

49 E. 21 LLC v AJS Project Mgt., Inc.

2007 NY Slip Op 32028(U)

June 25, 2007

Supreme Court, New York County

Docket Number: 0601417/2006

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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49 EAST 21 LLC and THE ELAD GROUP, LTD.,

Index No. 601417/06

Plaintiffs,

-against-

**AJS PROJECT MANAGEMENT, INC. , MATRIX
CONSTRUCTION, LLC, ROBERT C. HOHMANN,
ANTHONY SCLAFANI, ULTIMATE PARTITIONS, INC.,
SILIGHT LIGHTING, INC., OCEAN-BREEZE AIR
CONDITIONING CORP., K-VENT, INC., OAKWOOD
CLASSIC & CUSTOM WOODWORKS, INC., NORTHLAND
CONSTRUCTION, LLC, CASTLE MASONRY, INC., B&B
IRON WORKS CORP., ARCADE CONTRACTING &
RESTORATION, INC., A.U.M A&C, LTD., MAKUNA
TILE, INC., C.H. SCHMITT & CO., INC., DANICA
PLUMBING & HEATING, LLC, U.S. ELECTRIC CORP.,
KING FREEZE MECHANICAL CORP., SERVTECH CORP.,
KUDOS CONSTRUCTION CORP., EAST COAST
ELECTRIC, INC., and DOES 1 TO 10,**

Defendants,

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KING FREEZE MECHANICAL CORP.,

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Index No. 590757/06

Third-Party Plaintiff,

-against-

**AVALANCHE AIR ENTERPRISES, INC., and
AVALANCHE COOLING CORP.,**

Third-Party Defendants,

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**AJS PROJECT MANAGEMENT, INC., MATRIX
CONSTRUCTION, LLC, ROBERT C. HOHMANN,
ANTHONY SCLAFANI,**

Index No. 591080/06

Second Third-Party Plaintiffs,

-against-

**ROTAVELE ELEVATOR, C.H. SCHMITT & CO., INC.,
SERVTECH CETRA/RUDDY, INC., DUN RITE
FLOORING , NORTHLAND CONSTRUCTION, U.S.
ELECTRIC CORP., EL-AD PROPERTIES NY, LLC,
THOMAS ELLIOT and MIKI NAFTALI,**

Second Third-Party Defendants.

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LOUIS B. YORK, J.:

Motions sequence nos. 002, 003, and 004 are consolidated for disposition. In motion sequence no. 002, plaintiffs 49 East 21 LLC (49 East) and The El-Ad Group, Ltd. (Group) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the counterclaim of defendant U.S. Electric, Inc. (USE) seeking quasi-contractual recovery. In motion sequence no. 003, second third-party defendants El-Ad Properties NY LLC (Properties), Thomas Elliott, and Miki Naftali move, pursuant to CPLR 3211 (a) (7), to dismiss the eighth through eleventh causes of action of the amended second third-party complaint of defendants/second third-party plaintiffs AJS Project Management, Inc., Matrix Construction, LLC, Robert C. Hohmann, and Anthony Sclafani (collectively, Matrix), and Matrix cross-moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the first, third, and fourth causes of action of plaintiffs' complaint, the second cause of action as to Hohmann and Sclafani, and all claims for punitive damages.¹ In motion sequence no. 004, second third-party defendant

¹ At oral argument, Matrix withdrew that branch of their cross motion that was based upon CPLR 3211 (a) (1).

Cetra/Ruddy Incorporated (CRI) moves, pursuant to CPLR 3211 (a) (7) and, in the alternative, CPLR 3212 (a), for an order dismissing the second third-party complaint as to CRI.

Group is the parent of 49 East. 49 East, the sponsor of a condominium project in a commercial building located at 49 East 21st Street in Manhattan (Building), entered into a contract (Contract), dated October 31, 2003, with Matrix, as the general contractor, to convert the commercial space into residential condominium units. Plaintiffs brought this action against Matrix and its subcontractors alleging breach of contract and negligence. CRI was the supervising architect that 49 East had retained for the project.

