

**St. James Mech., Inc. v Bd. of Cooperative  
Educ. Servs. of Nassau County**

2008 NY Slip Op 30219(U)

January 17, 2008

Supreme Court, Nassau County

Docket Number: 5768-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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ST. JAMES MECHANICAL, INC.,

Plaintiff,

TRIAL/IAS, PART 4  
NASSAU COUNTY

INDEX No. 015768/06

MOTION DATE: Dec. 12, 2007  
Motion Sequence # 001, 002, 003  
and 004

-against-

THE BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES OF NASSAU  
COUNTY,

Defendant.

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THE BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES OF NASSAU  
COUNTY,

Third-Party Plaintiff,

-against-

BARTLETT, AMORUSO & RECCE, P.C.,  
CAPANO AND PARKER ENGINEERS, P.C.  
and PARK EAST CONSTRUCTION CORP.,

Third-Party Defendants.

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The following papers read on this motion:

Notice of Motion.....	XXX
Cross-Motion.....	X
Affirmation in Opposition.....	XXXXXX
Affirmation in Further Support.....	X
Reply Affirmation .....	XXX
Memorandum of Law.....	XXXXXX

This motion, by third-party defendant Park East Construction Corp., to dismiss the third-party complaint is **granted** in part and **denied** in part; the motion, by third-party defendant Park East Construction Corp., to dismiss the cross-claim of third-party defendant Capano and Parker Engineers, P.C. is **granted**; the motion, by plaintiff St. James Mechanical Inc., to consolidate the above action with No. 9873/06 is **granted** to the extent of a joint trial; and the motion, by third-party defendant Capano and Parker Engineers, P.C., to dismiss the third-party complaint is **denied**.

This is an action to recover the unpaid balance of the contractor's fee under a construction contract. Plaintiff St. James Mechanical, Inc. was awarded the contract to perform the heating, ventilating, and air conditioning work on the Career Development Center owned by defendant Board of Cooperative Educational Services of Nassau County ("BOCES"). The Career Development Center is located at 111 Cantiague Rock Road in Westbury.

The additions and alterations to the Career Development Center were part of a larger project involving the improvement of several different facilities owned by BOCES. On January 21, 2003, BOCES engaged third-party defendant Bartlett, Amoroso & Recce, P.C. to perform the architectural work in connection with the entire project. The written contract between BOCES and Bartlett, Amoroso provided that the architect was to research applicable regulations, prepare an estimate of the cost of construction, prepare design development and construction documents, compile a project manual including technical specifications, prepare bidding documents, assist the owner in obtaining bids, visit the site periodically, resolve design issues in the field, and determine whether the work was proceeding in accordance with the contracts. The architect was also to perform all structural, mechanical, and electrical engineering services in connection with the project. The contract provided that the architect's compensation for these services was 6% of the construction cost.

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The contract provided that Bartlett, Amoroso was authorized to retain consultants for the project, including mechanical and engineering consultants, subject to the owner's approval. On June 30, 2003, Bartlett, Amoroso hired third-party defendant Capano and Parker Engineers, P.C. to perform design and consulting work on the BOCES project. The letter agreement between Bartlett, Amoroso and Capano and Parker provides that the engineering firm will be compensated for "MEP Engineering Services" at the rate of 4% of the "final mechanical, electrical, and plumbing construction contract awards." The agreement further provides rates of compensation for site engineering services and for structural engineering services, depending upon whether the services involve a "defined scope of work."

On July 10, 2003, BOCES entered into a construction management contract with third-party defendant Park East Construction Corp. for the work to be performed on the Career Development Center. Among other responsibilities, the contract required the construction manager to "provide recommendations and advice to the owner as required to coordinate the work of the contractors with one another." The construction manager was also to review all "working drawings," assist the owner and the architect in procuring contractors, and assist the architect in achieving satisfactory performance from each of the contractors. However, the agreement provided that it was not to be "construed or interpreted so as to require or allow the construction manager to assume any duty, role, obligation, or responsibility to perform any function, task, [or] activity...properly that of the architect." Park East was to be paid \$495,000 for being the construction manager for the Career Development Center.

On March 30, 2004, St. James submitted a sealed bid to perform the heating, ventilating, and air-conditioning work on the Career Development Center for \$753,750. The bid was submitted on a proposal form prepared by Bartlett, Amoroso and subject to a "Project Manual" which had been compiled by the firm. Division 15 of the Project Manual is entitled "Mechanical," and subdivision 15B refers to "Heating, Ventilating, and Air-Conditioning". BOCES accepted St. James' bid and awarded it a contract on May 25, 2004. The contract called for the work to be performed by August 15, 2005.

However, even before the completion date it became apparent that the air conditioning system was not functioning properly. On July 13, 2005, Park East Facility Solutions, an air conditioning consultant, submitted a report to Bartlett, Amoroso. According to the report, oversized units was causing excessive air flow and high electricity consumption. On August 8, 2005, Capano and Parker notified BOCES that

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the "bypass box," a component of the air conditioning system installed in the second floor classroom of the Career Development Center, was "incorrectly specified as KLB-08 instead of KLB-18." According to Capano and Parker, the bypass box which had been installed was not too large, but rather too small for the specified airflow, and was generating excessive noise.

On August 30, 2005, Ciro Capano, an engineer with Capano and Parker, wrote to Bartlett, Amoroso concerning the HVAC system installed in the Career Development Center. According to Capano, the plans called for large-size fans and ductwork to provide the capacity for increased ventilation in the future, as occupancy increased. However, because the fans were generating an air flow greater than current requirements, a "balancing program" was necessary to ensure that the system was operating efficiently. Capano's letter suggests that St. James had requested additional compensation, claiming that they were obligated to make only "one change of sheave size" pursuant to their contract.

On October 6, 2005, Park East wrote to St. James, advising them that Island Insulation Contracting, one of St. James' vendors, had filed a public improvement lien in the amount of \$15,250. The lien was to secure payment for ventilating and air conditioning equipment which Island Insulation had supplied to the Career Development Center. Park East further advised St. James that their current payment application would not be granted until the public improvement lien was satisfied. On January 3, 2006, Park East wrote to St. James, enclosing a "punch list" of thirteen items claimed to be outstanding under the terms of the contract. On June 16, 2006, Park East wrote to St. James, notifying them that BOCES would hire another contractor if St. James did not complete the work within 24 hours.

This action for breach of contract was commenced by St. James on September 26, 2006. Plaintiff seeks to recover \$84,514.73, that sum being the difference between the agreed price and the payments which it received on the contract. Plaintiff also seeks to recover this amount on the theory of an account stated.

On July 10, 2007, BOCES filed a third-party complaint against Bartlett, Amoroso, Capano and Parker, and Park East Construction. In the third-party complaint, BOCES alleges that the heating, ventilating, and air-conditioning system installed at the Career Development Center did not maintain uniform temperatures throughout the building. BOCES alleges that Bartlett, Amoroso, the architect, and Park East, the construction

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manager, breached their contracts with BOCES. BOCES alleges that it is a third-party beneficiary of the contract between Bartlett, Amoroso and the engineering firm, Capano and Parker, and seeks damages also with respect to that contract. Finally, BOCES asserts claims for professional malpractice against each of the third-party defendants. In its answer to the third-party complaint, Capano and Parker cross-claims against Bartlett, Amoroso and Park East for contribution or indemnity.

Park East's motion to dismiss the third-party complaint

Park East moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) on the ground of a defense founded upon documentary evidence and pursuant to CPLR 3211(a)(7) on the ground of failure to state a cause of action. Park East alleges that the failure of the heating, ventilating system to operate properly is due to a defect in the design of the system. Park East asserts that it cannot be held liable for breach of the construction management contract because St. James performed the heating, ventilating, and air conditioning work in accordance with the terms of its contract. Park East argues that as a construction manager, it cannot be held liable for professional malpractice.

As noted, Sec. 3(b)(4) of the construction management agreement required Park East to "assist the owner's architect to achieve satisfactory performance from each of the contractors hired to perform the work of the project." The responsibility to interpret a contract falls upon the court, which must ascertain the intention of the parties from the language which they have employed (Lui v. Park Ridge Ass'n, 196 AD2d 579, 580, 2<sup>nd</sup> Dept., 1993). For purposes of determining responsibility for workplace safety, the construction manager is ordinarily charged with the duty of coordinating all aspects of a construction project (see, Nienajadlo v. Infomart New York, 19 AD3d 384, 2<sup>nd</sup> Dept., 2005). The construction manager's duty of overseeing the construction work extends to all the "various trades" involved at the construction site (Brennan v. 42nd Street Development Project, 10 AD3d 302, 1<sup>st</sup> Dept., 2004) [Andrias, J. dissenting].

Pursuant to the provision that the construction manager is to assist the architect in achieving satisfactory performance from the contractors, Park East was under a duty to ensure that the air conditioning contractor installed equipment in compliance with the technical specifications of the contract. Park East's duty to coordinate the project might extend to making good faith efforts to ensure that design professionals, that is architects and engineers, perform their work promptly and in coordination with each other. However, the construction manager's duty to assist the architect in achieving satisfactory

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performance cannot extend to reviewing the quality of professional services rendered by the architect himself or by a mechanical engineer retained to assist the architect.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the third-party complaint as true and provide third-party plaintiff the benefit of every possible favorable inference (**AG Capital Funding Partners v. State Street Bank and Trust Co.**, 5 NY3d 582, 591, 2005). Giving BOCES the benefit of every favorable inference, the court must assume, on Park East's motion, that the failure of the air conditioning system to operate properly was due, not to any defect in the plans prepared by the architect or the engineer, but to St. James' installation of equipment which did not comply with the terms of the contract. Thus, the third-party complaint adequately alleges that Park East breached its promise to assist the architect in achieving satisfactory performance by failing to report St. James' installation of air conditioning equipment which was not in compliance with the terms of the contract. Accordingly, Park East's motion to dismiss the third-party complaint for failure to state a cause of action or a defense founded upon documentary evidence is **denied** as to BOCES' third-party claims against Park East for breach of contract.

The court reaches a contrary conclusion as to BOCES' third-party claims against Park East for professional malpractice. It has been said that "Malpractice is the negligence of a professional toward a person for whom a service is rendered" (**Santiago v. 1370 Broadway Associates**, 264 AD2d 624, 1<sup>st</sup> Dept., 1999). While the definition of "professional" varies depending upon the context in which it is used, it refers to the learned professions for purposes of applying the malpractice statute of limitations (**Chase Research v. NIA Group**, 96 NY2d 20, 29, 2001). The qualities shared by members of these professions include extensive formal education and training, licensure and regulation, a code of professional conduct, and a system of discipline for its violation(Id). Traditionally, the "professionals" who are subject to malpractice liability include doctors, lawyers, engineers, architects, and accountants(Id at 30).

The court concludes that construction managers do not share the qualities of these professions. While a period of training and licensing may be necessary to become a contractor, it does not appear that construction management has formal education requirements. Construction managers may be required to comply with the building code, but they are not subject to a code of conduct or professional discipline. Although a construction manager may be liable for negligence, (see **Reiner v. Dormitory Authority**,

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266 AD2d 443, 2<sup>nd</sup> Dept., 1999), construction managers are not professionals who are subject to liability in a malpractice action. Accordingly, Park East's motion to dismiss the third-party complaint for failure to state a cause of action is **granted** as to BOCES' third-party claims for professional malpractice.

Park East's motion to dismiss Capano and Parker's cross-claim

Park East moves, pursuant to CPLR 3211(a)(7), to dismiss Capano and Parker's cross-claim for contribution or indemnity on the ground of failure to state a cause of action. Since there is no contractual privity between these parties, Capano and Parker's cross-claim is based on common law contribution or indemnity.

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. Purely economic loss resulting from a breach of contract does not constitute "injury to property" within the meaning of CPLR § 1401 because the existence of "some form of tort liability is a prerequisite to application of the statute (**Board of Education v. Sargent, Webster, Crenshaw & Foley**, 71 NY2d 21, 26, 1987). If contribution were permitted where economic loss arises from a breach of contract, damages might not be limited to those reasonably foreseeable at the time the contract was formed (Id at 28). Where no legal duty independent of the contractual obligation to supervise construction is claimed to have been breached, merely alleging a breach of the "duty of due care" will not transform a simple breach of contract into a tort claim (Id at 29).

Capano and Parker's cross-claim for contribution or indemnity is based, not on tort liability, but rather on Park East's breach of its duty of due care with respect to the performance of its construction manager contract. The court concludes that such a claim is not cognizable under CPLR § 1401. Accordingly, third-party defendant Park East's motion to dismiss third-party defendant Capano and Parker's cross-claim for contribution or indemnity is **granted**.

Capano and Parker's motion to dismiss the third-party complaint

In the third-party complaint, BOCES alleges that it is a third-party beneficiary of the contract between Bartlett, Amoroso and Capano and Parker. Capano and Parker moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) on the grounds

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of a defense founded upon documentary evidence, pursuant to CPLR 3211(a)(3) on the ground of lack of standing, and CPLR 3211(a)(7) on the ground of failure to state a cause of action.

Parties asserting third-party beneficiary rights under a contract must establish: 1) the existence of a valid and binding contract between other parties, 2) that the contract was intended for their benefit, and 3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost (Mendel v. Henry Phipps Plaza West, 6 NY3d 783, 786, 2006). The "intent to benefit" test is frequently difficult to apply to construction contracts because of "the multiple contractual relationships involved and because performance ultimately, if indirectly, runs to each party of the several contracts" (Port Chester Electrical Construction Corp. v. Atlas, 40 NY2d 652, 655-56, 1976). In Port Chester, the Court of Appeals stated that the general rule is that if the construction contract does not expressly state that the intention of the contracting parties is to benefit a third-party, third-parties who contract with the promisee are merely incidental beneficiaries (Id at 656). However, the decision indicates that this rule applies primarily where a subcontractor sues the owner of the project.

As noted, on this motion to dismiss, the court is required to give the third-party plaintiff the benefit of every favorable inference. Thus, at this stage, the court must assume that the agreement between Bartlett, Amoroso and Capano and Parker was intended to benefit BOCES, the owner of the project. Furthermore, with respect to Capano and Parker's motion to dismiss, the court must assume that the failure of the air conditioning system to operate properly was due, not to improper installation by St. James, but rather improper design by Capano and Parker. Finally, the rule prohibiting contribution for economic loss arising from breach of contract does not bar BOCES' third-party claim for breach of contract based upon its third-party beneficiary status. The court concludes that BOCES has sufficiently stated a claim against Capano and Parker for breach of contract.

The court also concludes that BOCES has stated a claim against Capano and Parker for malpractice. An architect's duty of professional care arises out of the contractual relationship between the architect and the client (Sears, Roebuck & Co. v. Enco Associates, 43 NY2d 389, 396, 1977). While an engineer's duty of professional care also arises out of the contractual relationship, that duty is not owed solely to the party with whom the contract is made and may enure to the benefit of others (White v.

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Guarante, 43 NY2d 356, 363, 1977). The duty extends to a "fixed, definable, and contemplated group" who may rely upon the engineer's services being performed properly(Id at 362). The court concludes, that when an engineer enters into a consulting contract with an architect, it is contemplated by the parties that the engineer's duty of reasonable care will run to the owner of the project. If Capano and Parker departed from the duty of professional care in designing the air conditioning system, the firm may be liable to BOCES for professional malpractice. Accordingly, third-party defendant Capano and Parker's motion to dismiss the third-party complaint is denied.

Plaintiff's motion to consolidate

Plaintiff moves to consolidate the present action with an action brought against St. James and its bonding company by Carrier Sales and Distribution, LLC, No. 9873/06. In the Carrier Sales action, the plaintiff seeks to recover \$20,901 as the outstanding balance for heating, ventilation, and air conditioning equipment which it supplied to the Career Development Center. In support of the motion to consolidate, St. James alleges that it "subcontracted" its work to Carrier Sales. Thus, it appears that in the present action St. James is seeking to recover for equipment provided by Carrier. Moreover, it appears that the malfunctioning of the equipment provided by Carrier gave rise the third-party complaint in the present action. The Carrier Sales action is also pending in this court. Park East and Capano and Parker oppose consolidation on the ground that the Carrier Sales action is purportedly ready for trial.

CPLR § 602(a) provides that when actions involving a common question of fact or law are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning the proceedings as may tend to avoid unnecessary costs or delay. Whether to grant consolidation or joint trial is within the discretion of the court, and the primary considerations are the interests of justice, judicial economy, and avoiding prejudice (Amcan Holdings, Inc. v. Torys, 32 AD3d 337, 1<sup>st</sup> Dept., 2006). Where two actions arise from the same construction project, and the same or similar acts or omissions caused the breach of two or more contracts, a common question is presented (Perini Corp. v. WDF, Inc., 33 AD3d 605, 2<sup>nd</sup> Dept., 2006). Delay of trial is not a sufficient basis for denying relief(Id). Where the actions involve different plaintiffs, a joint trial, rather than consolidation, is the more appropriate remedy(Id).

The court concludes that No. 9873/06 and the present action involve the common

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question of whether St. James fully performed its contract. It does not appear that third-party defendants will be prejudiced if the actions are tried jointly. Accordingly, plaintiff's motion for consolidation is **granted** to the extent that the present action and No. 9873/06 will be tried jointly. Responsive pleadings shall be served and filed within 20 days after service of a copy of this order upon all counsel by plaintiff's counsel.

A Preliminary Conference has been scheduled for March 3, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

This shall constitute the decision and order of the court.

Dated JAN 17 2008

*Stephen A. Severia*  
\_\_\_\_\_  
J.S.C.

**ENTERED**

JAN 22 2008

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE