Foremost Contr. & Bldg., LLC v Go Cat Go, LLC
2018 NY Slip Op 32381(U)
September 25, 2018
Supreme Court, New York County
Docket Number: 155049/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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INDEX NO. 155049/2016

MOTION DATE

MOTION SEQ. NO. 003

FOREMOST CONTRACTING & BUILDING, LLC,

Plaintiff,

-against-

GO CAT GO, LLC, 87 LEONARD DEVELOPMENT LLC, ANTHONY C. MARANO, ANTHONY M. MARANO, LEONARD STREET OWNER LLC, MIDTOWN ELECTRIC SUPPLY CORP., ACE WIRE & CABLE CO., INC., MICHAEL'S ELECTRICAL SUPPLY CORP, ELECTRICAL DESIGN MANAGEMENT LLC, A-BEST RESTORATION CORP., WASYL IWASYKIW, DISTINCT DRYWALL INC., DONATO INC., BLONDER BUILDERS INC., SOLAR INNOVATIONS INC., and JANE DOE NO. 1" THROUGH "JANE DOE NO. 10"

Defendants.

DECISION AND ORDER

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GO CAT GO, LLC, 87 LEONARD DEVELOPMENT LLC, ANTHONY C. MARANO, AND ANTHONY M. MARANO,

Third-Party Plaintiffs,

-against-

GERMAN AMERICAN CAPITAL CORPORATION,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for DISMISS/STAY

This action arises out of construction of a condominium project (the Project) located at 87 Leonard Street in Manhattan (the Property). The main action is brought by plaintiff Foremost Contracting & Building, LLC (Foremost), the contractor, to recover its unpaid fees for the Project from defendants/third-party plaintiffs Go Cat Go, LLC (Go Cat Go), 87 Leonard Development LLC (87 Leonard Development), Anthony C. Marano, and Anthony M. Marano (collectively, the developer defendants). The complaint in the main action (Foremost Compl.) pleads, among other causes of action against the developer defendants, a fourth cause of action

for unjust enrichment, a sixth for "breach of trust," and a seventh for "defrauding creditors." (Foremost Compl., ¶¶ 42-45, 49-53, 54-57.) This complaint also pleads a second cause of action for breach of contract against defendants Go Cat Go and 87 Leonard Development. (Id., ¶¶ 32-36.) This cause of action is based on the allegations that Go Cat Go entered into the construction contract with Foremost (the Foremost Contract) and breached the contract by not paying the amounts due to Foremost, and that 87 Leonard Development was a record owner of the Property and a third-party beneficiary of the contract. (Id., ¶¶ 18, 20, 33-34.)

In the third-party action, which is the subject of this decision, the developer defendants allege a first cause of action for common law indemnification and a second cause of action for common law contribution from third-party defendant German American Capital Corporation (German American Capital),[1] a lender of funds for the Project. (Am. Third-Party Compl., ¶¶ 31-32, 33-34.) German American Capital now moves to dismiss the amended third-party complaint in its entirety, pursuant to CPLR 3211(a) (5) and (a) (7), on the grounds that the developer defendants' claims are barred by res judicata and, in the alternative, fail to state a cause of action.[2]

Background

The parties' roles in the Project are not in dispute. Go Cat Go entered into a contract with Foremost for the construction. (Foremost Compl., ¶ 18.) 87 Leonard Development was the owner of record of the Property. (Prior Complaint, ¶ 8.)[3] Go Cat Go is the sole owner of 87

[1] In the amended third-party complaint and in its motion papers, the developer defendants refer to German American Capital as "Deutsche Bank."

[2] In the alternative, German American Capital moves, pursuant to CPLR 2201, to stay the third-party action pending appeal of the action that is the basis of its res judicata claim. As the appeal is no longer pending, the request for a stay is denied as moot.

[3] Factual allegations as to the roles of the parties are pleaded in a prior action brought against German American Capital by 87 Leonard Development and non-party 87 Mezz Member LLC. The prior action (Index No.

Mezz Member LLC (87 Mezz Member), and 87 Mezz Member is the 100 percent owner of 87 Leonard Development. (Id., ¶¶ 8, 12.) As of August 2016, Anthony M. Marano was the manager of 87 Leonard Development and of 87 Mezz Member. (Id., Verification, at 15.) Anthony M. Marano and Anthony C. Marano were guarantors of the loans made by German American Capital to finance the Project. (Id., ¶ 27.) More particularly, by agreement entitled Loan Agreement and dated as of March 31, 2011, German American Capital made a mortgage loan of approximately $13 million to 87 Leonard Development as mortgage borrower. (Developer Defs.' Memo. In Opp., at 3; Aff. of Andrew Todres [third-party defs.' attorney], Loan Agreement [Exh. D (3)].) By separate agreement dated as of March 31, 2011, German American Capital made a loan of nearly $15 million to 87 Mezz Member as mezzanine borrower. (Developer Defs.' Memo. In Opp., at 3; Todres Aff., Mezzanine Loan Agreement [Exh. D (2)].) As collateral for the mezzanine loan, 87 Mezz Member pledged all of its membership interests in 87 Leonard Development. (Am. Third-Party Compl., ¶ 12.)

On or about December 1, 2011, Go Cat Go and Foremost entered into the Foremost Contract – "a Standard Form Agreement Between Owner and Contractor . . . concerning the development" of the Property. (Am. Third-Party Compl., ¶ 13.) At that time, "the first item of work was performed and/or the first item of material was furnished" by Foremost. (Foremost Compl., ¶ 24.) On or about April 3, 2013, "the last item of work was performed and/or the last item of material was furnished" by Foremost. (Id.) Foremost pleads that $961,262.05 "still is justly due . . . for work performed and materials supplied" during this time frame. (Id., ¶ 26.)

On April 1, 2013, after the developer defendants did not make a payment (German American Capital Memo. In Supp., at 2), German American Capital declared "a technical Event

654279/2016) is discussed further below. (Infra at 5.) The complaint in that action is referred to as the Prior Complaint.

of Default" under the mezzanine loan. (Am. Third-Party Compl., ¶ 16.) German American Capital then "stated its intention to foreclose on [87 Mezz Member's] membership interests in [87 Leonard Development]."[4] (Developer Defs.' Memo. In Opp., at 4.) On August 13, 2013, German American Capital conducted a UCC foreclosure sale of 87 Mezz Member's membership interests in 87 Leonard Development. (Developer Defs.' Memo. In Opp., at 4.) At the UCC sale, German American Capital purchased the membership interests for itself. (Id.; Am. Third-Party Compl., ¶ 19.)

The developer defendants plead that at the time of the UCC sale, German American Capital "was aware that [Foremost] claimed payment for labor and materials in connection with the Property." (Am. Third-Party Compl., ¶ 20.) According to the developer defendants, German American Capital "benefitted from any labor and materials supplied by [Foremost]" (id., ¶ 21), but "did not compensate [Foremost] for the value of any labor or materials. . . ." (Id., ¶ 22.) On June 2, 2014, having purchased the membership interests, German American Capital "caused [87 Leonard Development] to sell the Property" to a third party for 33 million dollars. (Id., ¶ 23.) The developer defendants allege that "the proceeds from the sale of the Property, which reflected any labor or material provided by Plaintiff, were then transferred to another subsidiary or affiliate of [German American Capital]," and that they did not receive any of the proceeds from the sale of the Property. (Id., ¶¶ 24-25.)

On or about August 12, 2016, prior to commencement of the instant third-party action, 87 Leonard Development and 87 Mezz Member commenced an action in this Court (the prior action) against German American Capital. The prior action asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and conversion. (Prior

[4] In the amended third-party complaint and in its motion papers, the developer defendants refer to 87 Mezz Member as "87 Mezz" and 87 Leonard Development as "87 Development."

Complaint, ¶¶ 54-72.) The prior action pleaded that it arose "from [German American Capital's] willful breach of the parties' mezzanine loan agreement in an unlawful scheme to usurp Plaintiffs' valuable, but unfinished, Tribeca luxury real estate development project through a UCC foreclosure sale." (Id., ¶ 1.) As further pleaded in that action, "pursuant to its unlawful scheme, [German American Capital] purported to conduct a UCC sale of [87 Mezz Member's] membership interests in [87 Leonard Development], which [German American Capital] acquired for itself. Thus, [German American Capital] usurped the highly profitable development project from [87 Mezz Member] and converted [87 Leonard Development's and 87 Mezz Member's] substantial equity in the Property."[5] (Id., ¶ 52.)

By decision dated May 24, 2017, this Court (Singh, J.) rejected these claims and dismissed the prior action with prejudice in its entirety. (87 Mezz Member LLC v German Am. Capital Corp., 2017 NY Slip Op 31128 [U], WL 2265799, * 3-4 [Sup Ct, NY County 2017].) The Court reasoned that "the loans were not repaid. Therefore, under the unambiguous language of the Loan Agreement, an Event of Default was triggered" under a separate agreement between the parties entitled the Additional Interest Agreement. (Id., at * 2 [internal citation omitted].) The Court further held that German American Capital did not deliberately miscalculate the amount due under the Additional Interest Agreement. (Id., at * 3.) The Appellate Division affirmed, holding that "German American Capital Corporation (GACC) had a right to foreclose on its collateral." (87 Mezz Member LLC v German Am. Capital Corp., 162 AD3d 524, 524 [1st Dept 2018].)

In the amended third-party complaint in this action, as in the prior action, the developer defendants plead that "pursuant to its unlawful scheme," German American Capital "wrongfully

[5] In the Prior Complaint, "German American Capital" is referred to as "Deutsche Bank," "87 Mezz Member" as "87 Mezz" and "87 Leonard Development" as "87 Leonard."

usurped the Property in a purported UCC sale of the equity of [87 Leonard Development], in breach of the parties' various loan agreements. As a result of [German American Capital's] misconduct, the Developer Defendants were wiped out and did not receive a penny from the Property." (Am. Third-Party Compl., ¶¶ 19, 1.)

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].)

Res Judicata

It is further settled that "[i]n New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." (Matter of People of the State of New York v Applied Card Sys., Inc., 11 NY3d 105, 122 [2008] [internal quotation marks and citation omitted], cert denied 555 US 1136 [2009].) New York follows a "transactional analysis approach in deciding res judicata issues." (O'Brien v City

of Syracuse, 54 NY2d 353, 357 [1981].) Under the transactional approach, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." (Id.) "When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping,' the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions." (Id., at 357-358 [internal citation omitted]; accord UBS Secs. LLC v Highland Capital Mgt., L.P., 86 AD3d 469, 474-475 [1st Dept 2011]; Syncora Guar. Inc. v J.P. Morgan Secs. LLC, 110 AD3d 87, 96 [1st Dept 2013] [holding that where plaintiff in the second action "asserts different legal theories, but it seeks to recover for the same alleged harm based on the same underlying events," res judicata bars the second action, as "[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action"] [internal quotation marks and citations omitted].)

Here, the developer defendants argue that res judicata does not apply because the prior action and the instant third-party action do not arise from the same transaction. (Developer Defs.' Memo. In Opp., at 2, 7.) The developer defendants contend that the two actions arise out of different contracts, and that the instant third-party action pleads claims against German American Capital under the Foremost Contract, while the prior action asserted claims against German American Capital for breach of the mezzanine loan agreement. (Id., at 2.) The developer defendants also assert that the wrongdoing at issue in the two actions occurred at different times. They argue that their prior claims "involve[d] whether [German American Capital] wrongfully took control of the Property . . ." but, here, "do not in any way turn upon whether the UCC sale was wrongful." (Id., at 9.) The developer defendants further contend that

"[t]he two actions rely upon different sets of facts, hinge on the application of different laws and seek different forms of relief." (Id., at 2.)

The developer defendants' arguments are unpersuasive. German American Capital's alleged wrongful acts in connection with the UCC sale are the basis for both complaints. The developer defendants ignore that the complaint in the prior action, like that in the third-party action (quoted supra, at 5, 6), sought damages as a result of German American Capital's alleged wrongful usurpation, through the UCC foreclosure sale, of the developer defendants' interests in the Project. Put another way, although the prior action involved the mezzanine loan agreement rather than the Foremost Contract, the foreclosure, plus all of German American Capital's post-foreclosure acts, were at issue because the claim for damages was based on German American Capital's acquisition of 87 Mezz Member's interests in the Project following the UCC sale. German American Capital thus demonstrates on this record that the amended third-party complaint is based on the same transaction as the transaction at issue in the prior action.

German American Capital also satisfies the requirement for the application of the res judicata doctrine that there have been a final judgment on the merits in the prior action. As noted above, the prior action eventuated in a judgment that dismissed the claims on the merits with prejudice.

The court turns to the final element of the res judicata doctrine, which requires that a party must have been a party to the previous action or in privity with those that were. The developer defendants' sole challenge to privity is that only one of the four developer defendants, 87 Leonard Development, was a party to the prior action. (See Developer Defs.' Memo. In Opp., at 1-2; see Transcript of Oral Argument [NYSCEF Doc. No. 122] at 11-12, 17.) That argument is based on a misapprehension of the standards for establishing privity.

As the Court of Appeals has explained, "privity is not susceptible to a hard-and-fast definition." (Applied Card Sys., Inc., 11 NY3d at 123.) A Court "must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances. This inquiry is, of course, informed by reference to the policies that res judicata is designed to protect." (Id. [internal citation omitted].) "[A] person may be bound by a prior judgment to which he was not a party of record." (Watts v Swiss Bank Corp., 27 NY2d 270, 277 [1970].) "Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding." (Green v Santa Fe Indus., Inc., 70 NY2d 244, 253 [1987].)

It is undisputed that Go Cat Go owns 87 Mezz Member (Prior Complaint, ¶ 12), that Anthony M. Marano was the manager of 87 Leonard Development and of 87 Mezz Member (id., Verification, at 15), and that Anthony M. Marano and Anthony C. Marano were guarantors of the loans made by German American Capital to finance the Project. (Id., ¶ 27.) There is no claim here that the status of the three developer defendants is insufficient to establish that they were in privity with the prior parties. Nor is there a claim that the guarantors did not have notice of the prior action and an opportunity to appear. (See Walter E. Heller & Co. v Cox, 343 F Supp 519, 524 [SD NY 1972], affd no opinion 486 F2d 1398 [2d Cir 1973], cert denied 414 US 827 [1973] [holding, under New York law, that "guarantor is bound by a prior adjudication involving the principal debtor if the guarantor had notice of and an opportunity to participate in the prior proceeding"]; see also Jonas & Naumburg Corp. v Michlin, 220 AD 649, 652-653 [1st Dept 1927]); 63 NY Jur2d Guaranty and Suretyship § 376-377 [2018].) The court accordingly concludes that the developer defendants were in privity with the parties to the prior action.

As all of the elements for the application of the res judicata doctrine have been met, the

amended third-party complaint against German American Capital must be dismissed. The court will, however, address German American Capital's alternative argument that the developer defendants' claims lack merit.

Indemnification and Contribution

In the amended third-party complaint, the developer defendants seek common law indemnification and common law contribution from German American Capital. (Am. Third-Party Compl., ¶¶ 32, 34.) In opposing German American Capital's motion, the developer defendants argue that "[i]ndemnification is an equitable remedy designed to prevent unjust enrichment."[6] (Developer Defs.' Memo. In Opp., at 2.) The developer defendants also contend that "[c]ontribution is adequately pled where multiple alleged tortfeasors potentially are subject to liability."[7] (Id.)

As the Court of Appeals has explained, "[i]n the 'classic indemnification case,' the one seeking indemnity 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." (Glaser v M. Fortunoff of Westbury Corp., 71 NY2d 643, 646 [1988] [internal quotation marks and citation omitted]). "In indemnity, which arises commonly in cases involving vicarious liability

[6] According to the developer defendants, the amended third-party complaint alleges that German American Capital "was in control of the property at the time of the $33 million sale, that it caused the Property to be sold, and that it pocketed the sale proceeds without paying the contractors that made the property so valuable." (Developer Defs.' Memo. In Opp., at 2.) The developer defendants conclude that German American Capital "will be unjustly enriched if it fails to indemnify [the developer defendants] to the extent that they may be liable for the alleged costs of Foremost's labor and materials." (Id.) The complaint does not in fact allege unjust enrichment, although it does plead that German American Capital obtained the proceeds of the sale without compensating Foremost for the value of the labor or materials that Foremost supplied. (See Am. Third-Party Comp., ¶¶ 19-25.)

[7] As argued by the developer defendants, "Foremost has alleged causes of action against [the developer defendants] for breach of trust, defrauding creditors, and breach of fiduciary obligations by purportedly diverting the sale proceeds to themselves. . . . [German American Capital], not [the developer defendants], received and was in possession of the $33 million in sale proceeds. Accordingly, [the developer defendants] have adequately alleged that [German American Capital] is liable to the contractor as a separate tortfeasor." (Developer Defs.' Memo. In Opp., at 2.)

. . . a party held legally liable to plaintiff shifts the entire loss to another. The right to do so may be based upon an express contract, but more commonly the indemnity obligation is implied . . . based upon the law's notion of what is fair and proper as between the parties." (Mas v Two Bridges Assocs., 75 NY2d 680, 690 [1990] [internal citations omitted].) "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor. The duty that forms the basis for the liability arises from the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." (Raquet v Braun, 90 NY2d 177, 183 [1997] [internal quotation marks, citations, and ellipsis omitted].)

"[I]n contribution, the tort-feasors responsible for plaintiff's loss share liability for it. . . . [T]heir common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss." (Mas, 75 NY2d at 689-690 [internal citation omitted].) Under CPLR article 14, "[t]he 'critical requirement' for apportionment by contribution . . . is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." (Raquet, 90 NY2d at 183.)

Here, giving the developer defendants the benefit of all reasonable inferences, the allegations of the amended third-party complaint do not support a claim for common law indemnification. The developer defendants do not cite any authority on this motion that a lender is obligated by statute or common law to compensate a contractor for its work, after the lender forecloses on a loan made to finance a construction project.

The allegations of the amended third-party complaint also do not support a claim for

common law contribution. The Foremost complaint does not allege a viable tort against the developer defendants. In opposing German American Capital's motion, the developer defendants argued that Foremost pleaded tort causes of action against them for breach of trust, defrauding creditors, and breach of fiduciary duty, in connection with the sale of the Property. (Developer Defs.' Memo. In Opp., at 12.) As the developer defendants acknowledged at the oral argument, Foremost's pleading was predicated on the allegation that 87 Leonard Development was the owner of the premises at the time the Property was sold. This allegation was, however, based on a mistake of fact as to the ownership, as it was German American Capital that owned and sold the Property. (See Transcript of Oral Argument [NYSCEF Doc. No. 122] at 16.) Significantly also, the amended third-party complaint fails to plead a viable tort against German American Capital. As noted above, the decision of the prior action against German American Capital (see supra, at 5-6) held that the foreclosure was not wrongful.

It is accordingly hereby ORDERED that the motion of third-party defendant German American Capital Corporation to dismiss the amended third-party complaint is granted in its entirety with prejudice; and it is further

ORDERED that branch of the said motion for a stay is denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
September 25, 2018

MARCY FRIEDMAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE