

**Samuels v Consol. Edison Co. of New
York, Inc.**

2008 NY Slip Op 32838(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 107142/06

Judge: Judith J. Gische

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: GISCHE

PART _____

Index Number : 107142/2004

SAMUELS, WILLIAM C.

VS.

CONSOLIDATED EDISON COMPANY

SEQUENCE NUMBER : 002

DISMISS

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

OCT 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/08

HON. JUDITH J. GISCHE 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 10

-----x

DECISION/ORDER
Index No.: 107142/06
Seq. No. : 002

WILLIAM C. SAMUELS,

Plaintiffs,

-against-

Present:
Hon. Judith J. Gische
J.S.C.

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendant.

-----x
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Index No.: 590831/04

Third-Party Plaintiff,

-against-

ROADWAY CONTRACTING, INC.,

Third-Party Defendant.

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----x
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Index No.: 590089/08

Second Third-Party Plaintiff

-against-

ALEX R. FRADKOFF, individually, ALEX FRADKOFF,
INC., ALEX R. FRADKOFF, INC., HOWARD R.
GOLDIN, individually, HOWARD R. GOLDIN
ARCHITECT, P.C., HOWARD R. GOLDIN
ASSOCIATES, P.C., LEITHLONG CONSTRUCTION
CORPORATION and THEODORE WAGNER
PLUMBING AND HEATING CORP.,

Second Third-Party Defendant.

-----x

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Goldin n/m (3211/3212) w/ HRG affid, JHR affirm, exhs	1
Liethlong n/x-mot (3211/3212) w/ RPF affirm, exhs	2
Con Ed opp w/ WFT affirm, exhs	3
Goldin reply affirm (JHR), exhs	2
Theodore opp w/ KCF affirm	2
Theodore opp w/ KCF affirm	2

Upon the foregoing papers the court's decision is as follows:

This is an action to recover for property damage allegedly caused by defendant Consolidated Edison Company of New York, Inc. ("Con Ed"). The subject of this motion sequence is the second-third party action commenced by Con Ed against Howard R. Goldin, Howard R. Goldin Architect, P.C., Howard B. Goldin Associates P.C. (collectively herein referred to as "Goldin"), Leithlong Construction Corporation ("Leithlong"), Theodore Wagner Plumbing and Heating Corp. ("Theodore"), Alex R. Fradkoff, individually, and Alex Fradkoff Inc.

Goldin and Leithlong each move and cross-move, respectively, pursuant to CPLR §§ 3211 and 3212, to dismiss the second third-party complaint, in lieu of answering. Con Ed opposes the motion in its entirety. Second third-party defendant Theodore has submitted opposition to the motion and cross-motion only to the extent that the movants seek dismissal of Theodore's cross-claims against these parties. None of the other parties have taken a position with respect to the motion and cross-motion, although proof of service of the same has been provided to the court.

At the outset, the court denies Goldin and Leithlong's motion and cross-motion inasmuch as these parties seek relief under CPLR § 3212. Since issue has not been joined, summary judgment relief is not available. CPLR § 3212 (a).

[* 4]

Relevant facts

Plaintiff is the owner of a building located at 138 East 19th Street, New York, New York (the "premises"). Plaintiff alleges that in April 2003, Con Edison performed excavation work upon the sidewalk of East 19th Street, adjacent to the premises. Plaintiff claims that the premises were damaged as a result of three incidents of severe flooding due to Con Ed's work adjacent to the premises. Plaintiff has asserted three causes of action against Con Ed sounding in negligence.

Con Ed thereafter commenced the second third-party action, claiming that work performed by the second third-party defendants caused the damage alleged by plaintiff in the main action. Con Ed has asserted claims for contribution and/or indemnification. As is relevant to this motion, Con Ed claims that Goldin and Leithlow negligently performed architectural services in connection with the renovation of the premises (the "renovation"). Both Goldin and Leithlow maintain that the renovation project was unrelated to the flooding of the basement of the premises.

