

Turbo Enters., Inc. v Structuretone (UK), Inc.

2008 NY Slip Op 31607(U)

June 9, 2008

Supreme Court, New York County

Docket Number: 0602080/2007

Judge: Helen E. Freedman

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 602080/2007

TURBO ENTERPRISES, INC.

vs

STRUCTURETONE [UK]

Sequence Number : 002

DISMISS

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 06/09/08

HGN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----X
TURBO ENTERPRISES, INC.,

Plaintiff,

Index No. 602080/07

-against-

STRUCTURETONE (UK), INC., L.M. SCOFIELD
COMPANY, ACE WESTCHESTER SPECIALTY
GROUP, ILLINOIS UNION INSURANCE COMPANY,
and ACE INA HOLDINGS INC.,

Defendants.

FILED
JUN 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HELEN E. FREEDMAN, J.:

In an action by a subcontractor to recover monies due to it for leveling the floor on the third story of Tiffany's, 727 Fifth Avenue, New York, defendant L.M. Scofield Company ("Scofield"), the manufacturer of chemical products used in the flooring, moves to dismiss the cross-claims for indemnity and contribution brought against it by defendant Structuretone (UK), Inc. ("Structuretone"), the general contractor responsible for the interior renovation project at that site. For the reasons set forth below, Scofield's motion seeking dismissal of the cross-claims against it is granted.

Background

The Complaint alleges that Structuretone hired plaintiff Turbo Enterprises, Inc. ("Turbo") to level the rough concrete floor of the store's third floor so that carpet could be laid on a smooth surface. To that end, Turbo purchased "primer" and "leveling" materials manufactured by Scofield from a non-party distributor and applied them to the floor. Some time after the carpet was installed by a non-party agent of Structuretone, and the floor fitted out with store display

cases, Structuretone advised Turbo that the floor was exhibiting some defects. Assuming that Scofield's products had separated from the concrete floor, Structuretone hired other companies to remove the carpet, strip the entire area of the leveling materials, and re-level the floor. Structuretone then "backcharged" Turbo for the construction work done using Scofield's products.

Thereafter, Turbo filed a lawsuit in this Court claiming breach of contract (first cause of action), breach of implied contract (second cause of action) and negligence in the performance of a contract (third cause of action) against Structuretone. The Complaint also alleged claims against Scofield for breach of implied warranties of merchantability (fourth cause of action) and fitness for a particular purpose (fifth cause of action), and against Turbo's insurers for breach of contract (sixth cause of action). Turbo seeks damages in a sum equal to the amounts "backcharged" by Structuretone.

Before any answer was filed, Scofield moved to dismiss all claims asserted against it in the Complaint. By order and decision dated March 20, 2008 (the "Prior Decision"), this Court granted Scofield's motion in its entirety, thereby dismissing the fourth and fifth causes of action for breach of the implied warranties, based on the rationale that the implied warranties do not run from a remote manufacturer to a buyer suing for economic loss only. However, soon after that motion was made, Structuretone filed an answer to the Complaint containing cross-claims against Scofield and defendants insurers for contribution and indemnity. Scofield now moves, pursuant to CPLR 3211(a)(7), seeking dismissal of both the cross-claims for contribution and indemnity.

Discussion

Scotfield contends that the cross-claims should be dismissed as against it because neither contribution nor indemnity are available for breach of contract or negligent performance of contract claims. Structuretone opposes the motion and argues that it is entitled, at a minimum, to contribution with respect to the negligent performance of contract claim.

Contribution – It is well established that there is no common-law right to contribution for contract claims. *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21 (1987). Contribution is unavailable where, as here, the damages sought are merely for the economic loss of a contractual bargain. *Board of Managers v. 195 Hudson Street Assocs.*, 37 A.D.3d 312 (1st Dep’t 2007). Since the first and second causes of action in the Complaint allege only breach of contract, they cannot form the basis of a valid cross-claim for contribution against Scotfield.

Similarly, Structuretone may not maintain a cross-claim for contribution based on the third cause of action for negligent performance of contract because that claim, although sounding in tort, merely restates the contractual obligations asserted in the breach of contract claims. “[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” *Clark-Fitzpatrick v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987); *see also Megaris Furs v. Gimbel Bros.*, 172 A.D.2d 209 (1st Dep’t 1991). Here, Turbo does not claim a legal duty on the part of Structuretone independent of its contractual obligations. As the tort alleged is essentially a breach of contract claim, contribution from Scotfield is unavailable and this cross-claim is dismissed.

Indemnity – Structuretone’s other cross-claim seeks contractual and common-law

indemnification. There is no evidence, and Structuretone does not contend otherwise, that an indemnity agreement existed between Structuretone and Scofield. With respect to common-law indemnification, such a claim requires a finding that the alleged indemnitor owed and breached a duty owed either to the plaintiff on the underlying claim or to the alleged indemnitee. *Raquet v. Braun*, 90 N.Y.2d 177 (1997). In the Prior Decision, this Court has already found that Scofield owed no warranty duty to Turbo for the claims leveled against it. The cross-claim fails to otherwise allege that Scofield owed any other duty to Turbo or Structuretone.

Moreover, it is essential that a party seeking common-law indemnity be free of blame, fault or wrongdoing. *Trump Village Section 3 v. New York State Housing Finance Agency*, 307 A.D.2d 891 (1st Dep't 2003). In other words, a defendant's liability to the plaintiff must be merely vicarious to warrant common-law indemnity from a co-defendant. *Id.* In the underlying claim, Turbo does not seek to hold Structuretone vicariously liable for Scofield's actions. Rather, Turbo claims that the damages arose from Structuretone's own breach of the contract. As such, Structuretone cannot avail itself of common-law indemnification. *See Dormitory Authority of State of New York v. Scott*, 160 A.D.2d 179, 181 (1st Dep't 1990) (holding that common-law indemnification is not available where the damages arise from a defendant's own breach of contract). Thus, the cross-claim for indemnification is dismissed as well.

Based on the foregoing, it is hereby

ORDERED that defendant L.M. Scofield Company's motion to dismiss the cross-claims of defendant Structuretone (UK), Inc., for contribution and indemnity is granted, and that the sixteenth affirmative defense and first cross-claim and the seventeenth affirmative defense and second cross-claim as against the moving party are severed and dismissed, and it is further

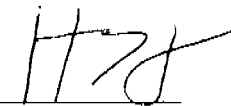
ORDERED that the remainder of the cross-claims against the remaining cross-claim defendant and that the remainder of the action is continued, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the parties are directed to appear for a status conference on July 29, 2008, at 9:30 a.m. in courtroom 208, 60 Centre Street, New York, New York 10007.

Dated: June 9, 2008

Enter:



Helen E. Freedman, J.S.C.

FILED
JUN 12 2008
COUNTY CLERK'S OFFICE
NEW YORK