

Ballinger v J. Tortorella Swimming Pools, Inc.

2007 NY Slip Op 33212(U)

September 28, 2007

Supreme Court, Suffolk County

Docket Number: 0017464/2006

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

Plaintiffs commenced this action to recover for property damage sustained as the result of defendant Tortorella's alleged breach of contract and negligence arising from its performance of work, labor, and services on an in-ground pool at plaintiffs' premises known as 93 Old Barn Lane, Sagaponack, New York. Plaintiffs assert, among other things, that Tortorella performed its work in a "shoddy unworkmanlike and unsatisfactory manner." Tortorella then commenced a third-party action for contribution and indemnity against SGM, the manufacturer and supplier of Diamond Brite pool finish, a product applied to the pool by Tortorella.

SGM now moves to dismiss the third-party complaint, pursuant to CPLR 3211(a)(7), alleging that the third-party complaint fails to state a cause of action. SGM argues that a cause of action for indemnity must be based upon an express contract or a common-law theory of implied indemnity. Further, SGM argues that a claim for contribution is governed by CPLR 1401, and that purely economic loss resulting from a breach of contract does not constitute "injury to property" within the meaning of CPLR 1401. As such, SGM alleges that Tortorella cannot seek contribution from SGM where plaintiffs' alleged tort claim is essentially a breach of contract claim.

In opposition, Tortorella alleges that SGM was impleaded in this case based upon plaintiffs' dissatisfaction with the Diamond Brite product manufactured by SGM. Tortorella has submitted a letter dated October 26, 2006, from PHIL GREGGS, a technical service manager of SGM, which indicates that an inspection of plaintiffs' pool by SGM revealed that "the Diamond Brite pool finish was properly installed and there were no signs of deficiencies with the material or workmanship." Tortorella contends that Tortorella installed the Diamond Brite pool finish properly, and that plaintiffs are dissatisfied with that product. As such, Tortorella argues that it should be entitled to assert a claim for contribution from SGM. However, Tortorella has not cited any authority for this argument.

With respect to Tortorella's claim for indemnification, it is undisputed that there exists no contract in which SGM agreed to indemnify Tortorella in connection with the work performed on plaintiffs' pool. As such, Tortorella could only proceed on a theory of implied indemnification. The general rule is that a right of implied indemnification will arise in favor of one who is compelled to pay for another's wrong (*Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]; 23 NY Jur Contribution, Indemnity, and Subrogation § 2). One whose liability is

premised upon active negligence cannot obtain common law or implied indemnity (*D'Ambrosio v City of New York*, 55 NY2d 454 [1982]). “The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee” (*Kagan v Jacobs*, 260 AD2d 442 [1999]; see *Barry v Hildreth*, 9 AD3d 341 [2004]; *Tulley v Straus*, 265 AD2d 399 [1999]).

In the case at bar, plaintiffs allege that they were caused to suffer property damage as a result of Tortorella’s actions during the work performed on plaintiffs’ pool. Plaintiffs allege causes of action against Tortorella for breach of contract and negligence; notably, plaintiffs do not allege causes of action sounding in breach of warranty or strict products liability relating to the Diamond Brite pool finish manufactured by SGM. Accordingly, that branch of SGM’s motion to dismiss Tortorella’s claim for indemnification is **GRANTED**.

With respect to Tortorella’s claim for contribution, under New York’s contribution statute, two or more persons who are subject to liability for damages for the same injury to property may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought (CPLR 1401). However, purely economic loss resulting from a breach of contract does not constitute “injury to property” within the meaning of CPLR 1401 (*Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]; *Board of Educ. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]). In the case at bar, plaintiffs have alleged both a claim for breach of contract as well as for negligence.

The critical requirement for apportionment 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 (see *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599 [1988]; *Schauer v Joyce*, 54 NY2d 1 [1981]; *Roma v Buffalo Gen. Hosp.*, 103 AD2d 606 [1984]; *Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 786 [1983]). The injury suffered by plaintiffs for which Tortorella is being sued and for which it seeks contribution from SGM is property damage as a result of, among other things, Tortorella’s application of Diamond Brite to the pool and surrounding area. SGM was not involved with the labor performed on the pool, and there is no allegation in plaintiffs’ complaint that the product itself caused or contributed to this injury.

In their verified bill of particulars dated January 8, 2007, plaintiffs allege that Tortorella was “negligent by failing to perform work pursuant to the

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terms of the agreement” and “performed its work in a negligent, shoddy unworkmanlike and unsatisfactory manner in violation and in breach of the agreement.” Plaintiffs claim that Tortorella failed to apply Diamond Brite to the pool properly according to the instruction manual, and that Tortorella damaged shrubbery and grass through negligent dispersion of Diamond Brite. This claim is distinguished from a claim that the Diamond Brite product was defective and caused injury to property. As such, it cannot be said that SGM caused or augmented the injury for which plaintiffs seek damages. Accordingly, that branch of SGM’s motion to dismiss Tortorella’s claim for contribution is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: September 28, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court

