

RCDolner LLC v Samson Mgt., LLC
2008 NY Slip Op 33234(U)
November 20, 2008
Supreme Court, New York County
Docket Number: 100694/07
Judge: Emily Jane Goodman
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: EMILY JANE GOODMAN

PART 17

Index Number : 100694/2007
RCDOLNER LLC
 VS.
SAMSON MANAGEMENT, LLC
 SEQUENCE NUMBER : 002
 PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided per

attached

FIVE DOLLARS
 DEC 05 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 11/20/08

EMILY JANE GOODMAN

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: IAS PART 17

-----X

RCDOLNER LLC,

Plaintiff,

-against-

SAMSON MANAGEMENT, LLC and 50 MADISON
AVENUE, LLC,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

Defendants Samson Management, LLC (Samson Management) and 50 Madison Avenue LLC (50 Madison; collectively with Samson Management, Samson) move for partial summary judgment on their counterclaims, adjudging plaintiff RCDolner LLC (Dolner) (a) liable to Samson for relocation costs in the amount of \$102,406.06 which were paid by Samson to Simon and Ludmila Lorne (the Lornes); (b) liable for the amount of attorneys' fees and other costs and expenses incurred by Samson in responding to the Lornes' claims asserted in *Lorne v 50 Madison Ave LLC*, New York Supreme Court, New York County, Index No. 602769/07 (the *Lorne* action); and (c) declaring that Dolner must indemnify Samson and reimburse Samson for its attorneys' fees and other costs and expenses incurred going forward with respect to all claims in the *Lorne* action and for relocation costs.

FACTS

Index No. 100694/07

FILED

DEC 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of a dispute regarding a major renovation project at 50 Madison Avenue in Manhattan, New York. Samson Management is the managing agent for 50 Madison, the sponsor of the building. Dolner is the construction manager and general contractor for the renovation. The parties' original agreement was modified by an agreement dated May 31, 2006 (2006 Agreement). That agreement provided that Dolner would "complete or reasonably commence to complete and diligently pursue with all best efforts prompt completion of the tasks set forth on the schedule annexed hereto as Exhibit 'A'... ." Order to Show Cause, ex. B., at 1. The 2006 Agreement also addressed various other issues, including subcontractor claims and mechanics' liens, the fire pump room, floor repairs, and punch list items. Additionally, it provided that Dolner would defend and indemnify Samson

from and against any and all claims, causes of action, damages, liabilities, mechanic's liens, and obligations of any nature that may be brought or asserted against Indemnitees, ... in regard to any aspect of this agreement or any work to be performed pursuant to this agreement, including, but not limited to, (a) any claims by Owners ... as to defects in workmanship and/or materials

Dolce Affid., Ex. E, at 11-12.

Dolner performed some of the repair work, and received payment for some work. Dolner acknowledges having received more than \$750,000 under the 2006 Agreement. However, Dolner maintains that it is entitled to compensation for nearly

everything in the 2006 Agreement, while Samson maintains that there were a number of items that Dolner did not correct, and that Dolner failed to defend and indemnify Samson with respect to expenses that Samson incurred as a result of the Lorne action, and as a result of the Lornes having been required to relocate in order to allow the repair work to be done. While there were a number of problems alleged in the Lornes' complaint, the biggest problem, which required their relocation, was that the concrete substrate under their flooring was defective.

Samson seeks indemnification for the relocation and disruption expenses incurred, which, it claims, has amounted to over \$100,000.00. Samson also seeks contractual and common-law indemnification for the claims made by the Lornes which arise from Dolner's work, as well as its attorneys' fees, costs and expenses, dating back to April 12, 2007, which was when Samson put Dolner on formal notice and demanded indemnification. Additionally, Samson seeks a declaratory judgment that Dolner is liable, going forward, to indemnify, defend, and hold Samson harmless with respect to the Lornes' action and their relocation costs.

DISCUSSION

Samson contends that it is entitled to \$102,406.06 for relocation costs paid by Samson to the Lornes. Samson maintains that there is no material fact in dispute as to liability or the

amount due with respect to relocations costs, since the 2006 Agreement provides that Dolner is responsible for "all reasonable costs that the Owners may actually incur due to the disruptive nature of the work" 2006 Agreement, ¶ 5. Samson asserts that even if Dolner disputed the reasonableness of any claim of the Lornes, it was obligated to "defend, indemnify, and hold harmless Samson from such claim or dispute" *Id.*, ¶¶ 5 and 13.

Samson oversimplifies the situation. While it is true that Dolner agreed to defend, indemnify and hold Samson harmless, it is only for those claims arising out of Dolner's work on the building. The Lornes' complaint (Ex. E, Notice of Motion) asserts a cause of action against Samson for fraud based upon Samson's allegedly fraudulent misrepresentation that the visible defects and deficiencies that were noticed during the 2005 pre-closing "walk through" inspection were insignificant, easy to repair, and would be repaired within the period provided in the Lornes' contract. The Lornes assert that Samson knew or should have known that such representations were materially false, and that the Lornes were damaged by their reasonable reliance on those misrepresentations. This cause of action is not based on the poor workmanship, or the results of that poor workmanship, but on Samson's alleged misrepresentations regarding the condition of the unit. Dolner is not responsible to defend or

indemnify Samson with respect to that claim. Samson's argument that, if Dolner had performed its obligations correctly in the first instance, the Lornes would not be asserting the fraud claim, is irrelevant. The fact that Dolner may have been responsible for certain defects does not relieve Samson from any responsibility for allegedly having misrepresented the state of the building during the inspection in 2005.

Unlike in the case of insurance, where a party agrees to defend, indemnify, and hold another party harmless, the 2006 Agreement does not require Dolner to defend Samson with respect to other claims brought in the same action. Therefore, its duty to defend is no broader than its duty to indemnify. See *Steuhl v Home Therapy Equip., Inc.*, 51 AD3d 1101 (3d Dept 2008). Thus, Dolner is not obligated to pay for all of Samson's defense costs in the *Lorne* action. Similarly, it is not obligated to indemnify it against all damages. It is only responsible for those damages that arise out of its faulty work, if any.

Since there is a possibility that the Lornes will obtain a judgment against Samson that does not implicate Dolner, it would be premature to grant Samson the relief requested at this time, even conditionally. In a similar vein, until Samson can demonstrate that the costs for defending the lawsuit arose from complaints about the quality of the work done as distinct from the claims that Samson made material misrepresentation to the

Lornes, any award for attorneys' fees, costs and expenses incurred in responding to the Lornes' complaint would likewise be premature. *Id.*

Samson asserts that there can be no dispute that Samson was obligated to pay the Lornes' relocation costs, and that Dolner is required to reimburse Samson for those costs. However, Samson has presented no evidence to support its contention that the costs demanded by the Lornes, and paid by Samson, were "reasonable" costs. The fact that Dolner was obligated to defend and indemnify Samson does not mean that it was obligated to pay whatever the Lornes demanded without any evidence of the reasonableness of that amount. Samson likens this case to a situation where a notice of claim is given to an indemnitor, and the indemnitor can either elect to defend against the claim or it is bound by any reasonable good faith settlement the indemnitee may make. Here, however, while Samson notified Dolner of the amount demanded, there is no evidence that there was a good faith settlement, or that the amount was reasonable. *Cf. North Am. Specialty Ins. Co. v Schuler*, 291 AD2d 924 (4th Dept 2002); *Clarostat Mfg. Co. v Travelers Indem. Co.*, 115 AD2d 386 (1st Dept 1985). Rather, it appears that Samson paid whatever the Lornes requested without inquiry.

Dolner also opposes Samson's motion on the ground that there are questions of material fact as to whether Samson complied with

its obligations under the 2006 Agreement. Dolner points out that this action was commenced based on Dolner's contention that Samson failed to pay it, in accordance with the 2006 Agreement. Dolner maintains that until Samson's compliance with payment obligations under the 2006 Agreement is established, it is not entitled to a determination concerning reimbursement or indemnification. This court denied summary judgment on the issue of Samson's compliance with the 2006 Agreement in a prior motion, and discovery is not yet complete.

Samson argues that Dolner cannot be excused from counter performance due to Samson's alleged failure to make final payment because Dolner's pleading seeks declaratory relief under the 2006 Agreement, which is akin to seeking specific performance. Samson's argument is not compelling. Contrary to Samson's assertion, the fact that Dolner seeks payment as provided for in the agreement does not mean that it is seeking specific performance. In fact, Dolner is seeking money damages (and its declaration is merely a breach of contract claim), and does not have to continue to perform under the contract if Samson materially breached the contract in order to be compensated for work already performed. *Hallaway Props. v Bank of N.Y.*, 155 AD2d 897 (4th Dept 1989); *Legend Artists Mgt. v Blackmore*, 273 AD2d 91 (1st Dept 2000). Thus, Samson's reliance on the standards for specific performance is inapposite, and the cases cited,

regarding specific performance with respect to real property, are irrelevant to this matter. If, as Dolner avers, Samson materially breached the 2006 Agreement prior to Dolner's refusal to indemnify Samson, Dolner's alleged breach would not preclude it from seeking payment. Thus, Samson's reliance on *Legend Artists Management, Inc. v Blackmore* (273 AD2d 91, *supra*) and *Borne Chemical Co. v Dictrow* (85 AD2d 646 [2d Dept 1981]) is unavailing.

The parties discuss whether General Obligations Law § 5-322.1 bars enforcement of the indemnification provisions of the agreement. That section bars a party from contracting with another to hold it harmless for damages resulting from the negligence of the promisee. This issue is not relevant to this case. The indemnification provision refers only to the damages resulting from Dolner's work, and does not apply to any claims against Samson arising from anything else, such as fraudulent misrepresentations. Nonetheless, Samson is not entitled to the declaratory judgment that it seeks at this time, because there remains a question as to whether any judgment that might be obtained against Samson in the *Lorne* action is based on the work done by Dolner or Samson's actions. While Samson contends that it was not negligent, and that Dolner was responsible for all of the work done, that assertion does not establish Dolner's liability to Samson. In addition to the fraudulent

misrepresentation claim, there is a question (albeit not a central question) of the significance of Dolner discontinuing its efforts to rectify the problem in the Lornes' apartment due to the Lornes' alleged actions that made it impossible to complete the work. At that time, October 13, 2006, Dolner claims that it advised Samson to arrange to have the work completed or arrange some other accommodation with the Lornes. The record does not disclose how that could affect Dolner's responsibility for any expenses that arose subsequently, or whether Samson was thereafter responsible for succeeding delays or damages.

For these reasons, Samson's motion for summary judgment on its common-law indemnification claim is likewise premature, even though there may ultimately be a determination in the Lorne action that Dolner's workmanship was poor/defective, causing damages.

CONCLUSION

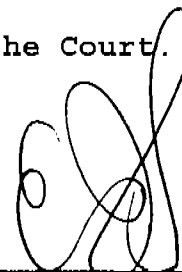
Accordingly, it is hereby

ORDERED that defendants' motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: November 20, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
 DEC 05 2008
 COUNTY CLERK'S OFFICE
 NEW YORK