

Samuels v Fradkoff

2006 NY Slip Op 30475(U)

August 16, 2006

Supreme Court, New York County

Docket Number: 112610/03

Judge: Marcy S. Friedman

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

HON. MARCY S. FRIEDMAN

Index Number : 112610/2003

PART 57

SAMUELS, WILLIAM C.

vs

FRADKOFF, ALEX R.

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Notice of Cross-Motion
Answering Affidavits — Exhibits _____

PAPERS NUMBERED

1, 2

3

Replying Affidavits _____

Cross-Motion: Yes No Memos of Law M1 - M3

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
AUG 31 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/16/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

WILLIAM C. SAMUELS,

Plaintiff,

- against -

ALEX FRADKOFF, et al.,

Defendants.

Index No.: 112610/03

DECISION/ORDER

_____ x

HOWARD R. GOLDIN ASSOCIATES, P.C., et al.,

Third-Party Plaintiffs,

- against -

VLAD RESTORATION LTD., et al.,

Third-Party Defendants.

Index No.: 590010/06

DECISION/ORDER

_____ x

In this action, plaintiff Samuels sues to recover damages from defendants Fradkoff, Howard R. Goldin Associates, P.C., and Howard R. Goldin, individually (collectively “Goldin”), for their alleged negligence in the provision of architectural and other services for the renovation of plaintiff’s Manhattan townhouse. Third-party defendant Charles G. Michel Engineering, P.C.

("Michel"), which describes itself as an engineering firm specializing in mechanical, electrical, plumbing and sprinkler design services, moves to dismiss Goldin's third-party complaint against it for common law indemnification and contribution. Goldin cross-moves to amend the third-party complaint to correct an incorrect factual allegation, and thus to allege that Michel entered into a contract not with the general contractor Leithlong Construction Corporation, as originally alleged, but rather with Fradkoff.

Michel does not object to the proposed amendment, and contends, in its reply, that the amended third-party complaint must nevertheless be dismissed. Michel's motion will accordingly be entertained as to the amended complaint. (See Sage Realty Corp. v Proskauer Rose L.L.P., 251 AD2d 35 [1st Dept 1998].)

Goldin's common law indemnification claim must be dismissed. 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." (17 Vista Fee Assocs. v Teachers Ins. & Annuity Assn. of Am., 259 AD2d 75, 80 [1st Dept 1999].)

Contrary to Michel's contention, the mere fact that plaintiff's complaint pleads wrongdoing on Goldin's part does not bar Goldin's maintenance of a common law indemnification claim.¹ However, neither plaintiff's complaint nor the third-party complaint expressly pleads a vicarious liability claim against Goldin based on Michel's acts, or contains

¹In contrast, if it is ultimately proved that Goldin participated in wrongdoing, its indemnification claim will be barred. (See Trump Village Section 3, Inc. v New York State Hous. Fin. Agency, 307 AD2d 891 [1st Dept 2003], ly denied 1 NY3d 504.)

allegations from which a vicarious liability claim may be inferred. (See, e.g., Board of Educ. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21 [1987]; Board of Educ. v Mars Assocs., 133 AD2d 800 [2d Dept 1978].) The third-party complaint therefore fails to state a cause of action for common law indemnification.

Goldin's contribution cause of action must also be dismissed. Michel argues that this cause of action is not maintainable because plaintiff seeks only economic damages to recover the cost of repairing or correcting alleged defects to the townhouse. Goldin counters that contribution is available because plaintiff's complaint seeks damages for Goldin's alleged negligence.

It is well settled that "the existence of some form of tort liability is a prerequisite to application of the [contribution] statute" (Sargent, Webster, 71 NY2d at 28), and that this statute does not permit contribution between two parties whose potential liability to a third party is for "purely economic loss resulting from a breach of contract." (Id. at 26.) Further, while claims may be brought against a professional, such as an architect, like Goldin, or an engineer, like Michel, for both breach of contract and professional malpractice (see 17 Vista Fcc Assocs., 259 AD2d at 83; Rockefeller Univ. v Tishman Constr. Corp., 240 AD2d 341 [1st Dept 1997], lv denied 91 NY2d 803), where the malpractice claim seeks only contractual "benefit of the bargain" damages, contribution is unavailable, the "tort language notwithstanding." (Trump Village Section 3, Inc., 307 AD2d at 897; Rockefeller Univ., 240 AD2d at 343. See also Sargent, Webster, 71 NY2d at 29.)²

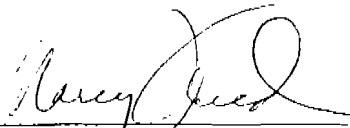
²While Tower Bldg. Restoration, Inc. v 20 E. 9th St. Apt. Corp. (295 AD2d 229 [1st Dept 2002]) upheld a contribution claim asserted against a third-party defendant for professional malpractice, there was no indication in the opinion that the damages for malpractice were limited to damages that would be

In the instant case, contrary to Goldin's contention, the damages sought by plaintiff against Goldin are solely contractual damages, for repair or correction of Goldin's work. On the above authority, the contribution claim must therefore be dismissed.

To the extent that this decision is inconsistent with this court's prior decision, dated July 6, 2005, which denied Goldin's motion to dismiss Fradkoff's claim for contribution against Goldin, the court will entertain a motion to reargue the prior motion.

This constitutes the decision and order of the court.

Dated: New York, New York
August 16, 2006



MARCY FRIEDMAN, J.S.C.

FILED
AUG 31 2006
COUNTY CLERK'S OFFICE
NEW YORK

available for breach of contract.