTURE, ENGINEERING & CONSULTATION, P.C. f/k/a MARIANO D. MOLINA, P.C. and COUNCILMAN HUNSAKER & ASSOCIATES,

Defendants.

INDEX NO.: 002750/2004
MOTION DATE: 10/21/2011
SEQUENCE NO.: 018, 019

The following documents were read on these motions:

Motion by Richard Dattner & Partners Architects, P.C., s/h/a Richard Dattner Architect P.C. and CSA Engineering & Consulting, P.C., f/k/a Mariano D. Molina, P.C. to dismiss cross-claims of NYS Urban Development Corporation, and DASNY 1.
Affidavit of Richard Dattner in Support of Motion ..... 2.
Memorandum of Law in Support of Motion ..... 3.
Affidavit in Opposition to Motion of Tishman Construction ..... 4.
Affirmation in Opposition by Counsel for Tishman Construction ..... 5.
Tishman Construction Memorandum of Law in Opposition to Motion ..... 6.
Reply Memorandum of Law in Further Support of Motion ..... 7.
Reply Affirmation in Further Support of Motion ..... 8.

PRELIMINARY STATEMENT

This motion by the defendants Richard Dattner Architect, P.C., and CSA Group NY Architecture, Engineering & Consultation, P.C., f/k/a Mariano D. Molina, P.C. ("Molina") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the defendants New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and the Dormitory Authority of the State of New York's ("DASNY") cross-claims sounding in contribution and indemnification and the defendant Tishman Construction Corporation of New York's ("Tishman") cross-claims sounding in breach of contract, negligence, contribution and indemnification is granted.

This cross-motion by the defendants ESDC and the DASNY is for an order pursuant to CPLR 3025(b) granting them leave to serve an Amended Answer to the Amended Complaint to advance cross-claims against Dattner and Tishman sounding in breach of contract, and an order pursuant to CPLR 3212(e) granting them partial summary judgment dismissing the defendants Richard Dattner Architect P.C., Tishman, Molina, Councilman Hunsaker & Associates' ("CHA") cross-claims and third-party defendant Dectron Internationale third-party claims sounding in contribution and indemnification as against them is granted to the extent provided herein.

The facts pertinent to the determination of this motion were set forth in this court's May

23, 2011 decision and will not be restated here.

DISCUSSION

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

Breach of Contract

Generally, construction contracts which do not express an intention to benefit third parties do not give rise to third parties' rights to enforce them. See, Port Chester Elec.Const. Co. v Atlas, 40 NY2d 652 (1976); Perron v Hendrickson/ Scalamandre/Posillico (TV), 283 AD2d 627 (2nd Dept. 2001). "In order to recover as third-party beneficiaries to a contract, plaintiffs 'must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for their benefit, and (3) that the benefit to them is sufficiently immediate

. . . to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost.' " Saratoga Schenectady Gastroenterology Associates, P.C. v Bette & Cring, LLC, 83 AD3d 1256 (3rd Dept. 2011), quoting Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 (2011), citing IMS Engrs.-Architects, P.C. v State of New York 51 AD3d 1355, 1357 (3rd Dept. 2008), lv den. 11 NY3d 706 (2008).

The Statute of Limitations for damages for architectural and engineering malpractice is three years. CPLR 214(6). Such a claim accrues upon the completion of the contract and the termination of the parties' professional relationship. Vlahakis v Belcom Dev., LLC, 86 AD3d 567 [2nd Dept 2011), citing Frank v Mazs Group, LLC, 30 AD3d 369, 369-370 (2nd Dept 2006). "The completion of an architect's obligations must be viewed in light of the particular circumstances of the case." Frank v Mazs Group, LLC, supra, at p. 370. A Certificate of Occupancy coupled with a cessation of obligations under the contract gives rise to accrual. Vlahakis v Belcom Dev., LLC, supra, at p. 568, citing City School Dist. of City of Newburgh v Stubbins & Assoc., 85 NY2d 535, 538 (1995). The parties' obligations under the contract are key. Town of Wawarsing v Camp, Dresser & McKee, Inc., 49 AD3d 1100, 1100-1102 (3rd Dept 2008); City of Binghamton v Hawk Eng'g, P.C., 85 AD3d 1417 (3rd Dept 2011).

It is not clear when Tishman's breach of contract claim against Dattner and Molina accrued. There are allegations that their work continued beyond the opening of the Aquatic Center and that their contractual obligations and payment arrangements have not been addressed. Assuming, arguendo, that the relation-back doctrine applies here, Tishman's cross-claims for breach of contract against Molina and Dattner may be untimely.

Tishman's cross-claim sounding in breach of contract against Dattner and Molina is

nevertheless dismissed. Tishman has failed to identify any provisions in either the Molina or Dattner contracts with ESDC/DASNY that "contain language evincing an intent to benefit it beyond its status as incidental beneficiary." IMS Engineers-Architects, P.C. v State, supra, at p. 1357, citing Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 44 (1985); Aymes v Gateway Demolition, Inc., 30 AD3d 196 (1st Dept. 1996). Tishman's reliance on the requirement in Dattner's agreement with ESDC that Dattner cooperate with Tishman does not suffice to establish his status as a third-party beneficiary. And, Tishman is not the "Owner's Representative" referenced in the "hold harmless" clause. See, Regatte Condominium Association v Village of Mamaroneck, 303 AD2d 739 (2nd Dept. 2003).

ESDC and DASNY's reliance on this court's September 15, 2010 order, which permitted the County to amend its complaint as support for its present motion for Leave to Amend its complaint is misplaced. Leave was granted the County to discontinue against a number of defendants pursuant to CPLR 3217, not CPLR 3025(b), which ESDC and DASNY rely on now.

Motions for leave to amend pleadings should be freely granted. Lucido v Mancuso, 49 AD3d 220, 226-227 (2nd Dept 2008), citing Norman v Ferrara, 107 AD2d 739, 740 (2nd Dept 1985); G.K. Alan Assoc., Inc. v Lazzari, 44 AD3d 95 (2nd Dept 2007), affd, 10 NY3d 941 (2008). A party seeking leave to amend to advance a claim is not required to establish its merit in the first instance. Lucido v Mancuso, supra, at p. 221, 232, citing G.K. Alan Assoc., Inc. v Lazzari, supra, at p. 99. Leave should be denied only when the proposed amendment is "palpably insufficient" or "patently devoid of merit." Lucido v Mancuso, supra at p. 221, 232, citing G.K. Alan Assoc., Inc. v Lazzari, supra, at p. 99.

ESDC is denied leave to amend its Amended Answer to interpose a cause of action

sounding in breach of contract against Dattner and Tishman. ESDC assigned, transferred and set over to DASNY "all of its rights under the contract" and, in so doing, lost standing. James McKinney &I Son, Inc. v Lake Placid 1980 Olympic Games, 61 NY2d 836 (1984); see also, Aaron Ferer & Sons Ltd. v Chase Manhattan Bank Nat. Ass'n, 731 F2d 112, 115 (2d Cir. 1984).

DASNY's motion for leave to amend its complaint to advance a cross-claim against Dattner sounding in breach of contract is granted. Again, at this juncture, it is unclear that DASNY"s contract claim against Dattner accrued when the Aquatic Center opened. Accordingly, it is not clear that the Statute of Limitations bars that claim. It may be timely if the relation back doctrine applies.

DASNY's motion for leave to amend its complaint to advance a cross-claim against Tishman sounding in breach of contract is also granted. The Statute of Limitations for that claim is six years. CPLR 213. The completion date of Tishman's work may have been as late as the Fall of 1998. DASNY's breach of contract claim against Tishman may relate back to the commencement of this action in 2004. Accordingly, DASNY's proposed breach of contract claim against Tishman is not barred, as a matter of law, by the Statute of Limitations.

Negligent Misrepresentation

The elements of negligence representation are (1) a relationship approaching privity, (2) incorrect information and (3) reasonable reliance. J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007); see also, Prudential Ins. Co. of America v Dewey, Ballanstine, Bushby, Palmer & Wood, 80 NY2d 377, 384 (1992), rearg den., 81 NY2d 955 (1993). " '[B]efore a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations, there must be a showing that there was either actual privity of contract between the parties or a

relationship so close as to approach that of privity.' " Marcellus Const. Co., Inc. v Village of Broadalbin, 302 AD2d 640 (3rd Dept. 2003), quoting Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood., supra, at p. 382; see, CFJ Associates of New York v Hanson Industries, 274 AD2d 892, 895 (3rd Dept 2000). " 'Where, as here, no privity of contract exists between the parties, the Court of Appeals has identified three criteria for imposing liability upon the maker of a negligent misrepresentation: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." ' " Marcellus Const. Co., Inc. v Village of Broadalbin, supra, quoting Rayco of Schenectady, Inc. v City of Schenectady, 267 AD2d 664, 665 (3rd Dept. 1999), quoting Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, supra, at p. 384. The Statute of Limitations for this claim is also three years. CPLR 213(6). IFD Constr. Corp. v Coddry Carpenter, Dietz & Zack, 253 AD2d 89, (1st Dept. 1999). Assuming, arguendo, that this claim related back to the County's original complaint of 2004, it may be timely as against Dattner and Molina as again, it is not clear when it accrued. Nevertheless, privity here is wanting. Tishman, therefore, lacks standing to advance a claim for negligent misrepresentation against Molina and Dattner. Tishman's reliance on the County's classification of Dattner, Molina and Tishman as the design team to establish privity fails. And again, a requirement of cooperation does not constitute privity. In fact, Tishman's agreement with ESDC expressly excluded Tishman's liability for design errors and omissions, confirming a lack of privity between Tishman and Dattner and/or Molina.

When analyzing the propriety of the defendant/third-party plaintiffs' contribution and

indemnification claims, the County's Amended Complaint supersedes its original complaint, leaving the original complaint of "no legal affect." Mendrzycki v Cricchio, 58 AD3d 171, 173 (2nd Dept. 2008). Thus, in fashioning their third-party contribution/indemnification claims, the third-party plaintiffs may not rely on the County's allegations in its original complaint nor may they rely on the County's 2006 Bill of Particulars. Since that Bill of Particulars amplified a complaint which is now a nullity, it has also become a nullity itself. See, Hawley v Travelers Indem. Company, 90 AD2d 684 (3rd Dept. 1982).

Contribution

Contribution is available under CLR 1401 where "two or more persons . . . are subject to liability for damages for the same personal injury, injury to property or wrongful death." "[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of" CLR 1401." Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 26 (1987). Furthermore, "[t]ort language [in the plaintiff's complaint] notwithstanding . . . absent some form of tort liability, contribution is unavailable." Rockefeller University v Tishman Const. Corp of New York, 232 AD2d 155 (1st Dept. 1996), lv den., 89 NY2d 811 (1997), citing Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.), 84 NY2d 685 (1995); Board of Educ. v Sargent, Webster, Crenshaw & Folley, supra; see also, Trump Village Section 3, Inc. v New York State Housing Finance Agency, 307 AD2d 891 (1st Dept. 2003), lv den., 1 NY 3d 504 (2003). "Where a plaintiff's direct claims . . . seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable." Trump Village Section 3, Inc. v New York State Housing Finance Agency, supra, at p. 897, citing Rothberg v Reichelt, 270 AD2d 760, 762 (3rd

Dept. 2000); Rockefeller University v Tishman Constr. Corp., supra, at p. 155. In fact, "the mere potential for serious physical injury or property damages is not enough to create a duty independent of the contract thereby authorizing recovery in tort." Rockefeller University v Tishman Const. Corp. of New York, supra, at p. 155, citing Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

"[T]he doctrine of the law of the case 'applies to legal determinations that were necessarily resolved on the merits in a prior decision.' " Powell v Kasper, 84 AD3d 915 (2nd Dept 2011), quoting Lehman v North Greenwich Landscaping, LLC, 65 AD3d 1293, 1294 (2nd Dept 2009). In its May 23, 2010 order, this court held: "[i]t is clear that the County is seeking the benefit of its contractual bargain from the defendants, in particular Tishman, DASNY and ESDC. That the County seeks damages to 'maintain, repair, replace or otherwise remediate the Aquatic Center' hardly transposes its claim against [them] to a tort claim. The County's damages are sought pursuant to a contractual duty only."

In fact, ESDC and DASNY do not oppose Dattner and Molina's motion to dismiss their cross-claim seeking contribution claim pursuant to CPLR 3212 and Dattner, Molina, CHA and Dectron do not oppose ESDC and/or DASNY's motion to dismiss their cross-claims seeking contribution. Pursuant to this court's aforementioned finding, ESDC, DASNY and Tishman's claims for contribution from Dattner and Molina and Dattner, Tishman, Molina, CHA and Dectron's claims for contribution from DASNY and ESDC are dismissed. See, Board of Educ. of the Hudson City School Dist. v Sargent ,Webster, Crenshaw & Folley, supra.

It is clear that the County is seeking the benefit of its contractual bargain from the defendants, in particular Tishman, DASNY and ESDC. That the County seeks damages to

"maintain, repair, replace or otherwise remediate the Aquatic Center" hardly transposes its claim against the defendants to a tort claim. The County's damages are sought pursuant to a contractual duty only. Accordingly, Tishman may not seek contribution from Dattner, Molina, ESDC or DASNY.

Allegations that defendants Dattner and Molina violated a Building Code does not convert a breach of contract claim to a tort claim nor does the County's use of the word negligent in describing Dattner and Molina's wrongdoings in its Interrogatories convert the County's claim so as to enable Tishman to recover of them for contribution.

The Dattner/ESDC Agreement contains, in relevant part, the following contractual indemnification provision:

> Article XI, of the Dattner/ESDC Agreement, dated July 17, 2010.
>
> The ARCHITECT [Dattner] hereby agrees to indemnify and hold harmless the OWNER [NYSUDC, now EDSC], the Client (Organizing Committee for the 1998 Goodwill Games, Inc. and Nassau County and its Departments' of Public Works and Recreation and Parks), the OWNER's Representative [DASNY], and all of their servants and employees, against all claims arising out of the negligent acts, or failure to act, by the ARCHITECT and shall pay any judgment or expense, including interest, **imposed against any of them for personal injury, wrongful death or property damage**, and to defend and pay the costs and expenses thereof, any action, proceeding or lawsuit brought against the parties indemnified and held harmless herein.

The plain language of the written indemnity clause provides that Dattner's obligation to indemnify ESDC and DASNY is expressly limited to claims for personal injury, wrongful death or property damage. It is law of the case that the damages sought by Nassau County herein are economic loss. Thus, to the extent relied upon by ESDC and DASNY, the indemnification provision is inapplicable to the pending litigation. There is no contractual provision that is

against Dattner.

Indemnification

"[I]n idemnity, the party held legally liable shifts the entire loss to another." Rosado v Practor & Schwartz, Inc., 66 NY2d 21, 24 (1995), citing D'Ambrosio v City of New York, 55 NY2d 454, 460-461 (1982); McDermott v City of New York, 50 NY2d 211, 216-217 (1980), rearg den., 50 NY2d 1059 (1980). It "arises out of a contract which may be express or may be implied in law 'to prevent a result which is regarded as unjust or unsatisfactory (citations omitted).' " Rosado v Practor & Schwartz, Inc., supra at p. 24, quoting Prosser and Keaton, Torts § 51 at p. 341 (5th Ed.). Common law indemnity only lies where one who has done no wrong is nevertheless held liable solely due to another's negligence. Glazer v M. Fortunoff of Westbury, Corp., 71 NY2d 643, 646 (1988). "Since the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that '[a] party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.' " Trump Village Section 3, Inc. v New York State Housing Finance Agency, supra, at p. 895, quoting Trustees of Colombia University in City of N.Y. v Mitchell/Giurgola Associates, 109 AD2d 449, 453 (1st Dept. 1985); see also, Broyhill Furniture Industries, Inc. v Hudson Furniture Galleries, LLC, 61 AD3d 554 (1st Dept. 2009).

"[T]he doctrine of the law of the case 'applies to legal determinations that were necessarily resolved on the merits in a prior decision.' " Powell v Kasper, supra, at p. 915, quoting Lehman v North Greenwich Landscaping, LLC, supra, at p. 1294. In its May 23, 2010 order, this court also held: "in light of the County's allegations against Tishman, DASNY and ESDC, i.e., that they have caused the County's damages by breach of contract and negligent

misrepresentation, their liability cannot possibly be predicated solely upon the negligence or wrongdoing of others." Pursuant to this finding, ESDC, DASNY and Tishman's claims for indemnification from Dattner and Molina and Dattner, Tishman, Molina, CHA and Dectron's claims for indemnification from DASNY and ESDC are dismissed.

ESDC and DASNY do not oppose Dattner and Molina's motion to dismiss their indemnification claims and Dattner, Molina, CHA and Dectron do not oppose ESDC and/or DASNY's motion to dismiss their cross-claims for indemnification.

There are no written agreements to indemnify between these parties. The predicate for common law indemnification, i.e., vicarious liability without fault on the indemnitee's part (Trustees of Columbia University in City of N.Y. v Mitchell/Giurgola Associates, supra), is not possible here. ESDC, DASNY, Tishman, Dattner, Molina, CHA and Dectron's potential liability are all predicated on their own wrongdoings. See, Mount Vernon Fire Ins. Co. v Mott, 179 AD2d 626 (2nd Dept 1992); Politte v Sherman, 168 AD2d 761 (3rd Dept 1990).

Tishman has not cited any provisions from its three (3) agreements with ESDC that identifies Tishman as anything other than the Construction Manager. The contractual indemnification provision contained within Dattner/ESDC's agreement runs in favor of the owner (NYSUDC, now ESDC), clients (Organizing Committee for the 1998 Goodwill Games, Inc. and Nassau County and its Department of Public Works and Recreation and Parks), the Owner's Representative (DASNY) and all of their servants and employees. Tishman, who was not even retained at the time the Dattner/ESDC agreement was executed, is not the owner's representative. Indeed, even Tishman's three (3) separate agreements with the ESDC clearly note that Tishman was retained as the Construction Manager and provided services of a Construction Manager. In

fact, the Tishma/ESDC agreements specifically prohibit Tishman from identifying itself as an agent of the owner (i.e., Owner's Representative) for any purpose:

> The relationship created by this Agreement between the Owner and Construction Manager is one of independent. . . nor is it to be construed as, in any way or under any circumstances, creating or appointing the Construction Manager as an agent of the Owner for any purpose whatsoever.

In light of the County's allegations against Tishman,, i.e., that it has caused the County's damages by breach of contract and negligent misrepresentation, its liability cannot possibly be predicated solely upon the negligence or wrongdoing of others: Accordingly, vicarious liability by the defendants Dattner, Molina, ESDC and/or DASNY is not possible. Tishman's cross-claims for indemnification against Dattner, Molina, ESDC and DASNY fail and are also dismissed. See, Village of Palmyra v Hub Langie Paving, Inc., 81 AD3d 1352 (4th Dept. 2011), citing Glazer v M. Fortunoff of Westbury, Corp, supra; Brickel v Buffalo Mun. Housing Authority, 280 AD2d 985 (4th Dept. 2001); Colyer v K Mart Corp., 273 AD2d 809 (4th Dept 2000).

In conclusion:

Dattner and Molina's motion is granted to the extent that defendants ESDC, DASNY and Tishman's claims against them for contribution and common law and/or contractual indemnification are dismissed and defendant Tishman's claims for breach of contract and negligent misrepresentation are dismissed.

ESDC and DASNY's motion is granted to the extent that Dattner, Tishman, Molina, CHA and Dectron's claims against them for contribution and common law and/or contractual indemnification are dismissed; the defendant ESDC is denied leave to amend its complaint against Dattner and Tishman and the defendant DASNY is granted leave to amend its complaint

against Dattner and Tishman.

Submit Judgment on Notice.

This constitutes the Decision and Order of the Court.

Dated: December [redacted], 2011

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J.S.C.