Motion Sequence No. 002

Although, by its terms, USE's counterclaim seeks recovery in quantum meruit, USE acknowledges that it is not entitled to such relief, and that what it actually seeks is the unpaid balance that it is allegedly due under its subcontract with Matrix. USE argues that it may seek that balance directly from plaintiffs by virtue of Article 23.1 of the Contract and Article 1.1 of the subcontract between USE and Matrix (the Subcontract). The latter provision provides that the Subcontract documents include the Contract. Article 23.1 of the Contract provides that:

[a]ll subcontracts ... shall fully incorporate the provisions of the Contract and shall require the Subcontractor ... to assume toward the Contractor all the obligations that the Contractor has assumed toward the Owner under the Contract ... and to grant to the Contractor all of the rights and remedies that the

Contractor, under the Contract, has granted to [the] Owner. This Article is not limited to the Contract Documents describing the portion of the work to be Subcontracted, but shall also include all rights, remedies, and obligations under the Contract. ...

On the basis of this paragraph, USE argues that, because the Contract gives Matrix a basis for recovery against the Owner if the Owner intentionally or wilfully interferes with the work or abandons the project, USE has the same rights against the Owner. However, contrary to the premise of USE's argument, nothing in the paragraph quoted above grants a subcontractor any rights against the Owner. Indeed, Article 39.1 of the Contract provides, insofar as is relevant here, that "the Contract shall not be interpreted to create a contractual relationship between the Owner and any party other than the Contractor," and Article 1.3 of the Subcontract provides that "[t]he Subcontract Documents shall not be construed to create a contractual relationship of any kind ... between the Owner and the Subcontractor, or ... between any persons or entities other than the Contractor and Subcontractor."

Nor is there any merit in USE's contention that, if the Subcontract grants USE no rights against plaintiffs, under the Contract, than it cannot grant plaintiffs any rights against USE. That the Contract requires Matrix to make 49 East the third-party beneficiary of each Subcontract that Matrix enters into does not require that subcontractors have any rights under the Contract. USE does not allege that its identity was known to plaintiffs at the time that they entered into the Contract, and Yehuda Mor, the project manager of 49 East, states in his affidavit that "[p]laintiffs never had any dealings with USE." See Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652 (1976); R. H. Sanbar Projects v Gruzen Partnership, 148 AD2d

316 (1st Dept 1989).

Because USE was neither in contractual privity with 49 East, nor the third-party beneficiary of the Contract, USE could recover from plaintiffs the amount that it is allegedly owed by Matrix only by filing a mechanics' lien pursuant to Article 2 of the Lien Law. The record is silent as to whether USE filed such a lien. In any event, there is no basis for USE's counterclaim, and, accordingly, plaintiffs' motion will be granted.

Motion Sequence No. 003

The Motion

The motion of the second third-party defendants to dismiss the eighth through the eleventh causes of action of the second third-party complaint is based on their argument that the eighth through tenth of them are redundant with the three counterclaims raised by Matrix in the main action, and that the eleventh does not allege an independent cause of action. Matrix's counterclaims allege, respectively, that: (1) plaintiffs approved certain additions and change orders as to the work to be performed on the Building but failed to pay for such work after Matrix had made a demand for such pay; (2) 49 East wrongfully directed Matrix to award the millwork subcontract to an incompetent contractor, who improperly performed construction, caused delays, and eventually abandoned the project, thereby causing Matrix to incur substantial expenses in corrective work; and (3) that plaintiffs engaged incompetent contractors to work on the Building. The eighth through tenth causes of action in the amended second third-party complaint allege identical wrongdoing as those counterclaims,

but they allege the wrongdoing to have been done by second third-party defendants Properties, Elliott s/h/a Elliot and Naftali. The difficulty with these causes of action is that Matrix reverses the customary usage of the term "alter ego." The term is generally used to refer to a corporate defendant that is alleged to be completely dominated by a non-party entity. That non-party is the entity sought to be held responsible for the alleged wrongdoing of its alter ego. Matrix confusingly describes Properties, Elliott, and Naftali as the alter egos of plaintiffs. Understandably, Properties, Elliott, and Naftali point out that Matrix has already asserted against plaintiffs the claims that Matrix asserts against them, and that inasmuch as Matrix claims them to be the alter egos of plaintiffs, the claims against them are redundant. However, it is clear to the court that, taking the amended second third-party complaint as a whole, second third-party plaintiffs allege that plaintiffs are the alter egos of Properties, Elliott, and Naftali. The eleventh cause of action which seeks to pierce the corporate veil of Group and of the plaintiffs, expressly alleges that Elliott and Naftali "exercised complete dominion and control over the operations of [Properties, 49 East, and El-Ad]," and that they deliberately undercapitalized those entities. Accordingly, the motion to dismiss the eighth through tenth causes of action of the second amended complaint will be denied.

However, the eleventh cause of action, which alleges that Elliott and Naftali should be held personally liable for the acts and omissions of Properties, 49 East, and Group, will be dismissed because the Court of Appeals has held that:

an attempt ... to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners.

Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141 (1993).

The Cross Motion

CPLR 2215 provides, in relevant part, that "a party may serve upon the moving party a notice of cross-motion demanding relief." There is no procedural basis for the service of a cross motion upon a nonmoving party. Here, the cross motion is not only made against a non-moving party, but also a party not a member of the third-party action of which the cross-movant is a member. Terio v Spodek, 25 AD3d 781 (2d Dept 2006). Accordingly, the cross motion is improper, and the motion to dismiss it will be granted, without prejudice to Matrix making such a motion in the main action, if it should so be advised.

Motion Sequence No. 004

The causes of action that Matrix alleges against CRI are, respectively, for common-law indemnification, contribution, and negligence. Matrix has, now, withdrawn the first of these. CPLR 1401 provides that:

two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them

"Injury to property," within the meaning of CPLR 1401, does not include purely economic loss resulting from a breach of contract, and a party may not seek contribution from a third

party for economic loss resulting from the first party's breach of its contract with plaintiff. Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21 (1987); Trump Village Section 3, Inc. v New York State Hous. Fin. Agency, 307 AD2d 896 (1st Dept 2003). While plaintiffs' complaint alleges breach of warranty and negligence, as well as breach of contract, the damages that plaintiffs specified in their bill of particulars all result from Matrix's, and the defendant subcontractors', alleged failures to complete the work and from their failures to comply with the architectural and design specifications in the work that they did perform. Matrix contends that three of the almost 400 items listed in plaintiffs' bill of particulars describe property damage, rather than economic loss. Those items are alleged deficiencies in the installation of Gypsum Board throughout the project, improper location of an exhaust fan, and improper application of the Exterior Insulated Finishing System. Lo Sardo Affirm. in Opp, ¶ 4. But in seeking recovery of the expense they claim to have incurred in connection to these matters, plaintiffs seek to be placed in the position in which they would have been had the work been performed to their satisfaction. In other words, plaintiffs are seeking the benefit of their bargain. Plaintiffs allege neither the occurrence of sudden damage, nor damage affecting a significant public interest. Compare Sommer v Federal Signal Corp., 79 NY2d 540 (1992); Trustees of Columbia Univ. in City of New York v Gwathmey, Siegel and Assocs. Architects, 192 AD2d 151 (1st Dept 1993). Accordingly, Matrix is not entitled to contribution from CRI.

Finally, Matrix argues, relying upon Board of Mgrs. of the Alfred Condominium v Carol Mgt. (214 AD2d 380 [1st Dept 1995]) and Board of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron (183 AD2d 488 [1st Dept 1992]), that its negligence claim should survive despite the absence of privity between Matrix and CRI. In both of those cases, however the condominium unit owners were held to be third-party beneficiaries of the defendants' contracts. Here, by contrast, nothing in CRI's contract with 421 East indicates that Matrix should be a third-party beneficiary thereof. A party may not recover for economic loss absent privity or "a relationship so close as to approach that of privity." Ossining Union Free School Dist. v Anderson Larocca Anderson, 73 NY2d 417, 424 (1989). There was no such relationship between Matrix and CRI.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 002, the motion is granted, and the counterclaim of defendant U.S. Electric, Inc. is dismissed; and it is further

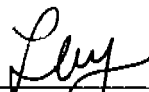
ORDERED that, in motion sequence no. 003, the motion is granted only to the extent that the eleventh cause of action in the amended second third-party complaint is dismissed; and it is further

ORDERED that second third-party defendants are directed to serve an answer to the amended second third-party complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross motion is denied; and it is further

ORDERED that, in motion sequence no. 004, the motion is granted, and the second
third-party complaint is severed and dismissed as to Cetra/Ruddy Incorporated.

Dated: 6/25/07



Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

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