

**Board of Mgrs. of Polo Club Condominium v Town  
of Babylon**

2006 NY Slip Op 30653(U)

January 17, 2006

Supreme Court, Suffolk County

Docket Number: 97-29974

Judge: Peter Fox Cohalan

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 9-1-04  
CAL. DATE 8-30-05  
Mot. Seq. # 003-MD  
004-XMD

-----X  
THE BOARD OF MANAGERS OF THE :  
POLO CLUB CONDOMINIUM, et al., :  
 :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 TOWN OF BABYLON and THE TOWN BOARD :  
 OF THE TOWN OF BABYLON :  
 :  
 Defendants. :

LAWRENCE F. DIGIOVANNA, ESQ.  
Attorneys for Plaintiffs  
375 Bay Ridge Parkway  
Brooklyn, New York 11209

MARK A. CUTHBERTSON, Esq.  
Attorneys for Defendants and Third-Party  
Plaintiffs  
434 New York Avenue  
Huntington, New York 11743

-----X  
TOWN OF BABYLON and THE TOWN BOARD :  
 OF THE TOWN OF BABYLON, :  
 :  
 :  
 Third-Party Plaintiffs, :  
 :  
 -against- :  
 :  
 :  
 OAKS DEVELOPMENT CORP. d/b/a LAUREL :  
 OAKS ASSOCIATES, LAURAL OAKS :  
 ASSOCIATES, LAURAL DEVELOPMENT :  
 CORP., WILBUR BRESLIN, and DONALD :  
 MONTI, :  
 :  
 :  
 Third-Party Defendants. :

CERTILMAN BALIN ADLER & HYMAN  
Attorneys for Third-Party Defendant  
90 Merrick Avenue  
East Meadow, New York 11554

Upon the following papers numbered 1 to 21 read on this motion and cross-motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross-Motion and supporting papers 10-15; Answering Affidavits and supporting papers 16-19; Replying Affidavits and supporting papers 20-21; it is,

**ORDERED** that third party defendants' motion for partial summary judgment is denied and it is further,

**ORDERED** that plaintiffs' cross-motion for partial summary judgment is denied.

Third party defendants move for an order granting them partial summary judgment on their First and Third counterclaims against the plaintiffs. The plaintiffs cross-move for partial summary judgment dismissing “so much of third-party defendants’ counterclaims as seek indemnification against plaintiffs and as seek an award of legal fees of any kind or nature” (Affirmation of Lawrence F. Digiovanna, dated August 25, 2004, para. 26). The Court construes, since the gravamen of the relief sought in the third party defendants’ First and Second counterclaims against the plaintiffs is for indemnification and the Third Counterclaim seeks an award of attorneys fees, that the plaintiffs’ cross-motion is directed at these counterclaims. As this Court noted in its prior decision in this same case,

“The plaintiffs in this action are the Board of Managers of the Polo Club Condominium (Polo Club) and individual owners of condominium units at the Polo Club. The plaintiffs allege that, on or about August 20, 1985, the Town Board of the Town of Babylon (Town Board) enacted Resolution Number 704 (704) which permitted the re-zoning of the property on which the Polo Club is now constructed as a Senior Citizen Multiple Residence District. 704 was conditioned on the recording of a Declaration of Covenants (Declaration) which limited development of the property to the construction of 88 senior citizen units. The owner of the condominium development, Oaks Development Corp. (Oaks), having had insufficient sales to senior citizens, applied to the Town Board, on or about February 5, 1991, for a change of the senior citizen restriction. On or about February 5, 1991, the Town Board enacted Resolution Number 125 (125) which, in effect, rescinded the restriction limiting sale of the condominiums to senior citizens by re-zoning the property as a Multiple Residence District. The effectiveness of 125 was contingent on Oak’s strict performance of various conditions, one of which limited the maximum base sales price of the condominium units. That condition, number 5, provided that ‘the maximum base purchase for a one bedroom unit without cost of extras shall be \$69,900, the maximum base purchase for a one bedroom unit with den without cost of extras shall be \$79,900.’ Condition number 4, which related to a restriction that all units be owner occupied, was the only condition that was required to be placed in the Condominium Offering Plan (Offering Plan). 125 further provided that the Town of Babylon (Town) had the right, on its own motion and upon notice to Oaks, to rescind the Multiple Residence District zone should Oaks fail to cure any violations of the conditions. The Town could also under the terms of 125 enforce the conditions by commencement ‘of any proceeding at law or in equity,’ including an action for injunctive relief.

On or about March 12, 1996, the Town Board enacted Resolution Number 240 (240) which authorized the Babylon Town Attorney to commence litigation against Oaks in order to secure its compliance with

the conditions of 125 and site work ordered by the planning board and in order to amend certificates of occupancy issued by Oaks which incorrectly referred to the zoning district as Senior Citizen Multiple Residence. The plaintiffs further allege that the defendants did not commence any litigation pursuant to 240 but, on or about September 9, 1996, the Town issued new certificates of occupancy which removed the senior citizen designation.

The plaintiffs commenced this action on December 6, 1997... by service of a complaint containing causes of action, as to plaintiffs as a class, sounding in negligence, fraud, breach of contract, violations of the equal protection clauses of the state and federal constitutions and claims for injunctive relief. The defendants served an answer to the complaint containing defenses that the complaint fails to state a cause of action, a class action has not been properly certified, defendants have no duty to enforce the provisions of the subject resolutions, defendants have acted in good faith and without malice and that punitive damages may not be recovered against a municipality. Plaintiffs, then served their first amended verified complaint which contains nine causes of action, including three causes of action alleging violations of the federal Civil Rights Act. The plaintiffs aver that the gravamen of this action is the defendants' failure to stop Oaks from selling condominiums in excess of the base prices fixed in 125" .

(Short Form Order of the undersigned)

According to the court's records a related action was commenced by the same plaintiffs that are in this action against Oaks Development Corp.(Oaks) d/b/a Laurel Oaks Associates (LOA), Wilbur Breslin (Breslin), Donald Monti (Monti), Susan Franks (Franks), Barbara Schillp (Schillp), The Marketing Directors Inc. (Marketing), Larry Gise (Gise), Gise Unified, Inc. (Unified), Raymond F. Fellman, A.I.A. (Fellman), Fleet Bank of New York (Fleet) and Certilman, Balin, Adler and Hyman (Certilman Firm) under Index No. 96-13117 (the Oaks action). The court's records also indicate that the plaintiffs stipulated on August 31, 1999 to discontinue the Oaks action as to defendants Oaks d/b/a LOA, Breslin, Monti, Schillp, Gise, Unified and the Certilman Firm, with prejudice.

The defendants in this action commenced a third party action on or about April 8, 2004. Defendants/third party plaintiffs allege in the third party complaint that the third party defendants, Oaks d/b/a LOA, Laurel Development Corp. (LDC), Breslin and Monti, were involved in the development, marketing and sale of the Polo Club. Defendants/third party plaintiffs assert in their first cause of action that third party defendants are required to indemnify them for any judgment the plaintiffs may recover against them. Defendants/third party plaintiffs assert in their second cause of action that third party defendants are liable for contribution with respect to any judgment the plaintiffs may recover against them arising out of the third party defendants' alleged active negligence in concealing price restrictions

from prospective unit owners and in charging prices in excess of those required by 125.

Third party defendants on June 28, 2004 served an answer to the third party complaint and in which they asserted three counterclaims against the plaintiffs. Third party defendants assert in the first counterclaim that “if the Third-Party Plaintiffs are successful in their Third-Party Cause of action against the Answering Defendants for contribution and/or indemnity, then Plaintiffs by virtue of Plaintiffs’ receipt of the sum of \$308,700.00 from the Answering Defendants and by their agreement as memorialized by the Stipulation of Settlement have agreed to waive, discharge, release, discontinue any claim, or release and satisfy so much of any judgment as may be obtained by the Third-Party Plaintiffs against the Answering Defendants” (Notice of Motion, Exhibit B). Third party defendants seek in the second counterclaim a declaratory judgment protecting them from any judgment that third party plaintiffs may recover against them on their third party claims for indemnification and contribution and for a declaratory judgment that “any award received by Plaintiffs against the Third-Party Plaintiffs will be proportionately reduced by any award received by Third-Party Plaintiffs against the Answering Defendants” (Notice of Motion, Exhibit B). Third party defendants assert in the third counterclaim that pursuant to the provisions of the Stipulation of Settlement they are entitled to be indemnified by the plaintiffs for any attorneys’ fees, costs and interest incurred by them in defending against the third party claims.

Third party defendants submit in support of their motion, inter alia, the affidavit of Monti and a copy of an un-executed “Stipulation of Settlement” dated “December \_\_\_\_, 1998” under Index no. 13117/96 (Notice of Motion, Exhibit D). Monti avers that he was the President of third party defendant, LDC, which together with Oaks, formed the partnership, LOA. Monti further avers that LOA developed and built the homes in the condominium complex known as the Polo Club. In December of 1998 “the Builders and other defendants in the First Action [the Oaks action]” (Notice of Motion, Monti affidavit, paragraph 6 [bracketed material added]) entered into the Stipulation of Settlement with the plaintiffs wherein he and Breslin, as the principals of Oaks and LDC, respectively, paid the plaintiffs \$308,700 in order to secure indemnification by the plaintiffs covering the type of claims made by the Town and the Town Board in this third party action. For this consideration, the plaintiffs also agreed to pay the costs and expenses of defending such actions, including the instant third party action. Monti also avers that the “crux of this motion” is that pursuant to the Stipulation of Settlement plaintiffs are required to indemnify third party defendants for any judgment third party plaintiffs may recover against them and to pay for their costs and expenses in defending this action.

In this regard, Monti specifically requests “a declaratory judgment which states *if* Babylon obtains an award for contribution or indemnity against the Builders, Plaintiffs must waive, discharge, release or discontinue any claim against Babylon or release and satisfy so much of any judgment as may be obtained by Plaintiffs against Babylon so as to satisfy the award against the Builders for contribution and/or indemnification to ensure that the Builders are not liable for any judgment” (Notice of Motion, Monti affidavit, paragraph 9 [emphasis added]). Monti also requests a declaratory judgment directing the plaintiffs to reimburse third party defendants for reasonable attorneys fees and other costs incurred in defending the third party action.

The plaintiffs oppose the motion and cross-move for summary judgment dismissing the Counterclaims. The plaintiffs submit in support of their motion, *inter alia*, the affirmation of their attorney, Lawrence Digiovanna, and a copy of a "Stipulation of Settlement" which is signed by the attorneys for the plaintiffs, the Certilman Firm and defendants Oaks d/b/a LOA, Breslin and Schillp. The plaintiffs, while they admit that they executed this particular Stipulation of Settlement, contend that the provisions of this stipulation do not support the third party defendants' claims either for indemnification or for attorneys' fees and other expenses incurred in the defense of the third party action. The plaintiffs also contend that the third party defendants' motions are premature.

Initially, the Court must address the issue of which, if any, of the Stipulations of Settlement govern the parties' conduct since the provisions of the unsigned Stipulation of Settlement tendered by the third party defendants are not the same as those in the Stipulation of Settlement submitted by the plaintiffs. Third party defendants, in their affirmation in reply and in opposition to the cross-motion do concede that the Stipulation of Settlement submitted by the plaintiffs in support of their cross-motion as Exhibit A is in fact the stipulation executed by the parties. Accordingly, any further reference by the Court to the Stipulation of Settlement shall be to that document.

Paragraph 6 of the Stipulation of Settlement is pertinent to the issues raised by these motions. It provides:

"Plaintiffs reserve their right to continue their claims against Fleet Bank, as successor to National Westminster Bank, and their independent action or claims against the Town of Babylon, provided, however, that:

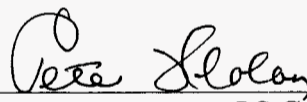
- a. The defendants shall under no circumstances be liable for any claims of contribution asserted by Fleet Bank or by the Town of Babylon pursuant to General Obligations Law § 15-108, or otherwise; and
- b. To the extent Fleet Bank, the Town of Babylon or any other party liable in any respect to plaintiffs for any of the claims asserted in the complaint may at any time assert claims against the Sponsor Defendants...for indemnification, implied indemnity, or any other claim which would not otherwise be discharged by General Obligations Law § 15-108 (the 'Indemnification Claims'), then and in such event, plaintiffs agree that, *to the extent necessary*, they will waive, discharge, release, discontinue any claim, or release and satisfy so much of any judgment they may obtain against Fleet Bank, Town of Babylon or against any other entity entitled to assert an Indemnification Claim against the Sponsor Defendants...as will insure that the Sponsor Defendants ...shall not under any circumstances be liable for any judgment, cost, sums, counsel fees, or any expense of any nature whatsoever for Indemnification Claims in addition to the \$308,700 settlement sum. By way of example, should plaintiffs recover judgment in any amount against defendant Fleet Bank, as successor to Nat West Bank, and Fleet Bank shall obtain a judgment over against any or all of the Sponsor Defendants...for Indemnification Claims, plaintiffs agree that they shall release, discharge, waive or cancel any such claim, right,

entitlement or release so much of any judgment against Fleet Bank as will correspondingly release and discharge all of the Sponsor Defendants...with respect to any such Indemnification Claim.” (Notice of Cross-Motion for Partial Summary Judgment, Exhibit A {emphasis added}).

“The granting of a declaratory judgment rests in the discretion of the court, but it ‘may not be granted if it will only result in an advisory opinion. (New York Public Interest Research Group v. Carey, 42 N.Y.2d 527, 529-530 [399 N.Y.S.2d 621, 369 N.E.2d 1155].)’ (Combustion Eng. v. Travelers Ind. Co., 75 A.D.2d 777, 778, 428 N.Y.S.2d 235, affd. 53 N.Y.2d 875, 440 N.Y.S.2d 617, 423 N.E.2d 40; see, also, Siegel, New York Practice, §436, p. 578; 3 Weinstein-Korn-Miller, N.Y.Civ.Prac., pars. 3001.03, 3001.05.) ‘[T]he courts of this State have long espoused a strong policy against rendering declaratory relief purporting to determine the rights of parties upon the occurrence of a future contingency beyond the parties’ control. Courts do not dispense advisory opinions.’ (Chicago Research & Trading v. New York Futures Exch., 84 A.D.2d 413, 417, 446 N.Y.S.2d 280; see, also, Combustion Eng. v. Travelers Ind. Co., supra.)” (*Aetna Casualty & Surety Co. v. Liberty Mut. Ins. Co.* 91 A.D.2d 317, 325-326, 459 N.Y.S.2d 158,163 - 164 [1983]).

Third party defendants’ counterclaims, by their own terms, are directly referable to the provisions of the aforementioned Stipulation of Settlement under index #013117/96. Third party defendants’ recovery under Paragraph 6 of the Stipulation of Settlement, at least with respect to the third party plaintiffs’ claims for indemnification, is dependent on the occurrence of two contingencies which are the plaintiffs’ recovery of a judgment against defendants/third party plaintiffs and secondly, the third party plaintiffs’ judgment over against third party defendants. Further, it is yet to be determined in the third party action whether third party plaintiffs are barred from asserting a claim for contribution pursuant to General Obligations Law § 15-108.<sup>1</sup> Determination of third party defendants’ motion and plaintiffs’ cross-motion should await the resolution of issues in the underlying actions. Accordingly, these motions are denied as premature (*Maxwell v Toys “R” Us*, 258 AD2d 630, 685 NYS2d 760 [1999]).

Dated: JAN 17 2006

  
 \_\_\_\_\_  
 J.S.C.

---

<sup>1</sup> General Obligations Law § 15-108 provides in part that a “release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules” (General Obligations Law § 15-108[b]; see *Shufelt v Niagra Mohawk Power Corporation*, 109 AD2d 66, 490 NYS2d 633 [1985]).