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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO S. HAGLER, J.S.C. PART _____

Justice

Index Number : 603029/2007
BANTA HOMES
vs.
JOB OPPORTUNITIES FOR WOMEN
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

This Motion (Sequence #003) is GRANTED to the extent set forth in the attached separate Decision & Order

FILED

FEB 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/23/13

SHLOMO S. HAGLER, J.S.C.

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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BANTA HOMES CORPORATION,

Plaintiff,

-against-

JOB OPPORTUNITIES FOR WOMEN,

Defendant.

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JOB OPPORTUNITIES FOR WOMEN,

Defendant/Third-Party Plaintiff,

-against-

LINDEN CONSTRUCTION CORP., CAR-WIN CONSTRUCTION INC., OLDCASTLE PRECAST, INC., a/k/a OLDCASTLE PRECAST EAST, INC., and YORK RESTORATION CORPORATION.

Third-Party Defendants.

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Index No. 603029/2007

Index No. 591129/2010

Motion Sequence Nos: 002, 003 & 004

DECISION and ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this breach of contract and negligence action, motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence number 002, third-party defendant York Restoration Corporation ("York") moves for an order, pursuant to CPLR § 3211, dismissing the third-party complaint for failure to state a cause of action. York is also seeking sanctions, attorneys fees and costs in this matter.

Third-party defendant Oldcastle Precast, Inc., a/k/a Oldcastle Precast East, Inc. ("Oldcastle"), cross-moves for an order, pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint.

In motion sequence number 003, third-party defendant Linden Construction Corporation ("Linden") moves, pursuant to CPLR § 3212, dismissing the third-party complaint and all cross-claims against it.

In motion sequence number 004, defendant/third-party plaintiff Job Opportunities for Women ("JOW") moves, pursuant to CPLR § 3025(b), for leave to amend the complaint.

FACTUAL BACKGROUND

The claims in this third-party action arise out of a breach of contract and negligence dispute between plaintiff Banta Homes Corporation ("Banta") and JOW in the underlying action. On September 12, 2001, Banta and JOW entered into a contract for installation of masonry work including, but not limited to, brick, mortar, blocks, lintels, stills and flashing work in and around all openings at the Harriet Tubman Gardens Mid Rise Apartments and Townhouse Projects located at 2235 Frederick Douglas Boulevard in New York City ("the Premises"). On November 21, 2001, Banta and Linden entered into an agreement for Linden to perform carpentry work which included installing doors, frames, medicine cabinets, kitchen cabinets, and windows at the Premises (Exhibit "K" to Affidavit of Joseph P. Fusco, dated March 12, 2012 ["Fusco Aff."]).

Banta alleges JOW failed to properly perform the scope of the work in accordance with the plans and specifications of the project, thereby allowing water infiltration into the Premises. After a battery of tests, Banta discovered that the flashing, associated with the masonry work at the Premises had been improperly installed. Flashing is an impervious material used in construction and installed at a joint or angle of a structure to prevent the passage of water from penetrating into the structure from the exterior. On September 11, 2007, Banta commenced a lawsuit against JOW

asserting three causes of action for breach of contract, negligence, and breach of a warranty. On November 21, 2007, JOW filed an Answer to the Verified Complaint.

During September of 2007, Bluestone Engineering Company ("Bluestone"), a sister company of Banta, consulted and hired York to correct the damage to the Premises following JOW's work. York completed its work on the Premises in 2009 after repairing leaks in over twenty different locations. Subsequently, Lawless & Mangione, LLP, an architectural and engineering firm inspected and approved those repairs.

On December 15, 2010, JOW commenced a third-party action against Linden, Car-Win Construction Inc., Oldcastle and York for common-law indemnification for all or part of any judgment, if any, obtained against JOW in the underlying action. Oldcastle filed its third-party answer on February 8, 2011, Linden filed its third-party answer on February 28, 2011, and York filed its third-party answer on December 13, 2011.

DISCUSSION

York's Motion to Dismiss (Motion Sequence No. 002)

York argues that it is entitled to dismissal of the third-party complaint because: (1) the facts alleged therein are patently false and contradictory to the documentary evidence in the record, (2) York did not enter into a sub-contract with JOW in 2001 to perform work at the Premises, (3) Bluestone retained York in September 2007 to complete restoration and repair work following JOW's alleged defective and negligent work at the Premises, (4) York was never in a position to control or oversee JOW's work at the Premises, and thus the facts alleged fail to state a cause of action for common-law indemnification.

JOW argues that York is not entitled to dismissal because: (1) JOW has properly pled a cause of action for common-law indemnification, (2) York performed work at the Premises that included the removal and replacement of flashing, (3) additional discovery is needed to determine whether York's repair work was negligently performed and, therefore, it is unclear as to what extent York may have created or exacerbated the alleged damage.

When a party moves to dismiss a complaint pursuant to CPLR § 3211(a)(7), the "standard is whether the pleading states a cause of action," and, in considering such a motion, "the court must accept the facts as alleged as true, accord plaintiff or plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2nd Dept 2010] [internal quotation marks omitted]).

JOW's first cause of action is a claim for common-law indemnification. The right to indemnification may be created by express contract or may be implied by law to prevent an unjust enrichment or an unfair result (*Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.*, 109 AD2d 449, 451-452 [1st Dept 1985]). "[C]ommon law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries" or damages (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]). In other words, "where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent" (*Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988] [citations omitted]).

JOW's opposition to York's motion is conclusory and sheer speculation as to York's alleged negligence as JOW surmises that since York opened up the masonry to perform the corrective work, York may have created or exacerbated the alleged damage. Here, JOW's alleged liability is not

based solely on the negligence of another but is based solely on JOW's own actions as an alleged tortfeasor (*see Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.*, 109 AD2d at 451-452). It is uncontroverted on this record that York was not negligent and was simply retained to repair JOW's allegedly negligent installation of the flashing. Thus, JOW failed to set forth sufficient facts to state a valid claim for common-law indemnification.

Oldcastle's Cross-Motion for Summary Judgment to Dismiss Third-Party Complaint

On its cross-motion, Oldcastle moves for dismissal of the third-party complaint. Oldcastle argues that it is entitled to summary judgment because: (1) Oldcastle was simply the supplier of precast hollow floor planking that was used at the Premises, and (2) there is testimony in the record demonstrating that the materials it supplied were not related to the water infiltration and subsequent damage at the Premises.

JOW argues that Oldcastle is not entitled to summary judgment because: (1) due to the early stages of the litigation, there is insufficient discovery, and (2) expert disclosures have not been made, and thus the issue of liability is undetermined.

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law (*J.E. v Beth Israel Hosp.*, 295 AD2d 281, 282 [1st Dept 2002]). A party must tender sufficient evidence to demonstrate the absence of any material issues of fact (*Smalls v AJI, Indus. Inc.*, 10 NY3d 733, 735 [2008]). Failure to do so requires denial of the motion despite the sufficiency of the opposing papers (*id.*). Here, Oldcastle has made a prima facie showing of entitlement to judgment as a matter of law.

Josef Greczek ("Greczek") and Saverio Fasciano ("Fasciano"), two construction supervisors for Banta, and Saverio Minucci ("Minucci"), JOW's construction supervisor, testified that in 2001, Oldcastle's involvement at the Premises was limited to supplying precast hollow core planking for the installation of ceilings and floors at the Premises (Exhibits "D," "E" and "F" to Affirmation of John A. Fearns, dated April 30, 2012 ["Fearns Aff."]). Greczek and Fasciano both reported that Oldcastle was neither present at the Premises nor responsible for any of the subcontracting work outside of the supply of the aforementioned materials. None of those witnesses were able to attribute any of the water infiltration at the Premises to the precast planking supplied by Oldcastle and used to install the flooring and ceilings (*id.*). Furthermore, they reported that Oldcastle was not responsible for the flashing or waterproofing that allegedly led to the water infiltration and damage to the Premises. Since there is no evidence that Oldcastle was responsible for or contributed to the defective work that is the subject of this action, Oldcastle has tendered sufficient evidence to demonstrate the absence of any material issues of fact and that it is entitled to judgment as a matter of law.

"Once the movant has made the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial of the action" (*J.E. v Beth Israel Hospital*, 295 AD2d at 282). Here, JOW has failed to produce sufficient evidentiary proof to establish the existence of a material issue of fact.

Linden's Motion to Dismiss (Motion Sequence No. 003)

Linden argues that it is entitled to dismissal of the third-party complaint because: (1) Linden's work at the Premises was limited to carpentry and installing drywall and windows, and thus it did not cause the alleged damage to the Premises, and (2) JOW has put forth no evidence demonstrating that Linden performed any work with respect to the installation of flashing or waterproofing on the project, and as such, it cannot be held responsible for the water infiltration and the resulting damage at the Premises.

JOW argues that Linden is not entitled to summary judgment because: (1) Linden failed to provide an affidavit or the deposition transcript of a person from Linden with knowledge of the facts, (2) although Banta alleges damages as a result of the improper installation of flashing, plaintiff's employee couldn't recall the flashing specifications for the windows used by Banta, (3) there is a complaint from a resident of the building that there was water infiltration into the apartment which JOW characterizes as coming through the windows, and thus (4) there is a question of fact as to the cause of the damages, given evidence in the record that Linden was retained to perform carpentry work which included the installation of windows at the Premises.

Concerning JOW's procedural argument for the denial of this motion, CPLR § 3212(b) requires that a motion for summary judgment must be supported by, among other things, an affidavit of an individual having personal knowledge of the facts. Notwithstanding this requirement, where, as here, a moving party "supports a summary judgment motion with an attorney's affirmation, deposition testimony, and other proof, the failure to submit an affidavit by a person with knowledge of the facts is not necessarily fatal to the motion (*Maragos v Sakurai*, 92 AD3d 922, 923 [2d Dept 2012]). Furthermore, pursuant to CPLR § 3105, "a verified pleading may be utilized as an affidavit

whenever the latter is required. Frequently, motions for summary judgment are supported by sworn deposition transcripts, as they are evidence in admissible form, satisfying the evidentiary requirements of CPLR § 3212 (*see* CPLR § 3116[a] and § 3212). Here, Linden's motion is supported by deposition transcripts of one if its principals (see Exhibit "1" to Affirmation of Joseph P. Fusco, dated April 2, 2012 ["Fusco Aff. II"]) in addition to a copy of the verified pleading, an attorney affirmation, and several deposition transcripts (Exhibits "A" through "G" to Fusco Aff.).

Linden has demonstrated that it is entitled to judgment as a matter of law. It is uncontroverted that Linden merely installed the windows and was not involved whatsoever in the installation of the flashing. The record reveals that JOW was the only contractor to install bricks, mortar, concrete masonry and the flashing behind those elements (Exhibit "I" to Fusco Aff. at pages 13-18). Moreover, JOW installed all the waterproofing material from the street level of the building to the roof, including all the flashing related to the masonry work (Exhibit "H" of Fusco Aff. at page 12). Linden was not contracted to install any flashing at the Premises (Exhibit "H" to Fusco Aff. at pages 16-18). JOW was the only contractor on the project who installed the flashing behind the brick and block walls of the Premises, which included the building's windows and all of the thru-wall flashing (Exhibit "H" to Fusco Aff. at pages 9-14 and Exhibit "I" to Fusco Aff. II).

Greczek, Banta's construction supervisor, was instructed to uncover and correct the issue of water infiltration at the Premises. Greczek testified that in 2007, he performed numerous tests and determined that there was water infiltration that seeped into the buildings at the Premises (Exhibit "G" of Fusco Aff. at pages 8-14). Additional tests revealed that the leaks were the result of defects to the masonry on the outside of the buildings due to failed flashing and there was no signs of water infiltration through the windows (*id.*). Further tests disclosed that the flashing had been improperly

installed on the facade of the building, causing water infiltration into the interior (*id.*). JOW maintained control of those operations at the Premises and it is clear that none of Linden's employees supervised, assisted or otherwise participated in the installation of the flashing at the Premises (see Exhibits "G," "H" and "I" to Fusco Aff.).

In opposition, JOW points to a letter in the record from James Carbonell, a resident at the Premises who informed management in 2008 that he suffered damage from a persistent water leak in his apartment (Exhibit "A" to Affirmation of Yadira Ramos-Herbert, dated March 23, 2012 [Ramos-Herbert Aff.]). Another tenant, Marion Adeyanju, wrote a similar letter to management concerning damage to her apartment following persistent rainfall from the roof, terrace, and/or gutters of the building (*id.*). There is no evidence presented to show that the cause of the water infiltration was due to Linden's installation of the windows. The tenant letters, none of which were sworn to, never state that the water seepage came through the windows. In fact, all the uncontroverted evidence indicates that the water seepage occurred as a result of JOW's allegedly defective installation of the flashing. Neither submission raises a question of fact as to Linden's liability or negligence in this action nor that Linden was responsible for the installation of the flashing or waterproofing at the Premises. Thus, JOW fails to offer proof in opposition, sufficient to raise a triable issue of fact to defeat this motion for summary judgment (*see Gilbert Frank Corp. V. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Laecca v New York Univ.*, 7 AD3d 415 [1st Dept 2004]).

JOW's Motion for Leave to Amend (Motion Sequence No. 004)

JOW moves pursuant to CPLR § 3025(b) for leave to amend the third-party complaint. In opposition, both York and Linden argue that JOW's request for leave to add a claim for contribution

should be denied because: (1) the motion is untimely, (2) the proposed amendment is palpably insufficient as a matter of law, and (3) it is devoid of merit.

It is well settled law that "leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise" (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009]). Nevertheless, an examination of the underlying merit of the proposed amendment is required, and "leave will be denied where the proposed pleading fails to state a claim or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

Here, there is neither a showing by the defendants of prejudice nor surprise resulting from JOW's delay in seeking to amend the third-party complaint. However, granting JOW's motion to amend the third-party complaint in the form as submitted would be futile as JOW failed, other than in a conclusory fashion, as stated above, to support its allegations that either York or Linden was negligent in performing the corrective work or window installation which would be subject to contribution to the extent of their proportionate responsibility for the damages suffered by plaintiff (*Trustees of Columbia v Mitchell/Giurogla Assocs., supra*). In other words, JOW has not sufficiently supported the added cause of action of contribution because they have not demonstrated any degree of negligence on the part of York or Linden at this time.

Therefore, JOW's motion to amend the third-party complaint must be denied without prejudice.

CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence no. 002 by third-party defendant York Restoration Corporation to dismiss is granted and the first cause of action of the third-party complaint is dismissed; and it is further

ORDERED that Oldcastle Precast, Inc.'s cross-motion for summary judgment is granted to the extent of granting partial summary judgment in favor of third-party defendant Oldcastle Precast, Inc., as to the first cause of action for common-law indemnification; and it is further

ORDERED that motion sequence no. 003 by third-party defendant Linden Construction Corporation is granted to the extent of granting partial summary judgment in favor of third-party defendant Linden Construction Corporation as to the first cause of action for common-law indemnification; and it is further

ORDERED that motion sequence no. 004 by defendant and third-party plaintiff Job Opportunities for Women for leave to amend the complaint herein is denied without prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the remainder of the action shall continue.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: January 23, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.