Goldin and Leithlow state that plaintiff previously commenced a lawsuit against Goldin, Leithlow, as well as other parties, for alleged damages caused to the premises during the renovation (the "prior lawsuit"). On October 3, 2007, plaintiff settled the prior lawsuit and plaintiff, Goldin, Leithlow executed a settlement agreement. The settlement agreement provides as follows:

In an effort to help achieve a settlement of the dispute, [plaintiff] has reduced and withdrawn his claims against the Defendants arising out of water damage in the basement of the Townhouse and damage to the structural wall in the basement on the south side of the Townhouse arising from or relating to [Con Ed's] work in the front of the [premises] which is the subject of the action pending in the Supreme Court of the State of

[* 5]

New York, County of New York between... [plaintiff] and [Con Ed]... bearing Index No. 107142/04 (the "Con Edison Action"). [Plaintiff] expressly releases the Defendants from their share of percentage liability, if any, for any and all contribution claims which have or may be asserted by [Con Ed] in the Con Edison Action. In the event [Con Ed] impleads one or more of the defendants in the Con Edison Action seeking contribution for the claims asserted by [plaintiff], such defendants shall file a motion to dismiss based on the releases exchanged in the Settlement Agreement. In the event such motion to dismiss is denied, [plaintiff] agrees to defend, indemnify and hold such Defendant harmless in connection with such contribution claims asserted by [Con Ed], with counsel of [plaintiff's] choosing.

The settlement agreement was signed by plaintiff and Alex R. Fradkoff, Goldin, Leithlong and Charles G. Michel Engineering, P.C.

Goldin and Leithlong now argue that because they have been released from any and all claims relating to water damage and damage to the structural wall in the basement of the premises, and because they were not involved in the work performed by Con Ed at or adjacent to the premises, Con Ed's claims for contribution and/or indemnification should be dismissed. Con Ed contends that the complaint should not be dismissed because, if the damages alleged by plaintiff are different from those covered by the settlement agreement, then dismissal is unwarranted

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly

contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

Under CPLR § 3211 (a) (1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law” (Leon, supra). In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (id., quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

GOL § 15-108 (b) provides in pertinent part:

Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor... relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

GOL § 15-108 (b) extinguishes all claims for contribution under CPLR article 14 against a settling tortfeasor by a non-settling tortfeasor.(see Chase Manhattan Bank v. Akin, Gump, Hauer & Feld LLP, 309 AD2d 173 [1st Dept 2003]).

Based upon documentary evidence, the motion and cross-motion must be granted. Under the settlement agreement, plaintiff has unequivocally released third-party defendants Goldin and Leithlong from any and all claims asserted in the main action, namely, plaintiff's damages arising out of the flooding and resulting damage in the basement of the premises. Con Ed's argument that Goldin and Leithlong must prove that plaintiff's damages alleged in the complaint are the same as those which plaintiff released Goldin and Leithlong from in the settlement agreement is unavailing.

The plain language of the settlement agreement makes it clear that the damages pertaining therein are one and the same as those alleged in the underlying complaint. Even affording the third-party complaint every favorable inference, there is simply no basis for Con Ed's assertion that the damages asserted in the underlying action are not the same as those covered in the settlement agreement.

Moreover, it is of no moment that plaintiff and Goldin are represented by the same counsel, Zetlin & De Chiara LLP. Con Ed's otherwise unfounded assertion of counsel's impropriety is rejected by the court.

As for Theodore's partial opposition, these arguments are part and parcel of the same unsuccessful arguments advanced by Con Ed, and for the reasons already stated herein, and rejected.

Accordingly, Goldin and Leithlong's motion and cross-motion, respectively, to dismiss the third-party complaint against them and all cross-claims asserted therein against them, are hereby granted in their entirety. The court need not address the parties' remaining contentions.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Goldin's motion is granted in its entirety and the second third-party complaint against Goldin and the cross-claims asserted by Theodore against Goldin are hereby severed and dismissed; and it is further

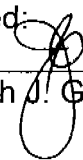
ORDERED that Leithlong's motion is granted in its entirety and the second third-party complaint against Leithlong and the cross-claims asserted by Theodore against

Leithlong are hereby severed and dismissed.

The court hereby schedules a preliminary conference in this matter for October 30, 2008 in Part 10 at 80 Centre Street, Room 122.

Any relief requested but not expressly addressed is hereby denied. This shall constitute the decision and order of the court.

Dated: New York, New York
October 14, 2008

So Ordered:


Hon. Judith J. Gische, JSC

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK