

**Briarcliffe Col., Inc. v CPG Architects**

2009 NY Slip Op 30950(U)

April 20, 2009

Supreme Court, Nassau County

Docket Number: 011674/2007

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 9**

**BRIARCLIFFE COLLEGE, INC. and CAREER  
EDUCATION CORPORATION,**

**Plaintiffs,**

**INDEX NO.: 011674/2007  
MOTION DATE: 02.27/2009  
MOTION SEQUENCE: 001, 002  
and 003**

**- against -**

**CPG ARCHITECTS and TRITEC BUILDING  
COMPANY, INC.,**

**Defendants.**

The following papers read on this motion:

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Motion for Summary Judgment .....	2
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Louis Commisso, Plaintiffs' Statement of Disputed Facts & Exhibits Annexed .....	3
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Facts Not In Dispute & Exhibits Annexed .....	4
Affirmation in Opposition of many A. Frade, Esq., Affidavit in Opposition of	
Ken Abrami, Statement Pursuant to Rule 19-A(B) of the Rules of the Commercial	
Division & Exhibits Annexed .....	5
Affirmation of Marc S. Krieg, Esq. in Opposition to Plaintiffs' Motion for	
Summary Judgment against CPG Architects & Exhibits Annexed .....	6
Notice of Cross-Motion, Affirmation & Exhibits Annexed .....	7
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Answer of Parshhueram T. Misir, Esq., Affidavit of Kenneth Zilch & Exhibit Annexed...	8
Affidavit of James Sackett, AIA in Opposition to Plaintiff's Motion .....	9
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Affidavit of Gary Unger as Principal of CPG Architects in Opposition to	
Plaintiffs' Motion for Summary Judgment .....	11

Plaintiffs' Reply Affirmation in Further Support of Parshhueram T. Misir, Esq., Plaintiffs' Statement of Disputed Facts as to Defendants' Counter Statements to Plaintiffs' Summary Judgment Motion & Exhibits Annexed .....	12
Reply Affirmation of Manny A. Frade, Esq. & Exhibits Annexed .....	13
Statement Pursuant to Rule 19-A of the Rules of the Commercial Division .....	14
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### **PRELIMINARY STATEMENT**

Motion Sequence # 1 is a motion by the Defendant Tritec Building Company, Inc. (Tritec) for summary judgment dismissing the complaint against them because the Plaintiffs did not comply with the notification requirement under the contract so as to enable them remediate conditions alleged to have been caused by them; that the terms of the contract exculpates them from liability for consequential damages; and that Career Education Corporation doe not have standing to sue since it is not authorized to do business in the State of New York.

The Plaintiffs move under Motion Sequence # 2 for summary judgment on the first cause of action against CPG Architects (CPG), summary judgment on the second cause of action against Tritec, costs, charges, and expenses, including attorney's fees and court costs against CPG under the terms of the contract between them; and plaintiffs' attorney's fees and costs against Tritec.

Motion Sequence # 3 is a cross-motion by Tritec for leave to serve an amended Verified Answer upon both Plaintiffs. The proposed amended complaint includes an affirmative defense against Plaintiff Career Education Corporation to the effect that they are the true party of interest and they are not authorized to do business in the State of New York, and are consequently ineligible to utilize the Courts of this State.

### **BACKGROUND**

This action involves the installation of windows in a building which was formerly a Swezey's Department Store and was being converted to a classroom building for Briarcliffe College. CPG and Briarcliffe College entered into a contract for architectural services dated

October 17, 2003.<sup>1</sup> On April 12, 2004 Briarcliffe agreed with Tritec for the latter to serve as the contractor on the project.<sup>2</sup> Tritec's maximum guaranteed price was \$4,354,190. The work was completed and the Village of Patchogue issued a Certificate of Occupancy on July 10, 2004.<sup>3</sup>

