Board of Mgrs. of the A Bldg. Condominium v 13th & 14th St. Realty, LLC
2014 NY Slip Op 33355(U)
December 18, 2014
Supreme Court, New York County
Docket Number: 100061/11
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM,

Index No. 100061/11

Plaintiff,

Motion seq. no. 23

-against-

DECISION & ORDER

13th & 14th STREET REALTY, LLC, *et al.*,

Defendants.

----------x

BARBARA JAFFE, JSC:

For Hudson Meridian:
James Freire, Esq.
Miller & Assocs.
One Battery Park Plaza, 28th fl.
New York, NY 10004
212-867-9255

For MG:
Raymond T. Mellon, Esq.
Zetlin & De Chiara LLP
801 Second Ave.
New York, NY 10017
212-682-6800

By notice of motion, third third-party defendant MG Engineering, P.C. s/h/a Marino Gerazounis & Jaffe Associates, Inc., moves pursuant to CPLR 3211(a)(1), (5) and (7) for an order dismissing the third-party complaint of third third-party plaintiff Hudson Meridian Construction Group, LLC, s/h/a Hudson Meridian Construction Group. Hudson Meridian opposes.

This action arises from the allegedly defective construction of a condominium; Hudson Meridian was the construction manager for the condominium. MG was retained by defendant/third-party plaintiff Magnum Management, LLC (Magnum), an entity related to the sponsor and involved in the construction, to provide mechanical engineering services, limited to preparing mechanical engineering design drawings and plans for the construction. Its agreement was solely with Magnum; there was no agreement between it and Hudson Meridian. (NYSCEF

933).

By decision and order dated August 30, 2013, as pertinent here, I granted partial summary judgment in favor of Hudson Meridian and against plaintiffs, finding that plaintiffs' claims for common law negligence were insufficient as they sought damages solely for economic loss arising out of the alleged negligent construction, notwithstanding their claims that Hudson Meridian's negligence created an unreasonable hazard to their lives and safety. (NYSCEF 496).

Hudson Meridian opposes dismissal only of its negligence and contribution claims. (NYSCEF 1012).

I. CONTENTIONS

MG argues that Hudson Meridian's contribution claim fails as plaintiffs seek to recover solely for economic loss, as I found in the August 2013 order, and that the negligence claim is meritless as it owed no duty to Hudson Meridian. It also contends asserts that the claims are time-barred. (NYSCEF 947).

Relying on plaintiffs' bill of particulars, Hudson Meridian contends that plaintiffs seek, in addition to property damage, damages for personal injuries arising from the condominium's defective construction, along with other documents addressing the mold that allegedly developed in the condominium. It denies that its tort claims are duplicative, as they are pleaded in the alternative, and asserts that MG may be held liable in tort regardless of the lack of privity between them. (NYSCEF 1012).

In reply, MG denies that plaintiffs assert claims for personal injuries, observing that no such claims appear in plaintiffs' complaint or bill of particulars, that my prior decision granting dismissal to Hudson Meridian is the law of the case and binding on its claims against MG, and

that Hudson Meridian's attempt to recast its breach of contract claims as tort claims must be rejected as it does not assert a duty owed by them other than its contractual duty to Magnum. (NYSCEF 1028).

II. ANALYSIS

As I already found on Hudson Meridian's own motion, plaintiffs' injuries relate solely to economic loss, and thus there is no basis on which MG may be held liable for common law contribution. (*Bd. of Educ. of Hudson City School Dist. v Sargent, et al.*, 71 NY2d 21 [1987] [no right to contribution where damages claimed are economic loss resulting from breach of contract]; *Kleinberg v 516 W. 19th LLC*, 121 AD3d 459 [1st Dept 2014] [contribution unavailable where underlying contractual claims seek purely economic damages]; *Bd. of Mgrs. of 195 Hudson St. Condominium v 195 Hudson St. Assocs., LLC*, 37 AD3d 312 [1st Dept 2007] [as damages sought by plaintiffs merely for economic loss, contribution unavailable]).

Moreover, claims based on the negligent performance of a contract are not cognizable (*Wildenstein v 5H & Co., Inc.*, 97 AD3d 488 [1st Dept 2012] [breach of contract not considered tort unless legal duty independent of contract has been violated]; *Bd. of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010] [claim for negligent performance of contract not cognizable]; *Saint Patrick's Home for the Aged and Infirm v Laticrete Intl., Inc.*, 267 AD2d 166 [1st Dept 1999] [allegation that breach of contract duty arose from lack of due care does not transform breach of contract into tort]), and, in any event, are duplicative of a claim for breach of contract (*Bd. of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506 [1st Dept 2014] [allegations of negligence based on defects in construction of condominium sound in breach of contract, not tort]; *Hamlet on Olde*

Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc., 65 AD3d 1284 [2d Dept 2009], *lv denied* 15 NY3d 742 [2010] [negligence claim based on construction defects dismissed as duplicative of breach of contract claim]).

While a contractor may be held liable in tort to a non-contracting party in certain limited circumstances, including if, in failing to exercise reasonable care in the performance of its contractual duties, it launches a force or instrument of harm by creating or exacerbating a dangerous condition (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d, 136 [2002]), Hudson Meridian cites no authority for the proposition that MG's alleged failure to prepare proper mechanical engineering design drawings and plans is equivalent to creating or exacerbating a hazardous condition (*see eg Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007] [failure to properly inspect vehicle did not create or exacerbate dangerous condition as no reason to believe that inspection made vehicle less safe than beforehand]; *Davies v Ferentini*, 79 AD3d 528 [1st Dept 2010] [engineering consulting's firm provision of construction drawings containing improper materials did not create dangerous condition]). *Johnson v City of New York* is inapposite as there, the movant raised a triable issue as to whether the third party contractor negligently failed to install circuit interrupters and thereby created the allegedly hazardous condition that caused the plaintiff's injuries. (102 AD3d 746 [2d Dept 2013]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of third third-party defendant MG Engineering, P.C. s/h/a Marino Gerazounis & Jaffe Associates, Inc. for an order dismissing the third-party complaint of third third-party plaintiff Hudson Meridian Construction Group, LLC, s/h/a Hudson Meridian

Construction Group and all cross claims against it is granted, and the third third-party complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of this action shall continue.

ENTER:

Barbara Jaffe, JSC

DATED: December 18, 2014
New York, New York