

Kerusa Co., LLC v W10Z/515 Real Estate Limited Partnership

2005 NY Slip Op 30083(U)

May 25, 2005

Supreme Court, New York County

Docket Number: 0060161/2003

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

0601610/2003

KERUSA CO. LLC
vs
W10Z.515 REAL ESTATE

INDEX NO. _____

MOTION DATE 3/30/05

MOTION BEG. NO. _____

MOTION CAL. NO. _____

SEQ 9

DISMISS ACTION

The following papers, numbered 1 to _____, were filed in support of this motion to/for _____

PAPERS NUMBERED

1-3
4-6

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the aforesaid memorandum decision and order in which (BA) is ~~permitted~~ ~~granted~~ ~~in~~ ~~591224/04~~ & dismissed in 591224/04 & ~~591222/04~~

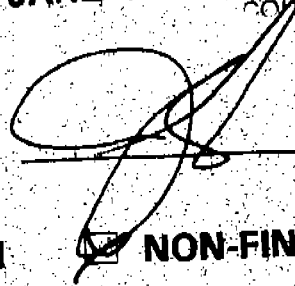
MOTION/CASE IS RESPECTFULLY REFERRED FOR THE FOLLOWING REASON(S):

FILED

MAY 27 2005

JANE S. SOLOMON, NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/26/05


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

KERUSA CO., LLC,

DECISION AND ORDER

Plaintiff,

Index No. 601610/03

-against-

W10Z/515 REAL ESTATE LIMITED PARTNERSHIP,
ET AL.,

Defendants.

-----X

J.A. JONES CONSTRUCTION GROUP, LLC,

Third Party Index
No. 591224/04

-against-

SORBARA CONSTRUCTION CORP, ET AL.,
[including Israel Berger & Associates, Inc.]

-----X

W10Z/515 REAL ESTATE LIMITED PARTNERSHIP,
ET AL.,

Third Party Index
No. 591222/04

-against-

THE BOARD OF MANAGERS OF 515 PARK AVENUE
CONDOMINIUM, ET AL.,
[including Israel Berger & Associates, Inc.]

-----X

Solomon, J.

Israel Berger & Associates, Inc. ("IBA") moves to
dismiss the claims against it in three actions that arise from
allegedly shoddy workmanship that permitted water to seep into a
new luxury condominium apartment building located at 515 Park
Avenue in Manhattan.

In Kramer v Zeckendorf, a condominium owner sues for breach of contract and breach of representations and warranties. The Kramer plaintiffs also have tort claims to recover for property damage caused by the water leaks, which represents a small part of the total damages they seek, and for breach of fiduciary duty as against William Lie Zeckendorf and Arthur Zeckendorf, who are individuals associated with the project sponsors. A personal injury claim has been withdrawn. In the Kerusa Co., LLC v W10Z/515 Real Estate, LP action, the plaintiff has claims for breach of contract, breach of representations and warranties, and breach of fiduciary duty. Siegel v The Chubb Corporation is a declaratory judgment action by the owner of the Kramer apartment against its insurer seeking coverage for a water damage claim and for the expense of finding alternate shelter. The insurer commenced a third-party action for subrogation against the many of defendants in the other actions, including the Sponsor Defendants, who, in turn, commenced a fourth-party action against IBA and others. As a practical matter, Chubb's third-party subrogation action will only succeed if the plaintiffs in the other actions can prove the defendants in their lawsuits were liable.¹

¹ There also is a fourth related action, Board of Managers of 515 Park Avenue Condominium v. W10Z/515 Real Estate, LP, but no motion is before the court in it.

There are many defendants. As relevant here, a group of defendants related to the developer W10Z/515 Real Estate Limited Partnership, including Messrs. Zeckendorf, 515/ZGP, LLC, and W10Z/515 Gen-Par, LLC, are referred to collectively as the "Sponsor Defendants". J.A. Jones Construction Group, LLC (J.A. Jones") was the construction manager. Both the Sponsor Defendants and J.A. Jones commenced third-party actions against subcontractors who consulted or otherwise performed work in erecting the building. Despite the byzantine procedural posture, there are common facts to these motions which make possible a fairly straight-forward decision.²

IBA is an engineering firm that entered into a contract with a former defendant to these actions, Zeckendorf Realty, LP. IBA sent a letter proposal to Zeckendorf Realty, dated February 23, 1998, which Zeckendorf Realty accepted, and the proposal states the terms of their agreement. In their third-party complaints, the Sponsor Defendants allege that they, too, were parties to the agreement. For the purposes of this motion to dismiss, that allegation is accepted as true even though it is not apparent from the text of the agreement itself.

² Substantively identical decisions on these motions are being filed in each of the three lawsuits.

Under the agreement, IBA was to provide consultation and inspection services for construction of the exterior wall. It also provides that IBA would monitor work in progress, and states that "Our monitoring is for action by the Construction Manager as we do not have any means or authority to enforce compliance. Remedial action will be verified by us when properly advised by the Construction Manager." Paragraph I(6). The Construction Manager was J.A. Jones. The agreement further provided that IBA was not responsible for coordination of work, for construction means or methods, or for the failure of a contractor or subcontractor to carry out the work in accordance with construction documents. If IBA learned of such failures, it was obligated to inform Zeckendorf. Finally, the agreement stated that the supporting structure and any structural work will not be verified by IBA.

It now appears likely that a primary cause of water seepage into the building are holes left in concrete structural walls. These holes resulted when tie-rods used in construction were removed. The exterior building wall was constructed over the structural wall.

According to the minutes of a project management meeting, attended by representatives of IBA, J.A. Jones, the Sponsor Defendants and the architects and engineers, among

others, the IBA representative reported the existence of the holes and opined that they must be filled. A J.A. Jones representative stated that "backer-rod and sealant" is the approved method of filling the holes. Another J.A. Jones representative at the meeting said that J.A. Jones was to provide the fix.

This meeting was held on January 27, 1999. The affirmation in opposition submitted by J.A. Jones states that this meeting occurred "very early on in the construction of the building." Aff. Of Susan P. Mahon, paragraph 6. Another project management meeting was held the next week, on February 3, 1999. IBA again raised the issue of the holes, stating that they were being filled with mortar. A representative from J.A. Jones stated that mortar "also is an approved method." Four months later, IBA created a memorandum addressed to employees of J.A. Jones and copied to a Sponsor Defendant. The memorandum again mentioned the holes, stating that they needed to be filled, and a photograph was attached bearing the legend "HOLES NEED FILLED". The holes were not filled by the time construction was completed in 2000, and remained unfilled when the plaintiffs commenced these lawsuits in 2002 and 2003.

The complaints in the Kramer and Kerusa actions were thinned as the result of motions to dismiss by the Sponsor

Defendants, J.A. Jones and others. As a result, only claims for breach of contract and negligence remain against J.A. Jones in the Kramer and Kerusa actions. In the Kramer action, plaintiffs' remaining claims against the Sponsor Defendants are for damage to personal property, and breach of representations and warranties as against W10Z/515 Real Estate L.P., one of the Sponsor entities.

The third-party complaints against IBA were served in 2004. In five separate motions, IBA now moves to dismiss the third-party complaints against it by the Sponsor Defendants in the Kramer and Kerusa actions; the fourth-party complaint against it in the Siegel one; and the third-party actions against it by J.A. Jones in the Kramer and Kerusa actions.

The Sponsor Defendant Third-Party Complaints

The Sponsor Defendants allege that plaintiffs suffered property damage as a result, among other things, of holes in the concrete structure of the building. See, Third-party Summons and Complaint in the Kramer Action, annexed as Exhibit A to the IBA Notice of Motion, paragraph 71; and Third-party Summons and Complaint in the Kerusa Action, annexed as Exhibit A to the IBA Notice of Motion, paragraph 78. The Sponsor Defendants allege that should the plaintiffs recover a judgment, it would be based on the negligence of IBA arising from its breach of contract.

They further allege that they will be entitled to indemnification or contribution, in whole or in part, from IBA.

With respect to the claim that the Sponsor Defendants can recover for breach of contract, it is dismissed as untimely. The third-party complaints are dated November 24, 2004. Assuming that they were served with alacrity, the actions against IBA were commenced more than four years after work on the building was completed. Under CPLR 214(6), a claim for professional negligence, even if framed as one for breach of contract, must be commenced within three years. Counsel for the Sponsor Defendants conceded this point at oral argument, and the claims for breach of contract and negligence are dismissed.

The claim for indemnification also must be dismissed. The letter agreement has no indemnification clause. Therefore, the Sponsor Defendants must demonstrate that they are entitled to implied indemnification. The principle of indemnity permits one who is held liable vicariously on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer. Trustees of Columbia University v Mitchell/Giurgola Assoc., 109 AD2d 449, 453 (1st Dept 1985). A party who has participated in the wrongdoing to some degree cannot receive the benefit of the doctrine. Id., and see, Dormitory Auth. Of the State of N.Y. v. Caudill Rowlett Scott, 160 AD2d 179 (1st Dept.

1990). Since the plaintiffs in the Kramer and Kerusa actions only will recover against the Sponsor Defendants by proving their participation in the acts giving rise to the loss, the Sponsor Defendants' potential liability is not vicarious, they have no claim for indemnification against IBA. Trustees of Columbia University, 109 AD2d at 453-454.

Under the agreement, IBA was obligated to notify Zeckendorf Realty if it became aware of a problem or defect. There is no dispute that IBA brought attention to the problem no fewer than three times. The project meeting minutes of January 27, 1999 unambiguously reflect that IBA gave notice of the problem. In the project meeting minutes of February 3, 1999, IBA's representative is quoted stating that the holes were being filled with mortar, and the J.A. Jones representative states that this is an approved method. Whether either of these particular statements were accurate or not is not material- - the fact is that IBA raised the issue to Sponsor Defendants, J.A. Jones, the engineers and the architect, all of which are parties with some responsibility for properly erecting the structural elements. The Sponsor Defendants cannot claim that their responsibility for the condition is entirely vicarious once they learned of the problem early in the construction process, or that the failure of some Sponsor Defendants to be candid with purchasers or the

successor board of managers is attributable to IBA.

The agreement specifically provided that IBA was not responsible for construction means or methods, and had no power to compel the construction manager or any sub-contractor to follow its advice. The Sponsor Defendants' opposition to the motions is premised upon IBA breaching its duty to advise them of the existence of unfilled holes in the wall, and as such the argument is belied by clear, unambiguous documentary evidence to the contrary.

In light of this, the Sponsor Defendants also have failed to demonstrate that their claims for contribution can survive. A claim for contribution may be asserted if there has been a breach of duty that runs from the contributor to the defendant who has been held liable. Raquet v Braun, 90 NY2d 177, 182 (1997). The "critical requirement" for apportionment by contribution under CPLR Article 14 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." Id. at 183. Here, the documentary evidence shows that IBA did not breach its agreement to notify the Sponsor Defendants of the problem. Moreover, the scope of services provided for in the letter states the supporting structure and any structural work will not be verified by IBA. The third-party complaint states

that the unwelcome holes were in the structural concrete walls, and it is undisputed that the holes were not in the exterior wall which IBA was charged with monitoring.

At oral argument, counsel for the Sponsor Defendants valiantly contended that a factual issue exists as to whether the parties to the agreement intended the interior structural concrete wall to be considered part of the exterior wall, so discovery is needed. Although it raises an interesting epistemological question (how does a Sponsor Defendant know what it meant by exterior wall, and what discovery will assist it to learn what it knows?), this issue is not presented by the pleadings served on IBA.

The J.A. Jones Third-Party Complaints

J.A. Jones alleges that it is entitled to contractual indemnification from IBA, and that IBA failed to procure proper insurance under their contract. In its opposition, J.A. Jones acknowledges that it had no contract with IBA, so these claims must fail.

The contribution claim also must be dismissed because IBA did not owe any duty to J.A. Jones that might, in its breach run to the plaintiffs. Raguet, supra. Moreover, the plaintiffs' claims against J.A. Jones arise from its alleged failure to exercise due care in the performance of its contractual duties as

the general contractor and construction manager. A breach of contract claim, even when framed using the language of a tort, may not form the basis for a contribution claim. Trump Village Section 3, Inc. v. New York State Housing Finance Agency, 307 AD2d 891 (1st Dept. 2003).

J.A. Jones's claims, including those for indemnification and contribution, fail in light of the documentary evidence. IBA had no obligation to monitor the means and methods of construction employed by J.A. Jones and its subcontractors. It was required to report conditions it deemed inadequate to its client, be it Zeckendorf Realty or a Sponsor Defendant, and J.A. Jones admits that IBA reported the existence of the holes very early in the construction process. That J.A. Jones, or any other entity made aware of the defect at that early stage, failed to address the problem once IBA discharged its duty to make it known may not be the basis for claims against it. Accordingly, it hereby is

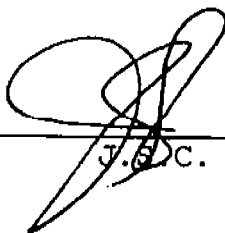
ORDERED that the motions by IBA to dismiss are granted, and the third-party claims against it by the Sponsor Defendants and J.A. Jones are severed and dismissed; and it is further

ORDERED that all cross-claims by and against IBA are severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements to IBA as taxed.

Dated: May 25, 2005

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
MAY 27 2005
NEW YORK
COUNTY CLERK'S OFFICE