From the completion of the construction, the project suffered from water intrusion above the newly installed windows. The Plaintiff retained the services of Vanguard Inspections, Inc. to inspect the conditions and evaluate the cause of the water problems. Claude A. Cuvier, AIA, submitted a report dated August 18, 2006.<sup>4</sup> It was his conclusion that the original plans for the building provided inadequate flashing and poorly located weep holes for the evacuation of water which was of such force as to permeate the brick facade. These were part of the original "Jacobsen" plans for the construction of the building. He further concluded that this should have been recognized by CPG and plans re-drawn to rectify the condition. In addition, he believes that this design problem should have manifested itself to Tritec, who, under the terms of the contract, was required to bring the problem to the attention of the owner. In this case the owner had Trammel-Crow Company serving as an owner's representative on the project. Cuvier also issued a report in which he analyzed the responsibility of the various parties.<sup>5</sup>

#### *The Plaintiffs' Motion*

The Plaintiff seeks summary judgment against both CPG and Tritec. Their position is that there was a design defect in the brickwork above the windows in the building as purchased. The Jacobsen Plans did not provide adequate flashing to divert water permeating the face bricks, and weep holes were 16" above the top of the windows, leaving no place for the intruding water to go except into the interior of the building. CPG, as the project architect, should have recognized the defect in their review of the "as-built" plans, but failed to do so. Their plans

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<sup>1</sup> Exh. "2" to Plaintiff's Motion.

<sup>2</sup> Exh. "5" to Plaintiff's Motion.

<sup>3</sup> Exh. "7" to Plaintiff's Motion.

<sup>4</sup> Exh. "12" to Plaintiff's Motion.

<sup>5</sup> Exh. "13" to Plaintiff's Motion.

(CPG Construction Documents) for the installation of new windows, which was within the scope of the contract, did not deal with the lack of adequate flashing or appropriately placed weep holes. The Plaintiffs' contend that the plans failed to comport to the New York State Building Code.

Tritec, the General Contractor, sub-contracted the window production work to Diamond Storefront, Inc. The Plaintiff claims that CPG had a second opportunity to discover the defects upon reviewal of Diamond's shop drawings. There was evidence of some recognition of the problem at least on the first floor when a CPG employee drafted a sketch showing what was necessary to avoid water intrusion, at least at that site. The failure of CPG to fully appreciate the problem both in the design plans and as constructed, resulted in the production of plans which failed to avoid water intrusion and also failed to comply with the Building Code of the Village of Patchogue, which incorporates the State Code.

In addition to the failure of CPG to recognize and remediate the condition by providing for flashing and weep holes at a lower location, Tritec, the construction manager, failed to note the deficiency and permitted the installation of the windows in accordance with CPG's plans, without recognizing the fact that there was no provision for the diversion of water which permeated 16" of face brick so as to prevent it from coming into the building above the newly installed windows.

The Plaintiff claims that Tritec was given the opportunity to analyze and rectify the condition but was unable to do so. Eventually, the Plaintiffs obtained a Storm Intrusion Report from Cuvier, which is the basis for their claim. In an additional report, found both CPG and Tritec responsible.

Eventually, the Plaintiffs contracted with Unico Construction, Inc. with respects to the leaks that were continuing to enter the building from above the newly-installed windows. The affidavit of Stephen A. Puco <sup>6</sup> recites that there were 34 windows experiencing intrusion. After reviewing the CPG plans which did not include flashing or lower weep holes, Unico submitted a proposal to rectify the condition for \$47,850. Unico thereafter entered into a contract to perform

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<sup>6</sup> Attached to Plaintiff's Motion.

the work on April 5, 2007 and did so. The work included the installation of flashing, a termination bar, and new weep holes. In addition to the Unico fees, the Plaintiffs claim to have sustained modest consequential damages in the nature of repainting, damage to personal property, replacement of ceiling tiles, and travel expenses of employees' travel back and forth to Chicago in an effort to resolve the problems.

*CPG's Opposition to Plaintiffs' Motion*

CPG Architects opposes the Plaintiffs' motion on the following grounds:

1. Career Education Corporation is the real party in interest, is a foreign corporation doing business in New York, but is not authorized to do so;
2. There are questions of fact as to whether or not Task 107, involving new windows, was included in the contract, or was an excluded alternate;
3. Questions of fact exist as to when, and under what conditions, it became the obligation of CPG and Tritec to perform otherwise excluded work relation to the windows and the exterior of the building;
4. The reports of the Plaintiffs' expert, specifically Cuvier, constitute factual questions which preclude the grant of summary judgment;
5. Redactions in the bills submitted in connection with claims by the Plaintiff for legal fees, costs and disbursements make it impossible to ascertain the applicability and merits of the claims.

*Tritec's Opposition to the Plaintiffs' Motion for Summary Judgment*

Tritec's opposition to the Plaintiffs' motion is summarized as follows:

1. Under the terms of the General Conditions of the Contract, the contractor is not responsible for design defects;
2. The Plaintiffs' Motion is replete with factual issues which are not fully resolved by the expert reports submitted in support of the Motion;
3. The amount of the cost of remediation submitted by Unico varies, and is a question of fact;
4. Claims for consequential damages, such as those for lack of productivity of employees as claimed by the Plaintiff, are precluded by § 4.3.10 of the General Conditions.

### DISCUSSION

There is simply no other explanation for the intrusion of rain water over the windows than that posited by Cuvier in his affidavit and his Storm Intrusion Report. The proof of the pudding is in the tasting, and the work performed by Unico, after consideration of the reports of Michael Gurevich of New York City Brickwork Design Center and Cuvier, resolved the problem. It is clear that the CPG Construction Plans did not provide for the flashing, weep holes and a termination bar. It does not appear that CPG's opposition to the motion seriously contends that the absence of these items led to the water intrusion problem.

What CPG contends is that Career Education Corporation is a foreign corporation doing business in New York without authority to do so, and is not entitled to avail itself of the services of the Courts of New York. There is, however, essentially no evidence submitted that CEC is doing business in New York in any traditional sense. The affirmation of counsel in which the claim is made is conclusory in nature, with no evidence of an office within the state, telephone number, maintenance of bank accounts, or even regular solicitation of business within the State.

If, in fact, CEC was doing business at the time of filing of the action, they would be barred from seeking affirmative relief in the Courts. "Doing business" for the purposes of General Business Law § 1312 (a) is different from "doing business" as the basis for in personam jurisdiction. Even if CEC maintained a permanent office and bank account in New York, while it would be sufficient to justify imposition of in personam jurisdiction, it would not be adequate to invoke the "door closing" stricture of § 1312 (a).<sup>7</sup> In this case there is no evidence that they even met these standards. The standards for § 1312 is stricter than for jurisdiction under Civil Practice Law and Rules § 301. To hold otherwise would very possibly infringe upon the constitutionally protected interstate commerce. The Plaintiff CEC is not barred from affirmatively seeking relief in the Courts of New York.<sup>8</sup>

While the inclusion of Article 107, the windows project, may not have been included in the original contract, it is beyond doubt but that at some point CPG assumed responsibility for,

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<sup>7</sup> *Alicanto, S.A. v. Woolverton*, 129 A.D.2d 601 (2d Dept. 1987).

<sup>8</sup> *Storwal Intern., Inc. v. Thom Rock Realty Co., L.P.*, 784 F. Supp. 1141 (S.D.N.Y. 1992)

and included in its billing, services respecting the windows project. This is best evidenced by the statement of CPG evidencing work on "Task #107, exterior renovation, new windows, entrances, stair, etc."<sup>9</sup> Precisely when CPG undertook responsibility for Task #207 is not relevant. It is clear that they did.

While the Couvier reports make factual findings as to the cause of the water intrusion, there have been no alternative conclusions propounded. It is true that a question of fact may preclude the granting of summary judgment, such factual controversy must be significant and not merely hypothetical. There simply has been no other cause suggested, and, given the fact that the work done to rectify the adverse condition was successful, grasping for another potential source of the problem is unreasonable.

CPG is correct, however, in its position that certain consequential damages, such as the loss of efficiency of employees, are waived in the contract. Nor is it clear whether the damages exceed the \$47,850 quotation by Unico, and, whether Tritec bears responsibility, and if so, to what degree.

It is correct that Tritec is not responsible for the design of the project. But the contract also provides that if the contractor becomes aware of any design errors or omissions they are to report them to the Architect.<sup>10</sup> It is a question of fact as to whether a reasonably prudent contractor should be aware that the failure to include flashing, weep holds and termination bar constitute a design defect so as to warrant their bringing to the attention of the Architect, or whether or not such action would have prompted a design change by CPG. These limited questions preclude the grant of summary judgment against Tritec.

### *Conclusion*

The Plaintiffs' motion for summary judgment against CPG is granted, but only to the extent of imposing liability. The determination of the amount of damages requires further proceedings.

The Plaintiffs' motion for summary judgment against Tritec is denied, subject to a

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<sup>9</sup> Exh. "D" to Plaintiff's Reply Affirmation.

<sup>10</sup> Exh. "9" to Plaintiffs' Motion at Art. 3, §§ 3.2.1 — 3.2.2.

determination as to whether or not a reasonably prudent contractor should recognize that the CPG Construction Plans and the conditions at the site were such as to warrant action on their part in conformity with the contract, and whether or not such action would have changed the outcome.

If it is determined that Tritec should have recognized the defect in the plans and the site conditions, the question of apportionment of liability between it and CPG must also be determined by the trier of fact. Tritec's claim that they did not receive written notice of the condition and the opportunity to correct it within one year of substantial completion is without merit. There is abundant evidence in the record as to Tritec's awareness of the problem, inspections done by their representative, and some steps, such as caulking, which failed to solve the problem. The simple and obvious fact is that Tritec was unable to diagnose the cause of the water intrusion, and calling upon them to rectify the situation would have been fruitless.

The Cross-motion by Tritec (Sequence 3) for leave to serve an amended answer is denied. The purpose of the amendment is to insert CEC's lack of standing to seek affirmative relief in New York Courts. There is no evidence submitted that the CEC is "doing business" to the degree necessary to meet the standards of *Alicanto* and *Storwal*.

The Motion by Tritec (Sequence 1) for Summary Judgment dismissing the complaint on the ground that the Plaintiff waived its entitlement to recover under the contract by failing to give notice of the condition as required by § 12.2.2.1 of the General Conditions of the Contract is denied. There can be no doubt that Tritec had actual notice of the condition, engaged in discussions as to how to rectify it, but was simply unable to do so. The affirmation of the counsel for Tritec in support of their motion, supported by the May 24, 2006 letter of Richard Krill of Tritec,<sup>11</sup> elaborate upon the efforts by Tritec to resolve the matter after being advised of the condition by an administrative assistant of the Plaintiffs

The matter requires a trial on the following issues:

1. Whether Tritec should have recognized that the absence of flashing, properly located weep holes, and termination bar was a design defect so as to warrant their giving notice to the

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<sup>11</sup> Exh. "G" to Tritec Motion.

Architect;

2. Whether such notice would have been likely to cause CPG to rework the construction plans;

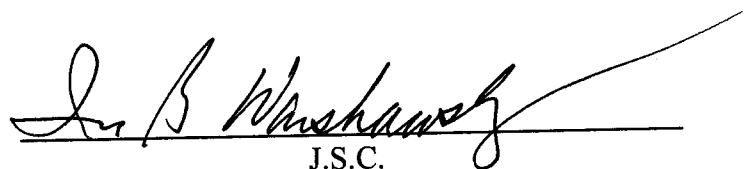
3. If Tritec is found to be liable for failure to ascertain the design defect, and if it is determined that notification of such condition to the Architect would have resulted in a design change which would have obviated the problem, the proportion of responsibility which Tritec bears as compared to CPG;

4. The actual damages sustained by the Plaintiff, and to what extent those damages constitute consequential damages which the Plaintiff is precluded by the Contract from recovering.

The parties are directed to appear for a conference in this Part on May 26, 2009, at 9:30 A.M., to discuss the limiting of issues for trial, scheduling a pre-trial conference and setting a trial date.

This constitutes the Decision and Order of the Court.

Dated: April 20, 2009

  
J.S.C.

**ENTERED**  
APR 23 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE