

**M&R European Constr. Corp. v Farinella &
Sam, Architects**

2007 NY Slip Op 33275(U)

October 4, 2007

Supreme Court, New York County

Docket Number: 0602953/2005

Judge: Louis B. York

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

PRESENT York
Justice

PART 2

Index Number : 602953/2005
M&R EUROPEAN CONSTRUCTION
vs
FARINELLA & SAM, ARCHITECTS
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 602953/2005

MOTION DATE _____

MOTION SEC. NO. 002

MOTION CAL. NO. _____

The motion is to _____

PAGES NUMBERED _____

Notice of Motion/Order to Show Cause — Affidavit — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motions Yes No

By order of the foregoing papers it is ordered that this motion _____

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

Dated 10/21/07

York
LOUIS B. YORK
Justice

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

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

----- X

M & R EUROPEAN CONSTRUCTION CORP.
and 237 CHELSEA LLC,

Plaintiffs,

INDEX NO.
602953/05

-against-

FARINELLA & SAM, ARCHITECTS and
PETER F. FARINELLA, R.A.,

Defendants.

----- X

FARINELLA & SAM, ARCHITECTS and
PETER F. FARINELLA, R.A.,

Plaintiffs,

INDEX NO.
590963/06

-against-

K SQUARE DESIGNS, MARK KEMENY d/b/a
K SQUARE DESIGNS and MARK KEMENY R.A.,

Defendants.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

----- X

LOUIS B. YORK, J.:

Third-party defendants K Square Designs, Mark Kemeny d/b/a K Square Designs and Mark Kemeny R.A. (collectively, "K Square") move to dismiss the third-party complaint.¹

¹ This is the relief sought in the supporting affidavit and subsequent papers submitted by K Square. The notice of motion seeks summary judgment dismissing the third-party complaint pursuant to CPLR 3212, relief unavailable to K Square since issue has not yet been joined on the third-party complaint. Although K Square has not amended its notice of motion, in the interest of judicial economy the court will entertain the motion as one to dismiss pursuant to CPLR 3211(a)[7] because the notice also sought "such other and further relief" deemed just by the court and Farinella has not been prejudiced. See also CPLR 2001.

Defendants/third-party plaintiffs Farinella & Sam, Architects and Peter F. Farinella, R.A. (collectively, "Farinella") cross-move pursuant to CPLR 3025(b) for leave to amend the third-party complaint.

This action stems from a real-estate project undertaken by plaintiffs which failed to meet their expectations allegedly due to the faulty work performed by Farinella. As alleged in the complaint, plaintiff M & R European Construction Corp. ("M&R") hired Farinella to provide a zoning analysis and expansion potential of a building it was considering buying in Manhattan's Chelsea area. After completing its analysis, Farinella advised M&R that the building could be vertically expanded to a maximum height of 120 feet, which would yield 8,405 additional square feet available for development. Relying on this advice, M&R created plaintiff 237 Chelsea LLC ("Chelsea") and bought the building through it. Thereafter, Chelsea sought to expand and develop the building in accordance with Farinella's advice, and hired K Square to prepare the formal architectural plans for their proposed expansion.

Plaintiffs' application for the conversion and enlargement of the premises in accordance with Farinella's analysis was denied by the Buildings Department on the ground that the "Sliver Law" (ZR 23-692) limited the maximum height of the building to 60 feet, not the 120 reported by Farinella. Chelsea filed multiple appeals of that decision, all of which were rejected. Thereafter, plaintiffs brought this action for negligence and architectural malpractice to recover more than \$2 million in damages from Farinella. Plaintiffs have not brought any direct claims against K Square, the architects hired by plaintiffs to draw up the building plans, but Farinella brought a third-party action herein seeking indemnification and contribution. K Square now moves to dismiss that third-party complaint.

Farinella's cross-motion to amend the third-party complaint is granted (CPLR 3025[b]; Edenwald Contracting Co. v. City of New York, 60 NY2d 957 [1983]), and the proposed amended third-party complaint attached as exhibit B to Farinella's moving papers is hereby deemed filed and served. The court will treat K Square's motion as addressed to the amended pleading.

The amended third-party complaint contains five causes of action sounding in contribution, architectural malpractice, common-law and contractual indemnification and breach of contract.

K Square argues that Farinella's claims for contribution and common law indemnification do not state viable causes of action because in the action in chief plaintiffs claim to have sustained their damages as a result of Farinella's faulty zoning analysis, not vicariously as a result of any of the work done by K Square. With respect to Farinella's claims for contractual indemnification and breach of contract, K Square argues that they cannot be sustained because there was no contract between the parties.

Farinella counters that under the standards applicable to a motion to dismiss pursuant to CPLR 3211(a)[7], it has sufficiently pleaded causes of action for contribution and indemnification based on K Square's negligence in performing the architectural services rendered to Farinella. Farinella does not dispute K Square's contention that there was no contract; rather, it counters that by its professional negligence K Square breached a duty independent of any contractual obligations to Farinella.

It is undisputed that there is no contract between K Square and Farinella. Farinella cannot state a cause of action for breach of contract without first alleging the existence of a

contract and specifying which particular covenant in that contract defendants breached. Thus, this cause of action cannot stand. "[U]nless a court can determine what the agreement is, it cannot know whether the contract has been breached" (Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation, 74 NY2d 475, 482 [1989], rearg den 75 NY2d 863 [1990], cert den 498 US 816 [1990]).

Similarly, contractual indemnification is just that -- indemnification provided for by a contract between the parties, which will be enforced "as long as the intent to assume such a role is 'sufficiently clear and unambiguous'" (Bradley v. Earl B. Feiden, Inc., 8 NY3d 265, 274 [2006], [citations omitted]). No such contract obligating K Square to indemnify Farinella is alleged by Farinella. Hence, Farinella cannot seek contractual indemnification from K Square (see SSDW Company v. Feldman-Misthopoulos Associates, 151 AD2d 293, 295 [1st Dept 1989]). "[T]he law is clear that in New York there is no liability to indemnify unless it is plainly spelled out in the contract" (Rosado v. Proctor & Schwartz, Inc., 106 AD2d 27, 30 [1st Dept 1984], affd 66 NY2d 21 [1985], [citations omitted]).

Neither can Farinella state a claim for common-law indemnification. Traditionally, common-law indemnification has been available in the absence of a contract to help a non-culpable party who is vicariously liable recover the payments it was compelled to make from the party which is actually culpable (see McDermott v. City of New York, 50 NY2d 211, 217 [1980], rearg den 50 NY2d 1059 [1980], [citations omitted]). Thus, to recover under this theory, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held

liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240(1)" (Correia v. Professional Data Management, Inc., 259 AD2d 60, 65 [1st Dept 1999]). Given that K Square's liability may spring only from its failure to catch Farinella's mistake, Farinella clearly cannot seek common-law indemnification from K Square. "Since the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (Trustees of Columbia University in the City of New York v. Mitchell/Giurgola Associates, 109 AD2d 449, 453 [1st Dept 1985]).

In contrast, "all that must be shown ... to set forth a viable claim for contribution is that both [K Square and Farinella] owed a duty to ... plaintiff[s] and that both contributed to ... plaintiff[s]' harm by breaching their respective duties" (Tower Building Restoration, Inc. v. 20 East 9th Street Apartment Corp., 295 AD2d 229 [1st Dept 2002]). Farinella may allege professional malpractice against K Square as the basis of a claim for contribution under CPLR 1401. To state such a claim, Farinella must allege that K Square failed to "employ[] the skill and knowledge ordinarily possessed and used by proficient architects in the area" and such failure contributed to plaintiffs' damages (Pipe Welding Supply Co., Inc. v. Haskell, Conner & Frost, 61 NY2d 884, 885 [1984]; see also Tower Building Restoration, Inc. v. 20 East 9th Street Apartment Corp., *supra*, 295 AD2d at 229-230, [citations omitted]).

In ascertaining the viability of a claim for contribution the First Department has at various times defined the dispositive factor as "the measure of damages sought" (Rockefeller University v. Tishman Construction Corporation of New York, 240 AD2d 341, 343 [1st Dept

1997], ly den 91 NY2d 803 [1997]), "the existence of the duty owed to plaintiff" (Trustees of Columbia University in the City of New York v. Mitchell/Giurgola Associates, supra, 109 AD2d at 455-456), and the role played by the prospective defendant's breach of duty "in causing or augmenting the injury for which contribution is sought" (Trump Village Section 3, Inc. v. New York State Housing Finance Agency, 307 AD2d 891, 896 [1st Dept 2003], ly den 1 NY3d 504 [2003]). Under none of those standards can Farinella state a claim for contribution against K Square.

To seek contribution from K Square Farinella must essentially admit to its own malpractice, since Farinella's only tenable claim against K Square is that it was negligent in not catching Farinella's error and hence is a successive tortfeasor. This in itself is not fatal to Farinella's claim since K Square could be liable as a successor tortfeasor, but it is relevant to the question of damages. Here, plaintiffs are seeking to be compensated for the damages they incurred as a result of Farinella's negligence **before** K Square was hired to draw up the plans. Had K Square caught Farinella's mistake at the first possible opportunity, it would not have reduced plaintiffs' alleged damages prior to that point since the building has already been bought based on unfounded expectations. Nor would plaintiffs' proposed development of the property have been possible if K Square had drawn up the plans in accordance with the correct zoning standards.

The court thus finds that Farinella's claim for contribution based on professional malpractice also cannot be sustained. In assessing a motion under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v. Martinez, 84 NY2d 83, 88 [1994], [citations omitted]). As discussed above,

Farinella has stated a theoretically valid cause of action, but one which is not viable under the facts of this case.²

Accordingly, Farinella's cross-motion to amend the third-party complaint is granted to the extent that the proposed amended third-party complaint attached as exhibit B to Farinella's moving papers is hereby deemed filed and served.

K Square's motion to dismiss, as addressed to the amended pleading, is granted in its entirety.

This decision constitutes the order of the court.

DATED: Oct. 4, 2007

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J.S.C.
LOUIS B. YORK
J.S.C.

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NEW YORK
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² This dismissal must be without prejudice to Farinella's resurrection of the claim should plaintiffs amend their complaint to seek damages causally connected to K Square's alleged negligence.