

Onebeacon Ins. Co. v Winden, LLC

2008 NY Slip Op 32294(U)

August 14, 2008

Supreme Court, New York County

Docket Number: 0108543/2007

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.
Justice

PART 1

Index Number : 108543/2007

INDEX NO. 108543/07

ONEBEACON INSURANCE

MOTION DATE _____

vs
WINDEN, INC.

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

DISMISS

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ -- Affidavits -- Exhibits ...

1,2
3
4
5
6

Answering Affidavits -- Exhibits from Two Cousins Traveling Corp

Cross-Motion + Answering Affs. with.

~~Replying Affidavits~~ Answering Affs with. to Cross-Motion

Replying Affs. + with

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance
with the attached decision and order.

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

FILED

AUG 18 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 14, 2008

MARTIN SHULMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
ONEBEACON INSURANCE COMPANY
A/S/O ESTATE OF EILEEN DIOGUARDI,
Plaintiff,

Action No. 1 Index No. 108543/07

-against-

WINDEN, LLC, TRIBECA TERRACE DEVELOPMENT,
INC. and VERSATILE CONSULTING & TESTING
SERVICES,
Defendants.

-----X
WINDEN, LLC, and TRIBECA TERRACE
DEVELOPMENT, INC.,
Third-Party Plaintiffs,

-against-

Third-Party Index No. 590031/08

TWO COUSINS TRUCKING CORP., F&A
CONTRACTING CO. s/h/a F&A CONTRACTORS,
DIAMOND POINT EXCAVATING CORP., SANO
CONSTRUCTION CORP., WINDSTAR CONSTRUCTION
CORP. d/b/a WINSTAR CONSTRUCTION CORP. d/b/a
WINDSTAR CONSTRUCTION INC., TC CONSTRUCTION
LLC., SHEN CHANG CONSTRUCTION, INC., VERSATILE
CONSULTING AND TESTING SERVICES, INC., IMPACT
CONCRETE & CONTROL INSPECTIONS, INC., LIN
ASSOCIATES ARCHITECTS, P.C., S.S.T. CONSULTANT,
INC., RAYMOND CHAN ARCHITECT P.C., WAI-LEUNG NG,
METAL STONE CONSTRUCTION, INC., 1ST CLASS
WRECKING CORP., EURO CONTRACTING, INC./LLC.,
and TRENCH TECH INDUSTRIES, LLC.,

Third-Party Defendants,

FILED
AUG 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
DIOGUARDI FAMILY REALTY, LLC.,
Plaintiff,

-against-

Action No. 2
Action Consolidated Under
Index No. 108543/07

WINDEN, LLC and TRIBECA DEVELOPMENT INC.,
Defendants.

-----X

MARTIN SHULMAN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition. Third-party defendant Wai-Leung Ng ("Ng") moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the third-party complaint and all claims asserted against Ng. Defendants and third-party plaintiffs Winden, LLC/Winden, Inc. ("Winden") and Tribeca Terrace Development, Inc. ("Tribeca") oppose the motion and cross-move, pursuant to CPLR 3124, for an order compelling third-party defendant Versatile Consulting & Testing Services ("Versatile"), to provide outstanding discovery. Versatile opposes the cross-motion. Third-party defendants Lin & Associates Architects, P.C. ("Lin") and S.S.T. Consultants, Inc. ("SST") move, pursuant to CPLR 3211 (a) (1), (5) and (7), or, in the alternative, pursuant to CPLR 3212, for an order dismissing the third-party complaint. Winden and Tribeca oppose the Lin/SST motion. Two Cousins Trucking Corp. ("Two Cousins") opposes both the Ng motion and the Lin/SST motion.

The plaintiffs in actions number one and two above, Estate of Eileen Dioguardi and Dioguardi Family Realty, LLC (collectively, "Dioguardi"), own the building located at 135-16 Roosevelt Avenue in Queens, New York (the "building"). The plaintiff in action number one, Onebeacon Insurance Company ("Onebeacon"), insured the building.

Action number one is a subrogation action seeking to recover the sum of \$87,156.44 for damage to the building allegedly caused by negligent excavation of the abutting parcel. Action number two is a direct action seeking to recover the sum of \$750,000.00 for additional damage to the building, also caused by negligent excavation of the abutting parcel.

