22 Gramercy Park LLC v Michael Haverland Architect, P.C.
2020 NY Slip Op 32362(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 155017/2019
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART** **IAS MOTION 43EFM**

Justice

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22 GRAMERCY PARK LLC,ERIC ELLENBOGEN,

Plaintiff,

- v -

MICHAEL HAVERLAND ARCHITECT, P.C.,

Defendant.

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INDEX NO. 155017/2019

MOTION DATE 03/23/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

MICHAEL HAVERLAND ARCHITECT, P.C.

Plaintiff,

-against-

LEHR ASSOCIATES CONSULTING ENGINEERS LLP

Defendant.

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Third-Party
Index No. 595848/2019

MICHAEL HAVERLAND ARCHITECT, P.C.

Plaintiff,

-against-

INTEGRITY CONTRACTING, INC.

Defendant.

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Second Third-Party
Index No. 595028/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISMISSAL.

Third-Party Defendant Lehr Associates Consulting Engineers LLP (LACE) moves, pursuant to CPLR 3211 (a) (7), to dismiss the

Third-Party Complaint of Michael Haverland Architect, P.C. (Haverland).

BACKGROUND

This third-party action for common law indemnification and contribution relates to a construction project undertaken in connection with the development of a condominium located at 22 Gramercy Park South, New York, New York (the Condominium), by plaintiffs 22 Gramercy Park, LLC (22 Gramercy) and its sole member, Eric Ellenbogen (Ellenbogen). According to the complaint underlying this third-party action (Underlying Complaint), third-party plaintiff Haverland was the architect of record for the project for the eight-year construction period from 2004-2012 and performed architectural services including "as to the Condominium's mechanical and other building systems, facades, building-wide schematic design and interior design" (NYSCEF Doc. No. 2, Underlying Complaint, ¶ 16) and was responsible for supervising the construction of the Condominium. According to the Underlying Complaint, third-party defendant LACE served as mechanical design engineer on the Condominium project.

The Underlying Complaint alleges that, as a result of Haverland's negligence in connection with both architectural design and construction supervision, there were defects in the Condominium's air conditioning, humidity and temperature

controls, heating system, windows and other miscellaneous defects. The Underlying Complaint further alleges that, as a result of the various defects, the Condominium's Board of Managers (the Board) and the owner of Unit 2 in the Condominium, 22GramercyParkSouthGroup, LLC (22Group), had to undertake remedial measures to cure the defects at their own expense. Those remedial measures included "remov[ing] the existing ceilings and walls, fabricat[ing] and install[ing] seven access panels, and replac[ing] or servic[ing] the existing air conditioning units throughout the Condominium and the individual units." Underlying Complaint, ¶ 27. As a result, the Board and 22Group threatened to sue 22 Gramercy and Ellenbogen to recover the funds that they expended to remedy the defects in the building. 22 Gramercy and Ellenbogen acknowledged the defects and settled the matter for $250,000 as partial reimbursement for the out-of-pocket expenses of the Board and 22Group. 22 Gramercy and Ellenbogen then sued Haverland for common law indemnification for the settlement amount of $250,000 plus attorney's fees and expenses in the amount of $23,869.75.[1]

[1] The Underlying Complaint states that it is substantively nearly identical to the amended complaint that plaintiffs previously filed on April 20, 2017 in the action entitled *22 Gramercy Park, LLC v Michael Haverland Architect, P.C.*, Sup Ct, NY County, Index No. 151756/2017, which was dismissed without prejudice for procedural reasons. Since it is not necessary for the determination of this motion, the court will not discuss the

In this third-party action, Haverland sues LACE for common law indemnification and contribution, alleging that LACE "was responsible for, among other things, the design of the Condominium's HVAC system plumbing, fire protection and electrical systems and oversight of the construction and installation of its HVAC system and other mechanical systems." NYSCEF Doc. No. 80, Third-Party Complaint, ¶ 10. Haverland contends that if plaintiffs sustained damages as alleged in the Underlying Complaint, they did so as a result of LACE's negligence, and if judgment is rendered against Haverland it is entitled to be indemnified by LACE and/or is entitled to contribution from LACE for any portion of the judgment attributable to or caused by LACE.

FIRST CAUSE OF ACTION: COMMON LAW INDEMNIFICATION

In its motion to dismiss the Third-Party Complaint, LACE first argues that Haverland's cause of action for indemnification must be dismissed because it cannot sufficiently allege a basis for recovery against Haverland by plaintiffs in the underlying action for any damages that are allegedly attributable to LACE. Quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.* (109 AD2d 449, 453 [1st Dept 1985]), LACE notes that the principles of common law indemnification

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previous litigation further.

"permit one who is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." As the Court further states in *Trustees of Columbia Univ.*, "[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." *Id.* LACE argues that Haverland has failed to allege that it is free from fault, and, therefore, common law indemnification is not available to it.

But, as the Court of Appeals stated in *Mas v Two Bridges Assoc.* (75 NY2d 680, 690 [1990]), "authorities have noted that 'the principle [of indemnification] is not . . . limited to those who are personally free from fault.'" *Id.* (citation omitted). Indemnification may also be available "in favor of a tort-feasor liable for damages arising for breach of a particular duty owed to the injured plaintiff and seeking indemnity over from another who has breached a related duty owed to the injured plaintiff." *Id.* That, however, has not been alleged here.

In addition, "the 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.'" *Raquet v Braun*, 90 NY2d 177, 183 (1997), quoting *Mas v Two Bridges Assoc.*, 75 NY2d at 690. LACE argues that Haverland fails to allege that it has any relationship with LACE on which indemnification could be based and, therefore, the cause of action for indemnification must be dismissed.

Haverland contends that a third-party complaint is entitled to "a more liberal reading" than a complaint in the main action, citing *Braun v City of New York* (17 AD2d at 268 ["the mere possibility of a claim over sustains the sufficiency of the third-party pleading"]). Although Haverland does not deny any possible responsibility for the damages alleged in the Underlying Complaint, it contends that at this stage of the litigation it is too early to determine whether there is no possibility that it may be found liable to plaintiffs and it should not be required to spell out its cause of action with the same precision that is applicable to the Underlying Complaint.

With respect to LACE's argument that Haverland fails to allege any relationship with LACE on which indemnity could be based, Haverland contends that the Underlying Complaint alleges that "[n]on-party [LACE] . . . was at all relevant times an engineering consulting firm that, pursuant to a letter agreement dated July 10, 2003 between [LACE] and Ellenbogen, as supplemented by letter agreement dated November 19, 2004 between

[LACE] and Haverland Architect, served as the mechanical design engineer for the Condominium project." Underlying Complaint, ¶ 12. According to Haverland, that "letter agreement," which was on LACE's letterhead, addressed to Haverland, and signed by representatives of LACE and Haverland, related to "services which include the very items that Plaintiffs allege were defective." NYSCEF Doc. No. 90, third-party plaintiff's memorandum at 11.

"Generally, [indemnification] is available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer." *Mas v Two Bridges Assoc.*, 75 NY2d at 690; *see also Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567-68 (1987)("where one joint tort-feasor is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent" [internal quotation marks and citations omitted]).

Indemnification could be triggered if LACE had contracted with Haverland to perform the work for plaintiffs and Haverland was found vicariously liable for LACE's work in the underlying litigation. *See McDermott v City of New York*, 50 NY2d 211, 216 (1980)("The right to indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from a contract, express or implied, and full, not

partial, reimbursement is sought"). Such a contractual relationship between Haverland and LACE has not, however, been alleged here.

As LACE argues, and as Haverland asserts in its third-party complaint, LACE was hired by plaintiff Ellenbogen, not by third-party plaintiff Haverland, to serve as the mechanical design engineer. Moreover, the document that Haverland relies on as a "letter agreement" between Haverland and LACE states that it is an "Authorization" for additional engineering services for additional services to be performed by LACE (*See* NYSCEF Doc. No. 86) signed by Haverland, which served as the project architect. There is no indication in the document that it altered the underlying business relationship between LACE and Ellenbogen or between LACE and Haverland, that Haverland would be paying LACE, or that LACE had any direct responsibility to Haverland. As this court raised in oral argument, there is no allegation by Haverland that it ever paid LACE, or that LACE owed a duty to Haverland, thus, no contractual basis has been alleged by Haverland on the basis of which Haverland could be found vicariously liable for the any alleged negligence by LACE.

Haverland contends it should not be required to admit it had a contractual relationship with LACE, but since such a relationship is a necessary element of vicarious liability,

in the absence of an allegation of such a relationship, there is no basis for a claim of common law indemnification by Haverland against LACE, and the first cause of action must be dismissed.

SECOND CAUSE OF ACTION: CONTRIBUTION

LACE contends that Haverland's claim for contribution must be dismissed because plaintiffs' Underlying Complaint seeks purely economic loss arising from Haverland's breach of its contractual obligations to plaintiffs. *See Galvin Bros., Inc. v Town of Babylon, N.Y.*, 91 AD3d 715, 715 (2d Dept 2012)(dismissing cross claim for contribution where plaintiff's complaint sought recovery of damages from defendant for breach of contract stating that "[p]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]" [internal quotation marks and citation omitted]). According to LACE, the Underlying Complaint claimed economic injuries and not personal injury or property damage as contemplated by the statute. Quoting *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.* (64 AD3d 318, 324 [1st Dept 2009]), LACE also contends 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." However, as the Court notes in *Children's Corner Learning Ctr.*, although the plaintiff there sued

defendant/third-party plaintiff for professional malpractice, it also alleged two causes of action against defendant/third-party plaintiff for breach of contract for failure to obtain construction permits and licenses which were necessary to enable the plaintiff daycare center to open on a timely basis. Furthermore, plaintiff sought the same damages for the professional malpractice claim as for the breach of contract claims. The Court distinguished the case of *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.* (295 AD2d 229 [1st Dept 2002]), where a claim for contribution was permitted, noting that the underlying briefs in that case indicated that traditional tort damages were sought where the architect's alleged breach of duty had resulted in damage to the floor and roof of one of the apartments in the building. *Children's Corner Learning Ctr.*, 64 AD3d at 324.

Here, as Haverland argues, the Underlying Complaint does not allege breach of contract by Haverland, but negligence. *See* NYSCEF Doc. No. 2 (Underlying Complaint), ¶ 2 ("This action for common law indemnification arises from the negligence with which Haverland Architect designed and supervised the construction of the heating, ventilation and air conditioning ['HVAC'] systems, windows and other parts of the condominium building located at 22 Gramercy Park South in New York City (the 'Condominium'")]. Furthermore, as this court pointed out during oral argument,

there are allegations that, for example, problems with the HVAC caused leakage which damaged the property. The Underlying Complaint alleges that, as a result of Haverland's alleged negligence, the Board and 22Group had to undertake remedial work which included "remov[ing] the existing ceilings and walls, fabricat[ing] and install[ing] seven access panels, and replac[ing] or service[ing] the existing air conditioning units throughout the Condominium and the individual units." Underlying Complaint, ¶ 27.

In contrast with indemnification, "in contribution, the tort-feasors responsible for plaintiff's loss share liability for it." *Mas v Two Bridges Assoc.*, 75 NY2d at 689. To set forth a viable claim for contribution the third-party plaintiff must show that both it and the third-party defendant contributed to the plaintiff's harm by breaching their respective duties to plaintiff. *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 AD2d at 229. "Although a tort claim against [the third-party plaintiff] may not ultimately be established, one is still pending and, thus, 'the necessary predicate tort liability for a contribution action remains in the case.'" *Id.* at 230 (internal quotation marks and citation omitted).

"On a motion to dismiss a complaint we accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory." *Morone v Morone*, 50

NY2d 481, 484 (1980)(citations omitted). The standard of review on a motion to dismiss a third-party complaint is even more liberal. "[T]he mere possibility of a claim over sustains the sufficiency of the third-party pleading." *Braun v City of New York*, 17 AD2d at 268. As the Appellate Division, First Department explained in *Humble Oil & Ref. Co. v Kellogg Co.*,

> "We should not expect the third-party complaint to spell out a cause of action against the third-party defendant with the same precision required of the complaint in the main action. To compel it to do so would be to compel it to make out the plaintiff's case in advance. . . . To compel it to plead with precision could well lay a foundation for a motion by the plaintiff for summary judgment or for judgment on the pleadings against it. Its complaint is really a defensive measure for its protection only in the event that it should, upon trial, be held liable to the plaintiff solely because of another's primary negligence."

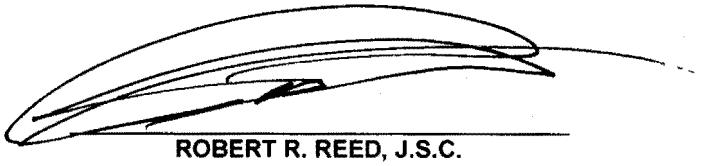
13 AD2d 754, 754 (1st Dept 1961).

Here, Haverland alleges that LACE was responsible for the "design of the Condominium's HVAC system, plumbing, fire protection, and electrical systems and oversight of the construction and installation of its HVAC system and other mechanical systems" that resulted in the damages for which the underlying plaintiff is now seeking indemnification from Haverland. Accepting those allegations as true, and even assuming that Haverland, too, was responsible for some of those damages, it has sufficiently alleged a cause of action for contribution.

Accordingly, it is hereby

ORDERED that the motion of third-party defendant Lehr Associates Consulting Engineers LLP to dismiss the third-party complaint is granted as to the first cause of action for indemnification and is otherwise denied.

This constitutes the Decision and Order of the court.



7/20/2020
DATE

ROBERT R. REED, J.S.C.

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