Board of Mgrs. of Manhattan Place Condominium v 616 First Ave., LLC
2019 NY Slip Op 30216(U)
January 25, 2019
Supreme Court, New York County
Docket Number: 652240/17
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

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THE BOARD OF MANAGERS OF MANHATTAN PLACE CONDOMINIUM, On Its Own Behalf And On Behalf Of Individual Unit Owners, and MANHATTAN PLACE CONDOMINIUM,

Plaintiffs,

Index No.: 652240/17
DECISION/ORDER

-against-

616 FIRST AVENUE, LLC, JDS CONSTRUCTION GROUP LLC, JDS DEVELOPMENT LLC, SHOP ARCHITECTS P.C., WSP CANTOR SEINUK STRUCTURAL ENGINEERS, RA CONSULTANTS LLC, BURO HAPPOLD CONSULTING ENGINEERS, P.C., ECD NY INC. and PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Defendants.

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PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Third-Party Plaintiff,

Third-Party Index No. 595039/18

-against-

MORETRENCH AMERICAN CORPORATION,

Third-Party Defendant.

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HON. FRANK P. NERVO, J.S.C.:

In this action, third-party defendant Moretrench American Corporation (Moretrench) moves to dismiss the third-party complaint, pursuant to CPLR 3211 (motion sequence number 002). For the following reasons, the motion is granted and the complaint is dismissed.

BACKGROUND

The underlying action herein concerns a building (the building) which is owned by the plaintiff Manhattan Place Condominium (the condominium), and located at 630 First Avenue in the County, City and State of New York. *See* notice of motion, exhibit A (complaint), ¶ 12. The co-plaintiff Board of Managers of Manhattan Place Condominium (the board) is the condominium's board of managers. *Id.*, ¶ 1. The underlying complaint alleges that the building suffered structural damage as a result of negligent excavation and dewatering work that was performed on the adjacent property in 2014. *Id.*, ¶ 11. It also alleges that defendant Peterson Geotechnical Construction LLC (Peterson) was the dewatering subcontractor retained by the condominium's general contractors, defendants JDS Construction Group LLC and JDS Development LLC (together, JDS). *Id.*, ¶¶ 26-27. Peterson's third-party complaint alleges that Moretrench designed the dewatering system that Peterson used in its work on the building. *Id.*; exhibit B (third-party complaint), ¶¶ 11-13. The original complaint does not mention Moretrench at all, however, and instead alleges that co-defendant RA Consultants, LLC (RA Consultants) designed the dewatering system. *Id.*, exhibit A (complaint), ¶ 25.

The condominium and the board commenced the underlying action on April 24, 2017. *See* notice of motion, exhibit A. That complaint names Peterson as a defendant in its first, second and third causes of action, which respectively allege strict liability, negligence and private nuisance. *Id.*, ¶¶ 65-81. Peterson originally answered on July 7, 2017, and later filed an amended answer with cross-claims against the other co-defendants on July 27, 2017. Thereafter, Peterson also commenced the third-party action against Moretrench on December 12, 2017. *Id.*; exhibit B. Peterson's third-party complaint sets forth one cause of action against Moretrench for "indemnification and/or contribution." *Id.*, ¶¶ 15-16. Moretrench has not yet answered, but has

instead filed the instant motion to dismiss (motion sequence number 002). For its part, on May 23, 2018 the court granted the motion of co-defendants SHoP Architects P.C., WSP Cantor Seinuk Structural Engineers and Buro Happold Consulting Engineers to dismiss the underlying complaint as against them (motion sequence number 001). The remaining co-defendants in the underlying action all filed timely answers. Now before the court is Moretrench's motion to dismiss the third-party complaint (motion sequence number 002).

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). Here, as was previously mentioned, Peterson's third-party complaint against Moretrench sets forth one cause of action for "indemnification and/or contribution," which asserts that:

> "To the extent that it is determined that plaintiffs suffered injuries and/or damages, and if plaintiffs thereafter recover a judgment against [Peterson], then [Peterson] is entitled to indemnification and/or contribution from, and judgment over and against, [Moretrench] for all or part of any verdict or judgment that plaintiffs may recover against [Peterson], together with reasonable attorney's fees, costs, expenses and disbursements incurred in defending this action."

See notice of motion, exhibit B, ¶¶ 15-16. In its motion, Moretrench raises two legal arguments that this cause of action "fails to state a claim," pursuant to CPLR 3211 (a) (7).

First, Moretrench argues that "Peterson cannot assert a claim for common-law indemnification . . . because it is being sued for active negligence, not for vicarious liability." *See* notice of motion Kauffman affirmation, ¶¶ 16-19. To support its argument, Moretrench cites

the decision of the Appellate Division, First Department, in *Chatham Towers, Inc. v Castle Restoration & Constr., Inc.* (151 AD3d 419 [1st Dept 2017]), which held that:

> "Common-law indemnification may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the plaintiff. Here, however, there is no common-law indemnification claim because [plaintiff] sought recovery from [defendant/third-party plaintiff] because of the latter's alleged wrongdoing—breach of contract—and not vicariously because of any negligence on the part of [third-party defendant]."

151 AD3d at 420 (internal citations omitted). In response, Peterson cites the First Department's holding in *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.* (259 AD2d 75 [1st Dept 1999]) that:

> "The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. In the classic case, implied indemnity permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer.
>
> "Implied indemnification has permitted a vicariously liable building owner and contractor to shift all liability to a subcontractor whose negligence actually caused the loss. However, "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [of indemnification]." Thus, to be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought."

259 AD2d at 80 (internal citations omitted). Peterson then argues that "in the instant case . . . Moretrench was solely responsible for the design of the dewatering system . . . [and] plaintiffs seek damages allegedly due, in part, to the improper design of the dewatering system." *See* mem of law in opposition, at 4. Moretrench replies that the *17 Vista Fee Assoc.* holding is factually inapposite, however, because: 1) paragraph 25 of the underlying complaint alleges that RA Consultants designed the dewatering system that was used at the building; 2) the underlying

complaint "never mentions Moretrench or alleges that Peterson designed the dewatering system"; and 3) paragraph 27 of the underlying complaint alleges that Peterson "performed the dewatering and related work" in a negligent fashion. *See* reply mem, at 3-5. After reviewing the underlying complaint, the court agrees that it contains no allegations whatsoever regarding Moretrench, or that the exclusive responsibility for designing the dewatering system had been delegated to Peterson. Thus, the court also agrees that Peterson does not stand in the same shoes as the defendant/third-party plaintiff in *17 Vista Fee Assoc.*, because the underlying complaint alleges that Peterson "actually participated to some degree in the wrongdoing" by itself performing negligent dewatering work. As a result, the court rejects Peterson's first opposition argument and concludes that New York law does not permit Peterson to avail itself of the doctrine of implied indemnification. Consequently, so much of Peterson's third-party claim as alleges "indemnification" is not legally viable.

Next, Moretrench argues that, because "plaintiffs are seeking purely economic loss damages against Peterson . . . Peterson's contribution claim against Moretrench should be dismissed." *See* notice of motion Kauffman affirmation, ¶¶ 20-21. In its reply papers, Moretrench noted the First Department's decision in *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.* (64 AD3d 318 [1st Dept 2009]) holding that "[w]here . . . the underlying claim seeks purely economic damages, a claim for common-law contribution is not available," because "it is well established that purely economic loss resulting from a breach of contract does not constitute injury to property." 64 AD3d at 323 (internal citations and quotation marks omitted). Moretrench's motion had noted that so much of Peterson's third-party claim as alleges contribution is defective because the underlying complaint had only alleged that plaintiffs

sustained "economic losses," including: 1) the cost of restoring the building to its original condition; and 2) the diminished value of individual apartment units. *See* mem of law in support, at 7-9. Peterson disagreed, and contended that the underlying complaint actually alleged that plaintiffs sustained "property damage" rather than "economic loss," because plaintiffs' causes of action against Peterson sound in tort (i.e., negligence and professional malpractice) rather than breach of contract. *See* mem of law in opposition, at 4-6. Moretrench's reply cited *Children's Corner Learning Ctr.* for the rule that "the touchstone for purposes of whether one can seek contribution is *not the nature of the claim in the underlying complaint but the measure of damages sought therein.*" 64 AD3d at 324 (emphasis added). Moretrench then reiterated its observation that, despite having cast their claims against Peterson in tort, plaintiffs' underlying complaint actually only sought damages for "economic losses." *See* reply mem, at 5-6. For its part, the court is mindful of the Court of Appeals' admonition in *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley* (71 NY2d 21, 26 [1987]) that "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute." It is true that the underlying complaint does name Peterson as a defendant in tort causes of action for strict liability, negligence and private nuisance. *See* notice of motion, exhibit A (complaint), ¶¶ 65-81. However, it is also true that the underlying complaint only alleges that Peterson had a *contractual* relationship as a subcontractor of plaintiffs' general contractor (JDS), and does not aver that Peterson bore any separate, additional duties to plaintiffs. *Id.*, ¶¶ 26-27. Further, the underlying complaint contains no allegations about Moretrench at all, but instead alleges that RA Consultants was retained to design the building's dewatering system. *Id.*, ¶ 25. Thus, it is clear that plaintiffs' allegation that

Peterson improperly performed its dewatering work only amounts to an assertion that Peterson breached its subcontracting agreement with JDS, no matter that the complaint facially alleges tort-based violations. It follows that the financial losses that plaintiffs allegedly sustained as a result of Peterson's purported failure to perform its subcontracting responsibilities are "economic losses," and cannot be deemed to constitute "damage to property" under New York law. Therefore, it is equally clear that New York law will not permit Peterson to assert a claim for contribution against a third-party for the economic losses that Peterson allegedly caused plaintiffs to sustain. Thus =, the court concludes that so much of Peterson's third-party claim as seeks contribution is not legally viable. Accordingly, the court finds that Moretrench's motion to dismiss the third-party complaint should be granted.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of third-party defendant Moretrench American Corporation (motion sequence number 002) is granted and the third-party complaint of Peterson Geotechnical Construction LLC is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: New York, New York
January 25, 2019

ENTER:

Hon. Frank P. Nervo, J.S.C.