Winden and Tribeca were constructing a 12 story (nine stories plus a three story cellar), 57,000 square foot mixed use building located at 135-11 40th Road in Queens. It

is alleged that the defendants, in excavating for their project, failed to protect the plaintiffs' abutting building by failing to provide adequate underpinning and shoring. The defendants in actions number one and two above are Winden, the owner of the abutting parcel, Tribeca, the general contractor, and Versatile, the structural engineer. In action number one, Winden and Tribeca have impleaded, in a third-party complaint setting forth 51 causes of action, the various sub-contractors and design professionals involved in the construction.

The moving third-party defendant Lin was the first architect retained by Winden on the project. On July 16, 2004, Winden retained third-party defendant Raymond Chan Architect, P.C. ("Chan") to replace Lin as architect. The moving third-party defendant Ng is an engineer engaged by Chan to prepare and review structural drawings, and to perform eight job site visits. The moving third-party defendant SST is a consulting engineer retained by Lin to, among other things, design the underpinning and foundation.

The third-party complaint sets forth causes of action against Lin for breach of contract (thirtieth), breach of an agreement to indemnify (thirty-first), engineering malpractice (thirty-second) and breach of an agreement to procure insurance (thirty-third). Similarly, the third-party complaint sets forth causes of action against SST for breach of contract (thirty-fourth), breach of an agreement to indemnify (thirty-fifth), engineering malpractice (thirty-sixth) and breach of an agreement to procure insurance (thirty-seventh). The third-party complaint sets forth the same causes of action against Ng for breach of contract (forty-second), breach of an agreement to indemnify (forty-

third), engineering malpractice (forty-fourth), and breach of an agreement to procure insurance (forty-fifth).

In support of their motion to dismiss the third-party complaint, third-party defendants Lin and SST argue that the causes of action for breach of contract should be dismissed because neither Lin nor SST was obligated to either indemnify third-party plaintiffs, or procure insurance on their behalf. It is also argued that the third-party claims are barred by a general release signed by Winden on August 11, 2004. Finally, it is argued that the negligence claim should be dismissed because Lin and SST did not prepare the plans purporting to protect the abutting building, and they were not responsible for supervising construction.

In support of its motion to dismiss the third-party complaint for legal insufficiency, Ng alleges that its agreement specifically excludes, among other things, earthwork, excavation, backfill and pile specs. Ng argues that all contribution and common-law indemnification claims should be dismissed since Ng neither owed, nor breached, any duty to the plaintiffs. It is also argued that all claims for contractual indemnification and for failure to procure insurance should be dismissed because Ng's agreement with Chan did not obligate Ng to either indemnify or insure anyone.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001]; Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference

(Leon v Martinez, 84 NY2d 83 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). "[A]ny deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582, 591 [2005]; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]). The credibility of the parties is not under consideration (S. J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338 [1974]).

On a motion to dismiss pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (Goshen v Mutual Life Insurance Co. of N.Y., 98 NY2d 314 [2002]). Where the parties have set down their agreement in a clear, complete document, the writing should be enforced according to its terms (Reiss v Financial Performance Corp., 97 NY2d 195 [2001]).

Turning first to the third-party claims for failure to procure insurance, the movants Ng, Lin and SST would have no duty to procure insurance unless a contract requiring them to name Winden and Tribeca as additional insureds was in existence (Bussanich v 310 East 55th Street Tenants, 282 AD2d 243 [1st Dept 2001]). Third-party plaintiffs are unable to point out the existence of such a contract, and its non-existence is established by the moving third-party defendants Ng, Lin and SST. Therefore, the motions to dismiss the third-party claims for breach of an insurance procurement clause must be granted.

Turning to the remaining third-party claims, the architect Lin and the engineers Ng and SST's duties of professional care extend to both the client and to those members of

a limited class whose reliance on the service was, or at least should have been, specifically foreseen (Gordon v Holt, 65 AD2d 344 [4th Dept 1979]). The failure to use due care in design or supervision allows recovery of both tort and contract damages (Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C., 91 NY2d 256 [1998]; Sears, Roebuck & Co. v Enco Associates, Inc., 43 NY2d 389 [1977]). A viable tort claim against a professional requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity (Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417 [1989]).

Here, the relationship between, on the one hand, the architect Lin and the engineers Ng and SST, and on the other hand, the plaintiff owner of the abutting real estate, was so close as to be the functional equivalent of contractual privity. It is clear that the designers of a building understand that an abutting owner is depending on them to avoid damaging the abutting building.

Moreover, contrary to Lin's assertion, its agreement at paragraph IV.19 very clearly states that Lin will provide "structural design and specifications for foundation" (exhibit A to Lin affidavit). SST's agreement with Lin also clearly calls for SST to design the underpinning and the foundation. Accepting the facts alleged in the complaint as true, and determining only whether or not the facts alleged fit within any cognizable legal theory (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]), the court finds that the third-party complaint's causes of action are adequately pled against Lin and SST. In addition, the third-party plaintiffs' allegation that Ng was aware that the purpose of its engineering services was for the third-party plaintiffs' renovation project,

and that its drawings, plans and recommendations would be used by the third-party plaintiffs for the project, suffice to show the functional equivalent of privity and state a cause of action for negligence (Samuels v Fradkoff, 38 AD3d 208 [1st Dept 2007]).

Turning to the causes of action for breach of an agreement to indemnify, a claim for indemnification must be based on either an express contract, or the common-law theory of implied indemnification. In an unusual case, the right to apportionment may arise from the duty owed from the contributing party to the party seeking contribution (Garrett v Holiday Inns, 58 NY2d 253 [1983]; Nolechek v Gesuale, 46 NY2d 332 [1978]). The critical requirement for apportionment is that the breach of the duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought (Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599 [1988]).

On its face, the third-party complaint alleges that the breach of a duty by Ng, Lin, and SST had a part in causing or augmenting the injury for which contribution is sought. Therefore, the motions to dismiss the causes of action for indemnification for legal insufficiency must be denied.

Despite the fact that Winden's and Tribeca's claims (other than the causes of action for failure to procure insurance) are facially sufficient, they must nevertheless be dismissed against Ng, Lin and SST based on the documentary evidence. The claims against Ng are barred by the terms of the contract between Ng and Chan, and the claims against Lin and SST are barred by the release entered into between Winden and Lin.

The single-page contract between Ng as consulting engineer, and Chan as architect (exhibit A to Ng's motion), by its terms, specifically excludes from the scope of Ng's work "(e)arthwork, excavation, backfill and pile specs." Therefore, it is clear that Ng never undertook the design of the shoring required by the excavation work. The document conclusively establishes a defense to the asserted third-party claims against NG, as a matter of law. Similarly, the release dated August 11, 2004, entered into between the architect Lin and the owner Winden, by its terms, bars any third-party action by the owner Winden and "all parties in its employ" against either Lin, or as a party in Lin's employ, Lin's consulting engineer, SST (exhibit M to Lin/SST motion).

In Matter of Schlaifer v Sedlow (51 NY2d 181, 185 [1980]), the Court of Appeals held that:

A general release is based on the assumption that there was a prior valid agreement out of the substantive provisions of which certain asserted claims had arisen, and manifests a subsequent agreement pursuant to which those claims have been given up and released. In legal effect then a general release accompanying a settlement of a substantive dispute is a form of contract termination with respect to the substantive rights of the parties under the original agreement.

Here, by mutual assent of the parties, the third-party plaintiffs' claims against Lin and SST have been given up and released. Therefore, the motion to dismiss the third-party complaint against Lin and SST also must be granted.

Finally, Winden's and Tribeca's cross-motion, pursuant to CPLR 3124, for an order compelling third-party defendant Versatile to provide outstanding discovery is denied as academic. In response to the cross-motion, Versatile has served a discovery response.

Accordingly, it is

ORDERED that the motions by the third-party defendants Wai-Leung Ng, Lin & Associates Architects, P.C. and S.S.T. Consultants, Inc. to dismiss the third-party complaint and all cross claims against them are granted and the third-party complaint is dismissed with costs and disbursement to the third-party defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the action in all other respects continues; and it is further

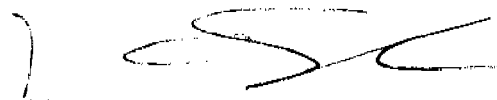
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion for discovery is denied; and it is further

ORDERED that the parties appear for a compliance conference on September 23, 2008 at 9:30 a.m., in Room 1127B at 111 Centre Street, New York, New York. Counsel for Winden and Tribeca is directed to immediately notify all remaining parties of the foregoing conference.

The foregoing constitutes this court's Decision and Order. A courtesy copy of this Decision and Order has been sent to counsel for movants Ng, Lin and SST and cross-movants Winden and Tribeca.

Dated: New York, New York
August 14, 2008



Hon. Martin Shulman, J.S.C.

FILED

AUG 18 2008

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