

**McMahon v Cobblestone Lofts Condominium**

2018 NY Slip Op 33525(U)

April 11, 2018

Supreme Court, New York County

Docket Number: 151136/2014

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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SHANE MCMAHON, MARISSA MCMAHON,

Plaintiff,

- v -

THE COBBLESTONE LOFTS CONDOMINIUM, THE ANDREWS ORGANIZATION, JOHN DOES 1-5, NOVA RESTORATION OF NY INC., NOVA RESTORATION LLC, WALTER B. MELVIN, ARCHITECTS, LLC, 7 VESTRY LLC, PACT REALTY, LLC, PAUL JACOBSON, AVRA JAIN, CHRISTOPHER SMITH, CMS ARCHITECTURE AND DESIGN, ROBERT SHAPIRO, OSTREICHER LAIGHT PARTNERS LLC, OSTREICHER CONSTRUCTION CORPORATION,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 026) 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 905, 906, 907, 908, 909, 910, 911, 920, 921, 922, 923, 924, 925, 926, 931, 933

were read on this motion to/for DISMISS

In this action for water damage to plaintiffs' condominium apartment, Defendant/Third-Party Defendant Walter B. Melvin Architects LLC ("Melvin") moves pursuant to CPLR 3211(a)(7) and 3211(b) to dismiss all third-party claims and cross-claims asserted against it by defendant/third-party plaintiff The Cobblestone Lofts Condominium ("Cobblestone") and defendant/third-party defendant Nova Restoration LLC ("Nova") for (1) common law contribution; (2) common law indemnification; (3) contractual indemnification; and (4) breach of contract for failure to procure insurance. Melvin also seeks sanctions against Cobblestone for its failure to voluntarily discontinue its claims against it and for failing to provide a legal or factual basis for its position. Only Cobblestone filed opposition to the motion.

In support of its motion, Melvin first argues that, given its settlement agreement with plaintiffs, Cobblestone's and Nova's claims for common law contribution are barred by General

Obligations Law § 15-108(b). General Obligations Law § 15-108(b) provides that the release of one tortfeasor relieves him from liability to any other person for contribution. *See Williams v. New York City Transit Auth.*, 9 A.D.3d 308, 309-310 (1st Dep't 2004). However, the remaining defendants continue to have a right to a set-off pursuant to General Obligations Law § 15-108(a). *Id.* Cobblestone does not dispute this part of the motion. Thus, given the parties' settlement agreement, and the releases executed by plaintiffs, all claims for common law contribution against Melvin must be dismissed without prejudice to defendants' right to assert an affirmative defense in the main action pursuant to General Obligations Law § 15-108(a). In addition, since Cobblestone's and Nova's liability is not derivative of Melvin, they may not seek common-law indemnification from it. *Williams*, 9 A.D.3d at 309.

Second, Melvin argues that the claims for contractual indemnification and breach of contract for failure to procure insurance must be dismissed. With respect to Nova, Melvin states that it never entered into a contract with Nova and thus there is no basis for these claims. With respect to Cobblestone, Melvin argues that its contract with Cobblestone does not contain any provision requiring Melvin to indemnify Cobblestone for the claims in this action or requiring Melvin to procure insurance naming Cobblestone as an additional insured. In support, Melvin attaches its signed contract with Cobblestone in its entirety ("Agreement"). Affirmation of Jeffrey S. Matty dated December 14, 2018, Exh. A.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleading must be afforded a liberal construction and the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, the Court of Appeals has made clear that a defendant can submit documentary evidence in support of a CPLR 3211(a)(7) motion. *Basis*

*Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (2014) (citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976)). “When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff has stated a cause of action to whether it has one.” *Id.* (internal quotations and citations omitted). Thus, the parties’ contract may be considered on this motion and if it conclusively establishes that Cobblestone has no cause of action, dismissal is appropriate. *Id.*

In opposition to the motion, Cobblestone does not dispute Melvin’s claim that the Agreement, on its face, does not contain a contractual indemnification or an additional insured provision. However, Cobblestone argues that, pursuant to section 10.2 of the Agreement, the provisions of another document, entitled AIA Document A201-2007, General Conditions of the Contract for Construction, is incorporated by reference into the Agreement and that this document does contain provisions requiring Melvin to indemnify Cobblestone and add it as an additional insured. Affirmation of Joseph A.H. McGovern dated January 11, 2019, ¶ 27, citing in relevant part Exh. B, §§ 3.18, 11.1.4.

