

Ross v Gluckman

2006 NY Slip Op 30610(U)

March 28, 2006

Supreme Court, New York County

Docket Number: 603715/01

Judge: Helen E. Freedman

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

PRESENT: _____

PART 39

Index Number : 603715/2001

ROSS, CLIFFORD

vs

GLUCKMAN, RICHARD

Sequence Number : 010

DISMISS

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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 as per accompanying memo /ad

FILED

APR 04 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

March 28, 2006

[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 IAS PART 39

-----X
CLIFFORD ROSS,

Plaintiff,

-against-

RICHARD GLUCKMAN AND DAVID MAYNER,
d/b/a/ GLUCKMAN MAYNER ARCHITECTS; S.A.
GAVISH, INC.; GILSANZ MURRAY STEFICEK, LLP;
AMBROSINO, DEPINTO & SCHMIEDER CONSULTING
ENGINEERS, P.C.; AMRUS MECHANICAL CO., INC.; and
PHOTO LAB FABRICATIONS, INC.,

Defendants.

-----X
AMBROSINO, DEPINTO & SCHMIEDER CONSULTING
ENGINEERS, P.C.,

Defendant/Third-Party Plaintiff,

-against-

EUROSTRUCT, INC. and MICHAEL ZENREICH AIA
ARCHITECT,

Third Party Defendants.

-----X
RICHARD GLUCKMAN and DAVID MAYNER, d/b/a
GLUCKMAN MAYNER ARCHITECTS;

Fourth-Party Plaintiff,

-against-

MICHAEL BRAITO, PLANSPEK, INC., and DIANE KAESE,

Fourth-Party Defendants.

-----X
Helen E. Freedman, J.S.C.

Index No. 603715/01
b10

Third Party
Index No. 590823/05

Fourth Party
Index No. 590990/05

In this action to recover damages caused by defects in a townhouse renovation and

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reconstruction project, Michael Braitto ("Braitto") moves to dismiss the fourth party complaint brought by the project's supervising architect Gluckman Mayner Architects ("GMA"), and alternatively moves to sever the fourth party action from the underlying action pursuant to CPLR § 1010.

In the underlying action, Clifford Ross ("Ross") alleges, inter alia, that GMA breached its contractual duties to properly design and supervise the townhouse renovation and reconstruction project and also claims that GMA was negligent and committed professional malpractice. Ross hired GMA in 1997 and under their contract, GMA was to act as the supervising architect on the renovation project. Ross moved into the townhouse in 1999 and thereafter hired structural engineer Michael Braitto and his firm Planspeck, Inc. to inspect the premises, locate defects, and recommend solutions. Braitto created a punchlist of items related to the heating, ventilation, and air conditioning system ("HVAC"), fire safety elements, waterproofing, and structural problems.

In its fourth party complaint, GMA sues Braitto for negligence, breach of contract, contribution, and implied indemnification. GMA alleges that Braitto was the chief person responsible for investigating, designing, planning and supervising the remediation of Ross' darkroom, HVAC system, shaft wall and fire stopping, exterior wall waterproofing and reconstruction, boiler and kitchen exhaust replacement, and additional structural problems, and that Braitto's substantial contribution aggravated and or caused the injuries for which Ross is suing GMA. Braitto moves to dismiss the fourth party complaint against him contending that it does not state a cause of action for negligence or breach of contract because there is no privity between GMA and Braitto, and that it does not state a cause of action for contribution and implied indemnification because the underlying action seeks to recover solely for economic loss, the cost to repair defects in the townhouse.

There is no privity nor any relationship approaching privity between Braitto and GMA, and GMA is not an intended third party beneficiary of the contract between Ross and Braitto. Thus, GMA cannot support its negligence and breach of contract claims against Braitto.

The fourth party complaint does allege sufficient facts to support GMA's claims for contribution and implied indemnity against Braitto. Under CPLR § 1401, a party may seek contribution for tort claims where the underlying action seeks to recover for personal injury, property damage or wrongful death. A contribution claim will not survive where the underlying claims seek to recover solely economic damages and do not allege any breach of legal duties independent of the defendant's contractual obligations to supervise construction and apprise the plaintiff of defects. *See Bd. of Education of the Hudson City School District v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 30 (1987)(holding that the architect's contribution claims against the contractor could not survive because the plaintiff seeks only pecuniary damages resulting from the defective condition of the roof). However, where the underlying claims implicate legal duties beyond contractual duties, the contribution claim should not be dismissed. *See Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992)(finding that defendant's legal duty to comply with public safety regulations was independent of its contractual obligations and thus the contribution claim could survive).

When the alleged tortious conduct is professional malpractice and the gravamen of the complaint seeks to recover the cost to repair the premises, the line between contractual and independent legal duties blurs. For example, in *Tower Building Restoration, Inc. v. 20 East 9th Street Apt. Corp.*, 295 A.D.2d 229 (1st Dept. 2002), the court held that "professionals may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" and thus the defendant could seek contribution from an engineer under the theory that the engineer was a

successive tortfeasor. The fact that there is no privity between the fourth party plaintiff and fourth party defendant is not dispositive where, as in that case, both parties owed a duty to the plaintiff and both contributed to the plaintiff's harm by breaching their respective duties. In *Facilities Development Corp. v. Miletta*, 180 A.D.2d 97 (1st Dept. 1992), the court found that the architect's third party contribution claim against the contractor did not state a cause of action, but noted that "when an architect is sued in both breach of contract and malpractice, he can seek contribution from ... engineers involved in the project if the economic loss was caused by the professionals' breach of legal duties independent of their contractual obligations." *Rothberg v. Eichel*, 270 A.D.2d 760 (3d Dept. 2000) does not control because there the court found that the defendant architect did not state a cause of action for contribution against the contractor where the plaintiff owner essentially sought to recover the benefit of her bargain, and the contractor was not a "design professional."

Here, Braitto, as a structural engineer and design professional that allegedly supervised much of the remediation and structural modifications, had a legal duty beyond his contractual duty to exercise reasonable care as a professional. Thus, GMA's fourth party complaint states a cause of action for contribution. Additionally, GMA alleges that Ross delegated full responsibility to Braitto for at least some of the remediation, and thus the fourth party complaint states a cause of action for implied indemnity with respect to the claims in the underlying complaint where Ross seeks to hold GMA responsible for injuries that GMA alleges Braitto alone caused. *See 17 Vista Fee Associates v. Teachers Ins.*, 259 A.D.2d 75 (1st Dept. 1999).

Braitto's alternative motion to sever the fourth party action is denied. Where no resulting prejudice to Braitto has been demonstrated, the actions should remain together in order to efficiently and accurately determine the many factual issues involved and assess each of the parties' relative

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fault.

Accordingly, it is

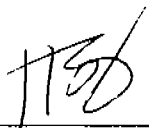
ORDERED that Braitto's motion to dismiss the fourth party complaint against him is granted to the extent that the negligence and breach of contract claims are dismissed, and it is denied to the extent that the contribution and implied indemnification claims remain, and it is further

ORDERED that the alternative motion to sever the fourth party action is denied, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: March 28, 2006

ENTER:



Helen E. Freedman, J.S.C.

FILED

APR 04 2006

COUNTY CLERK'S OFFICE
NEW YORK