

**Board of Mgrs. of 141 Fifth Ave. Condominium v 141
Acquisition Assoc. LLC**

2020 NY Slip Op 32151(U)

July 1, 2020

Supreme Court, New York County

Docket Number: 651426/2013

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

-----X

BOARD OF MANAGERS OF 141 FIFTH AVENUE
CONDOMINIUM,

INDEX NO. 651426/2013

Plaintiff,

MOTION DATE 02/25/2020

- v -

MOTION SEQ. NO. 016

141 ACQUISITION ASSOCIATES LLC, 141 FIFTH
AVENUE PARTNERS LLC, 141 FIFTH AVENUE
MANAGER LLC, SAVANNA 141 PRINCIPALS LLC, CIF
141 FIFTH LLC, J CONSTRUCTION COMPANY
LLC, CHRISTOPHER SCHLANK, NICHOLAS
BIENSTOCK, CETRA/RUDDY INCORPORATED,
ALFRED KARMAN, FRANK SETA & ASSOCIATES LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

J CONSTRUCTION COMPANY LLC

Third-Party
Index No. 595360/2016

Plaintiff,

-against-

FRANK A. SETA & ASSOCIATES, LLC, CETRA-RUDDY
INCORPORATED, JOHN A. CETRA ARCHITECTURE, LLC

Defendant.

-----X

J CONSTRUCTION COMPANY LLC

Second Third-Party
Index No. 595394/2016

Plaintiff,

-against-

IMPERIAL PAINTING & FIREPROOFING, CITIQUIET, INC.,
ACCURATE ELECTRICAL CONTRACTORS CORP., D&D
ELEVATOR MAINTENANCE, INC., GARDEN STATE
COMMERCIAL SERVICES, LLC, JM3 CONSTRUCTION, LLC,
HUGHES CONTRACTING INDUSTRIES, LTD., M&D
FIREDOOR, RCI PLUMBING CORP., PRITECH
CONTRACTING CORP., WOODBURY CONSTRUCTION
ENTERPRISES INC., PERIMETER BRIDGE & SCAFFOLD CO
INC., NEW YORK CUSTOM WOODWORKS, METRO
MECHANICAL, LIFT TECH ELEVATOR SERVICE, LLC, SIM
SOON CONSTRUCTION, INC.

Defendant.

-----X

PRITECH CONTRACTING CORP.

Third Third-Party
Index No. 595225/2017

Plaintiff,

-against-

FRANK A. SETA & ASSOCIATES LLC

Defendant.

-----X

GARDEN STATE COMMERCIAL SERVICES, LLC

Fourth Third-Party
Index No. 595322/2017

Plaintiff,

-against-

NEW ROYAL RESTORATION CORP.

Defendant.

-----X

141 ACQUISITION ASSOCIATES LLC

Fifth Third-Party
Index No. 595414/2017

Plaintiff,

-against-

FRANK SETA & ASSOCIATES LLC

Defendant.

-----X

J CONSTRUCTION COMPANY LLC

Sixth Third-Party
Index No. 595639/2017

Plaintiff,

-against-

ROYAL-PAK SYSTEMS INC., GOTHAM WATERPROOFING AND RESTORATION, LLC, KNS BUILDING RESTORATION INC., CCR SHEET METAL, INC., CROWNE ARCHITECTURAL SYSTEMS, INC., YATES RESTORATION GROUP LTD., GACE CONSULTING ENGINEERS, D.P.C. F/K/A GOLDSTEIN ASSOCIATES, PLLC, MG ENGINEERING D.P.C. D/B/A MGJ ASSOCIATES INC., QUALITY CONSULTANTS, LLC, PROJECT CONTROL GROUP, INC.

Defendant.

-----X

GOTHAM WATERPROOFING AND RESTORATION, LLC

Seventh Third-Party
Index No. 595676/2018

Plaintiff,

-against-

CLARK & WILKINS INDUSTRIES, INC.

Defendant.

-----X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 909, 910, 911, 916, 917, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Defendant/Third-Party plaintiff J Construction Company, LLC (“J Construction”) moves for partial summary judgment against Third-Party Defendants Garden State Commercial Services (“Garden State”) and JM3 Construction LLC (“JM3”) seeking: (1) to enforce J Construction’s purported contractual right to have Garden State and JM3 assume J Construction’s defense; (2) contractual indemnification as to any liability which may be found against J Construction, and; (3) attorneys’ fees incurred and to be incurred by J Construction.¹ J Construction has subsequently withdrawn its cause of action for contractual indemnification (Oral Argument Transcript, NYSCEF Doc. No. 974, p.5); therefore, only the issues of past and future defense costs and attorneys’ fees remain.

¹ Initially, J Construction also filed this motion against third-party defendants: KNS Building Restoration Inc., Citiquiet, Inc., and RCI Plumbing Corp., but has subsequently withdrawn its motion as against these third-party defendants (*See* NYSCEF Doc. No. 911, 916, and 922).

Background

Plaintiff Board of Managers of 141 Fifth Avenue Condominium (“BOM”) brought this action to recover damages for alleged design and construction defects in connection with the renovation and conversion of a building located at 141 Fifth Avenue, New York, New York (the “Building”) into a residential condominium (the “Project”). Defendant 141 Acquisition Associates, LLC was the Project’s sponsor (“Sponsor”). The Sponsor contracted with J Construction, which served as the Project’s construction manager and general contractor. J Construction, in turn, entered into contracts (the “Trade Contracts”) with several trade contractors, including Garden State and JM3 (collectively, “Trade Contractors”); J Construction hired Garden State to perform façade and exterior work on the Project and hired JM3 to perform carpentry work.

BOM alleged causes of action against J Construction for breach of contract. J Construction then commenced third party actions and asserted causes of action against the Trade Contractors for failure to perform adequately on the Project. In my previous decisions, I dismissed all causes of action sounding in tort and negligence. The only remaining causes of action are for breach of contract.

Now, J Construction moves for partial summary judgment, arguing that the Trade Contracts it entered into with the Trade Contractors obligate the Trade Contractors to defend J Construction in this action. At oral argument, J Construction indicated that it tendered a request for defense to the Trade Contractors two years ago and that the Trade Contractors did not accept the tender (NYSCEF Doc. No.974, p.11, lines 7-9). In

opposition, the Trade Contractors argue that pursuant to the Trade Contracts, the duty to defend is not triggered here.²

The Relevant Trade Contract Provisions

J Construction alleges that § 8.3(b) of the respective Trade Contracts obligates the Trade Contractors to take over J Construction's defense in this litigation.³ Section 8.3(b) states:

Should any person or persons at any time assert a claim or institute any action, suit or proceeding against the Owner, Lender, Architect, or Construction Manager involving the manner or sufficiency of the performance of the Work contemplated under this Contract, *the Contractor will upon request of the Construction Manager or Owner promptly take over the defense of any such claim, action, suit or proceeding at the sole cost and expense of the Contractor* and will also indemnify the Owner, Architect, Lender, and the Construction Manager, all other persons and entities mentioned or referred to as Indemnitees or Additional Insureds herein, and save them harmless from and against any and all liability, damages, judgments, costs or expense, including attorneys fees and disbursements, arising out of or in connection with any such claim, action, suit or proceeding.

(emphasis added); NYSCEF Doc. No. 861 at 20-21; NYSCEF Doc. No.866 at 20-21.

J Construction argues that pursuant to this provision, the Trade Contractors must assume its defense as to causes of action arising out of or connected with the Trade Contractors' work. J Construction maintains that the contractual provision is clear, evidencing the parties' intent to place the burden of defense on the Trade Contractors. J

² Garden State and JM3 submitted separate motion papers in opposition to the motion. However, both sets of papers contain virtually the same arguments and will be considered together.

³ J Construction entered into identical contracts with both Garden State (NYSCEF Doc. No. 861) and JM3 (NYSCEF Doc. No. 866).

Construction also argues that this duty to defend is triggered immediately and not *after* liability has been established.

In opposition, the Trade Contractors argue that J Construction failed to account for another section, § 12.2(a), in the Trade Contracts which pertains to defense and indemnity. They argue that § 12.2(a) must be read in conjunction with § 8.3(b) because § 12.2(a) dictates *when* a defense is owed.

Section 12.2 is entitled “Indemnity Requirements” and states that contractors shall “indemnify, defend, and hold harmless Owner, Lender, Tenant, Architect, Consultants, Construction Manager...from and against all losses, claims...causes of action, lawsuits, costs, damages, and expenses...due to”:

(i) any personal injury, sickness, disease or death, or damage or injury to, loss of or destruction of property (including tools, equipment, plant and the buildings at the Project site, *but excluding the Work itself*), including the loss of use resulting therefrom sustained at the Project; (ii) any negligent or wrongful act or omission of Contractor, its employees, Subcontractors, representatives or other persons for whom Contractor is responsible; and (iii) any claims asserted, or lien or notice of lien filed, by any Subcontractor or supplier of any tier against the Project, or against any Indemnitee in connection with the Work. (emphasis added).

NYSCEF Doc. No. 861 at 34-35; NYSCEF Doc. No.866 at 34-35.

The Trade Contractors argue that according to the language of § 12.2(a), the Trade Contractors are obligated to provide a defense *only* for “injury, sickness, disease or death, or damage or injury to, loss of or destruction of property...but excluding the Work itself,” *i.e.*, defenses *not related* to the work on the Project itself. Because the causes of action

brought against J Construction relate to the purportedly faulty work on the Project itself, the Trade Contractors argue that they are not obligated to assume J Construction's defense in this litigation. They essentially argue that § 12.2(a) conflicts with and supersedes § 8.3(b) of the Trade Contracts and therefore, they are not obligated to take over J Construction's defense in this litigation.

“In interpreting a contract a court should favor an interpretation that gives effect to all the terms of an agreement rather than ignoring terms or interpreting them unreasonably.” *U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc.*, 67 N.Y.S.3d 206, 211–12 (1st Dept. 2017). A contract's terms should not “be subverted by straining to find an ambiguity which otherwise might not be thought to exist.” *Uribe v. Merchants Bank of N. Y.*, 91 N.Y.2d 336, 341 (1998) (quoting *Loblaw v. Employers' Liab. Assur. Corp.*, 57 N.Y.2d 872, 877 [1982]).

Here, § 8.3(b) and § 12.2(a) are not in conflict with each other. Article 8 is entitled “Inspection, Testing and Correction of the Work” and § 8.3 is entitled “Defective Work.” Article 8 enumerates the parties' rights and responsibilities with respect to defective or non-conforming work. In contrast, Article 12 is entitled “Indemnity and Insurance Requirements” and § 12.2 within Article 12 is entitled “Indemnity Requirements.” This Article discusses the parties' insurance requirements and certain grounds under which contractors must “indemnify, defend and hold harmless” certain parties, including the construction manager (§ 12.2[a]) for injury to persons and/or property *not* relating to the contractors' work itself.

These sophisticated parties drafted Trade Contracts with differing defense and indemnification provisions depending on the nature of the dispute. Article 8 and Article 12 provide separate and distinct grounds for indemnification and defense, and nothing in the Trade Contracts shows that the limiting language in § 12.2(a) should be read into § 8.3(b). Instead, § 12 explicitly states, “[s]uch obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any Indemnitee” (§ 12.2[a]).

The Trade Contractors’ Obligations Under § 8.3

Section 8.3 (b), which addresses the Trade Contractors obligations when a dispute arises about the “manner or sufficiency of the performance of the Work,” is the provision applicable to J Construction’s demand for legal fees. Section 8.3 states: “the Contractor will upon request of the Construction Manager or Owner promptly take over the defense of any such claim, action, suit or proceeding at the sole cost and expense of the Contractor” (§8.3[b]).

Where, as here, “a written agreement ... is complete, clear and unambiguous on its face [, it] must be enforced according to the plain meaning of its terms.” *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). In the contracts the construction manager (J Construction) has tendered a request to the Trade Contractors (Garden State and JM3) to take over J Construction’s defense. Pursuant to the unambiguous terms of the contract, the Trade Contractors are obligated to assume J Construction’s defense.

General Obligations Law

In its opposition papers, Garden State also argues that the motion for partial summary judgment should be denied pursuant to General Obligations Law (“GOL”) § 5-322.1.⁴ It argues that GOL § 5-322.1 “prohibits contractual indemnification where the promisee’s negligence was responsible for the accident ‘in whole or in part’” (Garden State’s Memo of Law in Opposition, NYSCEF Doc. No. 929 at 13). It maintains that until J Construction’s percentage of negligence is determined by a verdict or judgment, Garden State’s obligation to indemnify is limited to the extent of its own negligence, and therefore, summary judgment should be denied as premature.

General Obligations Law § 5-322.1 applies to claims “against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee.” *Bd. of Managers of Hester Gardens v. Well-Come Holdings LLC*, 128 A.D.3d 601 (1st Dept. 2015) (Court held that GOL § 5-322.1 was not applicable because, “[t]his action is not for either personal injury or property damage, but one for pure economic damages stemming from breach of contract.” *Id.*). Here, GOL § 5-322.1 is similarly inapplicable because the only remaining causes of action are for economic damages on claims for breach of contract. Therefore, GOL § 5-322.1 is inapplicable to this summary judgment motion.

⁴ Only Garden State raises this particular issue. JM3 does not advance this argument.
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Timeliness of Duty to Defend

The Trade Contractors maintain that the partial summary judgment motion is premature because liability has not been established and therefore, there is no obligation yet to take over J Construction's defense. "The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased." *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 310 (1984) (internal citations omitted).

The contract interpretation principles that apply in the insurance context are equally applicable to the duty to defend in the Trade Contracts. Section 8.3(b) of the Trade Contracts plainly states that the Trade Contractors are obligated to take over the defense *prior* to a finding of liability.

For all of the foregoing reasons, I find that J Construction is entitled to summary judgment on its demand for a declaration that Garden State and JM3 are obligated to defend it going forward on the claims related to Garden State and JM3.

Attorneys' Fees

In addition to seeking a declaration that the Trade Contractors are obligated to defend it going forward, J Construction seeks reimbursement of attorneys' fees it has

already incurred in defending this action because of Garden State's and JM3's refusal to accept its tender of a request for defense two years ago.

It is undisputed that J Construction did nothing to enforce its contractual right to have Garden State and JM3 defend it in this litigation for at least two years. During that time, J Construction hired and paid its own counsel of choice and made its own strategic decisions with respect to how to defend the lawsuit. Conversely, Garden State and JM3 had no ability to minimize the burden of § 8.3(b) by, for example, coordinating and streamlining their legal costs. Nor did Garden State and JM3 receive the benefit of controlling the defense of the litigation during that two year period (including settlement negotiations).

In light of J Construction's long and inexplicable delay in enforcing its rights under § 8.3(b), its demand for attorneys' fees already incurred is barred by the doctrine of laches. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). Here, J Construction's failure to timely assert its right to a defense from Garden State and JM3 has prejudiced them in efficiently defending their work in this action.

In accordance with the foregoing, it is hereby

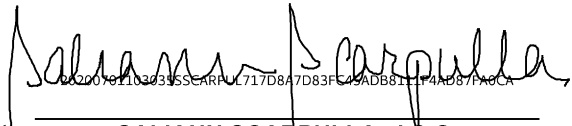
ORDERED that J Construction Company LLC's motion for partial summary judgment is granted in part and denied in part; and it is further

ORDERED that J Construction Company LLC’s demand for a declaration that Garden State Commercial Services and JM3 Construction LLC are obligated to defend it going forward with respect to claims related to the manner or sufficiency of the performance of their work is granted; and it is further

ORDERED that J Construction LLC’s demand for reimbursement for previous legal fees expended is denied.

Settle order on notice.

7/1/20
DATE


SALIANN SCARPULLA, J.S.C.

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