“The doctrine of incorporation by reference is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document beyond all reasonable doubt.” *Von Ancken v. 7 East 14 LLC*, 2019 WL 1473819, at \*1 (1st Dep’t April 4, 2019) (internal citations and quotations omitted). Moreover, “a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.” *Hayward Baker, Inc. v. C.O. Falter Const. Corp.*, 104 A.D.3d 1253, 1254 (4th Dep’t 2013) (citing *Guerini Stone Co. v. Carlin Constr. Co.*, 240 U.S. 264, 277 [1916]); *see also Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989) (“When a party is under no legal duty to indemnify, a contract

assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.”).

Here, section 10.2 of the Agreement, which Cobblestone cites in support of its position, provides that the “Terms in this Agreement shall have the same meaning as those in AIA Document A201-207, General Conditions of the Contract for Construction.” Matty Aff., Exh. A, § 10.2. Thus, to the extent this clause incorporates by reference another document, it is limited to incorporating the meaning of its terms, not all of its substantive provisions, as Cobblestone contends. Indeed, if the parties intended to incorporate this entire document into the Agreement, they would have included it in section 13.2 of the Agreement, which explicitly lists the documents which comprise the Agreement. Matty Aff., Exh. A, § 13.2.

Moreover, even if this document is incorporated wholesale into the Agreement, sections 3.18 and 11.1.4 of this document, which Cobblestone cites in support of its position, do not impose a duty on Melvin, as the architect, to indemnify Cobblestone or add it as an additional insured. Rather, the provisions apply to the “Contractor” for the project, a term which is distinct from “Architect”, which is defined as Melvin. Matty Aff., Exh. A, p. 1 (naming Melvin as the “Architect” and Cobblestone as “Owner”); McGovern Aff., Exh. B., p. 1 (listing separate sections for “Owner”, “Contractor”, and “Architect”). Accordingly, since Melvin has no contractual obligation to indemnify Cobblestone or add it as an additional insured, Cobblestone’s claims for contractual indemnification and breach of contract for failure to procure insurance must be dismissed.

Finally, Cobblestone argues that its third-party complaint against Melvin should not be dismissed because it also sets forth causes of action for breach of contract and breach of warranty. However, the relevant portion of the third-party complaint, as cited by Cobblestone,

clearly states a derivative claim for liability sounding in common law contribution, rather than a direct claim for breach of contract or breach of warranty. *McGovern Aff.*, Exh. C, ¶ 41. The fact that the third-party complaint incorporates by reference the underlying complaint does not change the fact that Cobblestone has not asserted its own claims for breach of contract/breach of warranty against Melvin. Accordingly, the third-party complaint must be dismissed.

Finally, Melvin's request for sanctions is denied. Although Cobblestone's arguments in opposition to the motion were found to be unavailing, it cannot be said that they are frivolous or lack any legal or factual basis. Accordingly, it is

ORDERED that the motion of defendant Walter B. Melvin Architects LLC to dismiss the third-party complaint and all cross-claims asserted against it is granted and the third-party complaint and all cross-claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the dismissal of the common law contribution claims against said defendant is without prejudice to defendants' right to assert an affirmative defense in the main action pursuant to General Obligations Law § 15-108(a); and it is further

ORDERED that the action is severed and continued against the remaining defendants, third-party defendant, and second third-party defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the request for sanctions is denied.

4/11/19  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE