

6 W. 37 St. Realty LLC v Karey Kassl Corp.

2009 NY Slip Op 31319(U)

June 15, 2009

Supreme Court, New York County

Docket Number: 600947/2006

Judge: Shirley Werner Kornreich

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 SHIRLEY WERNECK PART 54

Index Number : 600947/2006
6 WEST 37 STREET REALTY LLC.
vs.
KAREY KASSL CORP.
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. 6 00947/06
MOTION DATE 3/19/09
MOTION SEQ. NO. ~~007~~
MOTION CAL. NO. _____

this motion to for Dismiss

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

PAPERS NUMBERED

FILED
JUN 17 2009
COUNTY CLERKS OFFICE
NEW YORK

Cross-Motion: Yes ~~_____~~

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 6/22/06

[Handwritten signature]

[Handwritten signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
6 WEST 37 STREET REALTY LLC, :
 :
 Plaintiff, : INDEX NO. 600947/2006

- against - :
 :

KAREY KASSL CORPORATION and,
IMPERIAL GLASSWORK CORP.,
 :
 Defendants. :
-----X

IMPERIAL GLASSWORK CORP., :
 :
 Third-Party Plaintiff, : INDEX NO. 590567/2008

- against - :
 :

NATHANSON CONSULTING CORP., ASA : DECISION AND ORDER
NATHANSON, MELVIN A. CORNELIUS, JK :
DESIGN GROUP a/k/a JK DESIGN, and JBF :
INSTALLATION, INC., :
 :
 Third-Party Defendants :
-----X

FILED
JUN 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

Defendants Karey Kassl Corporation (Kassl) and Imperial Glasswork Corp. (Imperial), window manufacturers, have each brought a motion for summary judgment against plaintiff, 6 West 37 Street Realty LLC (6 West), seeking dismissal of the Complaint. The Complaint asks for damages arising from the installation of windows in a landmark property located at 49-51 Warren Street (the Property). Both Kassl and Imperial also seek summary judgment granting their and dismissing the other's cross-claims, and Kassl seeks judgment on its counterclaim against plaintiff. Plaintiff cross-moves for partial summary judgment as to liability, and third-party

defendant JK Design Group a/k/a JK Design (JK), the architect, submits a renewed motion to dismiss the third-party complaint or, alternatively, to award summary judgment in its favor or a Traverse hearing on the issue of service. Third-party defendant JBF Installation (JBF), the window installer, also cross-moves for summary judgment dismissing the third-party claim for contribution and indemnification. Finally, Imperial claims in its motion that it should be referred to as "Imperial Glassworks, Inc." The Court construes Imperial's claim as a request to amend the caption to reflect its proper name, and so construed, grants the request.¹

I. *Background*

A. *Complaint*

By its March 20, 2006 Complaint, plaintiff alleges that Kassl and Imperial installed and fabricated windows at the Property, a Landmark building, which windows were rejected by NYC Landmarks Preservation. Plaintiff further claims the installation was improper, not to code and made without proper permits. Plaintiff further alleges that defendants Imperial and Kassl walked off the job. Additionally, in its Bill of Particulars, it alleges that it had contracts with Imperial and Kassl that were breached.

B. *Cross-Claims, Counterclaim and Third-Party Claims*

Kassl, who was hired by Imperial to manufacture the windows for the project, cross-claims against Imperial, who was hired by plaintiff to manufacture the windows. Kassl alleges

¹6 West owns the landmark Property on Warren Street. Originally, 49 Tribeca Realty LLC and 49 Warren Realty LLC purchased the Property. The two LLCs then merged under the name Tribeca Realty LLC 6 West succeeded Tribeca as the Property Owner. By this Court's Order dated August 14, 2008, the caption was amended to substitute 6 West 37 Street Realty LLC as plaintiff in place of Tribeca.

that Imperial failed to pay it fully for completed work, in breach of contract. Kassl counterclaims against plaintiff, alleging the latter's breach of an agreement with Imperial, resulting in Imperial's failure to pay Kassl fully and in plaintiff's unjust enrichment. Imperial cross-claims against Kassl for indemnity and/or contribution and breach of contract. By Third-Party Complaint, Imperial claims indemnity and/or contribution from JK Design, the architect, JBF, the entity that Kassl hired to install the windows, NATHANSON Consulting Corp., the construction manager, its President ASA Nathanson, and Melvin A. Cornelius, the original architect on the project.

II. *Background*

A. *Kassl's Motion*

(i) *Kassl's Submissions*

In support of its motion for summary judgment, Kassl submits the pleadings, an attorney's affirmation, an Affidavit of Karey Kassl, the Construction Manager Agreement for the gut renovation and alteration of the Property, Imperial's proposal to 6 West, a July 11, 2002 Contract of Sale between Kassl and Imperial, correspondence, facsimiles, and transcripts of EBTs of Asa Nathanson, Lawrence Omansky, Esq. (Managing member of plaintiff)², Javier Sanchez (President of Imperial), and Gary Kassl (owner and Vice President of Kassl).

Kassl's submissions establish the following facts. On April 14, 2000, plaintiff contracted with Nathanson Consulting (Nathanson), as construction manager, for the gut renovation and alteration of the Property consisting of two adjacent buildings. Under that agreement, Nathanson agreed to, among other things, hire subcontractors and coordinate their work. Nathanson

²Omansky is also counsel of record for plaintiff.

arranged for the hire of several subcontractors, including Imperial, and was responsible for paying them. Nathanson prepared a contract for plaintiff and Imperial. Plaintiff then contracted with Imperial on May 7, 2002, to remove the existing windows and install new ones. This agreement was per Imperial's September 17, 2001 proposal to Nathanson titling the project "landmark windows" and the specifications of JK Design.

Imperial in turn subcontracted the window work to Kassl, a business that fabricates aluminum windows for commercial and residential properties. An August 20, 2001 facsimile from Imperial to Kassl requests a price and includes the requirements in list and picture form. One picture displays an 8-panel window unit with a straight top and elliptical panel above it. A second picture shows a 4-panel window unit. A subsequent facsimile shows pictures of window units displaying a mixture of straight, rectangular units and similar units with elliptical panels above. A June 7, 2002 facsimile from Imperial to Kassl in relevant part states, "Place order double hung windows ... windows with arc on top ... arc sample to follow." In a July 11, 2002 letter to Imperial, Kassl writes, in relevant part,

Kassl Window Co. agrees to supply only the Series 5000 Architectural Triple Hung, custom color to be Sahara sand by PPG, all muntins to be applied to exterior face of the sash, as per existing configuration, the operating sash to be square at head location, the "Eyebrow" to be fabricated with an 1/4" aluminum faced panel to match window finish"

Thereafter on July 2, 2002, Kassl hired JBF to install the windows.

The window openings on the second through fifth floors of the front of the buildings have arched or curved tops, which are called "eyebrows" in the window trade. Nathanson explained that the "overall look" of the windows was designed by JK Design and the "physical window" was designed by Kassl. Nathanson, however, was dealing with Imperial, which had the field

measurements and the architect's drawings.

Nathanson testified that when he discovered the windows being installed had straight-headed frames instead of the original landmark curve-headed frames, he talked to Sanchez of Imperial who said they should just try to get it approved as is by Landmarks. Nathanson claimed they could not stop the work because they had tenants in the building and could not leave them without windows. In an "errata sheet" dated October 31, 2008, more than nine months after his deposition, Nathanson made a number of changes to his testimony. The main change was to add the explanation that after some of the windows had been installed, he complained to Imperial that they did not meet Landmarks specifications because they were not rounded on top. Nathanson asserts that Imperial said it could not afford to replace them all at that point so he convinced Omansky to let them go ahead and finish installing the ones they had made as long as they would replace them if they failed Landmarks' inspection

At some point, Sanchez told Nathanson he was having financial problems. There were also some problems with the windows not fitting the way they were supposed to fit and with window stops. In or about August 2002, Imperial disappeared from the job. Under an agreement with plaintiff, Kassl finished Imperial's work, replacing some windows Imperial had already installed, and working to correct defective installation. Thus, after Nathanson complained about Imperial installing some triple sash windows, Kassl replaced them with double sash windows. Nathanson described the problems with the windows as involving gaps between the sash and the frame, window balances, and misplacement of stops.

Lawrence Omansky, Esq. testified as the managing member of plaintiff, that the Property had not been approved for landmark status when it was originally purchased. Landmarks

designated the Property for landmark status in 2000 or 2001, then approved it in 2003 or 2004. Omansky described his business as buying buildings, then gut renovating and selling them as condos. This was the first building he had bought that was landmarked. In 2001 the Landmarks Commission approved the renovation project in accordance with the architect JK's specifications. Landmarks then issued a violation based on the failure of the windows to be arched at the top in accordance with the original appearance of the buildings. The windows that were installed have straight instead of curved tops. According to Omansky, the architect had submitted a design to Landmarks that included arched tops for all the windows. Landmarks also objected to some windows having a six over six configuration instead of the approved four over four configuration. Further, there were complaints by condo owners about some of the windows not functioning properly. Omansky admitted that neither Kassl nor Imperial had been paid all the money they were owed.

Jay Sanchez, the President of Imperial, testified that before he wrote up the proposal for Nathanson, he picked up a set of drawings showing the type of windows they wanted built. The drawings showed windows with curved tops. He believed that Nathanson was handling the Landmarks Commission and did not discuss it with him. He did discuss with Nathanson that he would not be able to duplicate the original wooden arched window tops in aluminum. They would have to provide square frames with a top infill panel. Nathanson agreed after speaking with Omansky because to duplicate "eyebrow" windows would have been "massively expensive." Sanchez had consulted with a company that could fabricate eyebrow windows and determined the cost versus a square window with a panel on top.

Sanchez contacted Kassl to manufacture and install the windows. Based on the price

Kassl came back with, it was obvious to him that the window would be squared on top with an infill panel above it, which was acceptable to Nathanson. Sanchez understood that Kassl would be working through Imperial and not directly with Nathanson. Sanchez was at the job site a few days a week, and Nathanson came to the building while the windows were being installed. At one point, Nathanson asked when the infill panels for the window tops would be coming. Sanchez spoke to Kassl who said the infill panels would be installed after the installation of the windows, and Nathanson said "fine." Sanchez also saw Omansky at the job site. When the windows were finished, Sanchez was satisfied they received the windows Kassl had promised to deliver. There were some minor adjustments that needed to be made, which is not unusual. Neither Omansky nor Nathanson complained that the windows did not comply with the drawings.

Sanchez recalled giving Kassl the \$9,000 deposit provided by Nathanson and possibly another \$5,000, but at some point Nathanson stopped paying, so Imperial could not pay Kassl. Kassl and Nathanson started negotiating directly with each other, and Imperial was left out of the picture. During the winter and spring of 2003 there were repeated attempts by Kassl to get paid. It was after they were trying to collect the money that complaints about the windows started. In May or June of 2004, Nathanson started to complain that the windows did not comply with the requirements of Landmarks, and Sanchez told him to talk directly to Kassl.

Gary Kassl testified at deposition that he was the owner and Vice President of Karey Kassl Corporation. Kassl sent Imperial a July 11, 2002 "contract of sale" detailing the work and the prices. The work included installation of square and arch top windows. "Arch top" meant they would use a 1/4 aluminum infill panel to make up the difference. Kassl never had discussions with Omansky or Nathanson about the window design. Kassl used JBF to do the

installation job at the Property. He denied there was a contract. Installation was completed approximately October 2002. After JBF did the installation, Kassl went to the site and did retrofitting. About one year later, Imperial stepped out of the job. The balance due was \$45,058 in August of 2003, and approximately \$18,000 on June 2, 2004. It had been Kassl's understanding that Imperial would provide a deposit then pay in weekly installments. He worked with Imperial until the dispute about money.

Kassl submits an affidavit in support of the motion with attached exhibits. The exhibits include Kassl's shop drawings showing a 1/4 inch panel at the head of windows. The proposal by installer JBF shows a price of \$220 per window with an additional charge of \$40 "per window if round top using 1/4 inch insulated panel." Also attached to Kassl's affidavit are copies of the contract with Imperial, invoices and correspondence regarding payment negotiations. These documents show that as of June 2, 2004, Kassl was claiming an outstanding balance of \$18,058.74 and agreeing to repair "punch list" items if Omansky first paid \$12,000 of the outstanding balance.

(ii) Plaintiff's Submissions in Opposition

Omansky submits his own affirmation in opposition to Kassl's motion. He does not submit the architect's drawings. He does submit many of the same documents submitted in support of Kassl's motion. In addition, he attaches the February 22, 2001 Landmarks approval of the proposed work at the site. In the letter of approval, the Commission refers to the Architect's drawings and states, in relevant part,

Staff has reviewed these drawings and finds that ... the existing windows are in a deteriorated condition which warrants replacement; that the installation of the new windows in the existing openings will not require the destruction of any historic

stonework; that the new four-over-four double-hung windows will match the configuration, operation, details and finish of the historic windows still in place on the building

Omansky refers to the deposition of Sanchez who stated that he knew the windows had to be Landmarks approved windows and "they wanted to duplicate basically what's there in the building." Omansky denies that either he or Nathanson were privy to the contract or conversations between Imperial and Kassl. He also refers to certain documents as establishing a separate contract between plaintiff and Kassl.

Exhibit 10 is an April 2, 2003 letter from Nathanson to Sanchez at Imperial and copied to Kassl and Omansky in which Nathanson describes their "understanding" that Kassl and Imperial will fabricate and install "12 sets of new sash designed for a double hung window configuration," and the payment terms. Exhibit 11 is an April 3, 2003 letter from Kassl to Nathanson and copied to Sanchez objecting to the terms of the April 2, 2003 letter and demanding that Nathanson first pay for work completed to date. Exhibit 9 is a subsequent letter from Kassl to Nathanson identified on top as an invoice with the work described as "Supply and install 48 Series 5000 Double and Triple sash windows.... All product to be custom color as per architect." The balance due is noted as \$45,058.74 for the entire job, with \$6,000 for the "Change Order (Replacement sashes)" and "Invoice Amount as per agreement of April 2, 2003 _____ \$12,000."

Omansky asserts that checks written to Kassl conform to the payment terms of the April 2, 2003 "agreement." Exh. 12. Exhibit 12 includes copies of two checks, each for \$12,000, dated respectively July 2, 2003 and January 27, 2004.

B. Imperial's Motion

Imperial submits an attorney's affirmation and attaches most of the same exhibits

submitted by Kassl, but does not attach its contract with plaintiff. Imperial claims that summary judgment is warranted because Kassl replaced it as the sole contractor responsible for the window project, and it did not do any of the work alleged to have caused plaintiff's damages. Imperial's argument is based on negating its own negligence. Imperial claims that plaintiff failed to allege a breach of contract claim and that in any event, Imperial's contract with plaintiff was terminated by the time Kassl installed the windows.

Kassl responds with an attorney's affirmation and an affidavit of Gary Kassl, and exhibits. Kassl points to plaintiff's Bill of Particulars in which the latter states that the Architect Jacob Kanner was responsible for obtaining permits from Landmarks. Kassl argues that it was Imperial's obligation to fabricate and install the windows pursuant to its contract with plaintiff. Kassl refers to a series of correspondence with Imperial through which the latter requested and Kassl agreed to fabricate and install windows with square tops and infill panels. The correspondence culminated in a contract dated July 11, 2002.

C. Plaintiff's Cross-Motion and Opposition to Imperial's Motion

Plaintiff submits an affidavit of Asa Nathanson, the architect's drawing A-13 (which it failed to submit in opposition to Kassl's motion), Landmarks' February 22, 2001 approval of the renovation project, plaintiff's contract with Imperial, and an excerpt of Nathanson's EBT with his "errata sheet." Plaintiff argues that Imperial agreed to fabricate and install windows that would be approved by Landmarks, basing that argument on Imperial's alleged knowledge that the initial Landmarks approval specified construction according to the architect's drawings. Drawing A-13 shows curved top windows.

In opposition, Imperial submits an attorney's affirmation and documents showing

Imperial's objection to the "errata sheet" submitted by Nathanson on the ground that it was untimely. Imperial also challenges the breach of contract claim, arguing that it was not adequately pled, that the contract was never signed by both parties, and that Omansky only signed it after-the-fact to avoid summary judgment. Imperial claims that plaintiff failed to produce a signed contract, as well as the architect's drawing A-13 in response to discovery demands. Imperial offers to submit the discovery responses for an *in camera* inspection by the Court. Finally, Imperial objects to Omansky serving as counsel for both plaintiff and JK Design as the latter was responsible for obtaining Landmarks approval and could be liable for the damages claimed by plaintiff, thereby creating a conflict of interest.

Kassl opposes with an attorney's affirmation and refers to its own motion and supporting evidence, as well as exhibits showing objection to Nathanson's "errata sheet." Kassl also argues that the drawing A-13 attached by plaintiff to its cross-motion is dated January 1, 2001, and not September 30, 2000, so it cannot be one of the "contract documents" referred to in the contract between Imperial and plaintiff; that contract defined "contract documents" as "Drawings and Specifications prepared by the Architect, dated 9/30/00." Kassl claims also that the September 30, 2000 drawings have never been produced.

D. JBF's Cross-Motion

JBF submits an attorney's affirmation, the pleadings, the "contract" with Kassl, and an affidavit of Anne Marie Bode, JBF's Vice President. It opposes Imperial's third-party claim for contribution/indemnity on the ground that it has no legal duty to Imperial. The cross-motion is unopposed.

E. JK Design's Motion to Dismiss

JK Design, contrary to the Court's prior Decision denying its first motion to dismiss, again does not attach the relevant pleadings. It again denies having any construction or inspection responsibilities to plaintiff under its contract, which was limited to preparing all drawings and plans for the project and preparing filing documents and applications with Landmarks. JK Design also claims lack of sufficient service, lack of privity, and that the Third-Party Complaint was filed in violation of the Statute of Limitations.

Kassl opposes, citing to Omansky's conflict of interest. Kassl refers to the argument on the first motion to dismiss, claiming the Court directed that Omansky could only represent JK Design in the third-party action with respect to a motion to dismiss upon Statute of Limitations grounds. Kassl also argues that the third-party action is timely because it is one for indemnification and thus the Statute of Limitations does not begin to run until the person seeking indemnity has paid the underlying claim. Kassl also seeks attorneys' fees and costs for opposing a motion brought "in flagrant and blatant disregard for a directive of this Court."

II. *Legal Discussion and Rulings*

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. C.P.L.R. 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. C.P.L.R. 3212 (b); *id.* at 560. *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut

moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

Before addressing the individual motions and cross-motions, the Court must determine the nature of the Complaint. The parties have submitted arguments and used terminology suggesting tort claims. The Court finds, however, that the Complaint sounds in contract. The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Noise in Attic Productions, Inc. v. London Records*, 10 A.D.3d 303 (1st Dept. 2004). The Complaint specifically alleges the existence of contracts with Imperial and Kassl and refers to attached copies of said contracts, as well as plaintiff's payment and damages resulting from defective and inadequate work. Although not identified as a "breach" of contract, the allegations make out a claim for breach of contract and not one for tort liability.

Plaintiff's use of language familiar to tort law, like "defective" and "negligent," does not transform the breach of contract into a tort claim. See *Board of Education v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 29-30 (1987). No legal duty independent of contractual obligations has been pled. *Id.* "If the alleged obligation to do or not to do something that was breached could not have existed but for a manifested intent [to contract], then contract law should be the *only* theory upon which liability would be imposed" (Prosser and Keeton, Torts § 92, at 656 [5th ed] [emphasis in original]). The Court is not deciding the sufficiency of the

allegations, only the nature of the claims being made, which plaintiff clarified as being contractual when it specifically alleged in its Bill of Particulars that defendants breached their alleged contracts with plaintiff. *See Harmon v. Alfred Peats Co.*, 243 N.Y. 473 (1926) (bill of particulars is an amplification of the complaint). *See also State v. Horsemen's Benevolent & Protective Ass'n*, 55 A.D.2d 251 (1st Dept. 1976).

With the contractual nature of the Complaint in mind, the Court now turns to the first motion.

A. Kassl' Motion for Summary Judgment

Kassl seeks summary judgment dismissing the Complaint, granting its Counterclaim and granting its Cross-Claim against Imperial for breach of contract.

The Complaint

Kassl's argument, that plaintiff has no privity of contract with Kassl, is not persuasive. Kassl cannot claim it was unaware that the ultimate beneficiary of its contract with Imperial was plaintiff. Under these circumstances, plaintiff was an intended third party beneficiary of this contract and may sue Kassl directly for its breach. *See R.H. Sanbar Projects, Inc. v. Gruzen P'ship*, 148 A.D.2d 316 (1st Dept. 1989) (finding that although subcontractors ordinarily lack privity to assert claims against owners, an owner, as "foreseeable and intended beneficiary" of general contractor-subcontractor agreement, may proceed against subcontractor). Here, the agreement between Kassl and Imperial called for fabrication and installation of square-topped windows with arched infill panels. That is what Kassl provided, so there was no breach of the Imperial-Kassl agreement as alleged in the Complaint.

Kassl has met its burden in establishing, as a matter of law, that it never agreed to

fabricate and install arched windows, as opposed to straight windows with aluminum infills. The documents reflecting the agreement between Imperial and Kassl, which include a July 11, 2002 Contract of Sale, specifically refer to square-headed windows with separate "eyebrows" fabricated from 1/4" aluminum faced panels. This is what Kassl provided. The evidence does not show any agreement between plaintiff and Kassl to provide arched windows that would meet with Landmarks approval, contrary to the Complaint's allegations. Accordingly, plaintiff has no legitimate basis on which to allege otherwise.

Plaintiff has not submitted evidence sufficient to raise an issue of material fact. At the outset, Omansky submits an affirmation in support of his opposition on behalf of plaintiff. Omansky testified at an EBT, so the Court will disregard his affirmation to the extent it is inconsistent with his prior sworn testimony. *Amaya v. Denihan Ownership Co., LLC.*, 30 A.D.3d 327, 328 (1st Dept. 2006). In particular, the Court disregards Omansky's conclusory statements in his affirmation that Sanchez and Kassl knew they were required to fabricate and install arched top windows that Landmarks would approve. At his deposition, Omansky testified that he did not even know what the architect's drawings looked like or if anyone had spoken to Nathanson about the required design for the windows, and that he never spoke with the window subcontractors. Regardless, the operative agreement for assessing Kassl's potential liability is the one between it and Imperial, which the evidence unrefutably shows it did not breach.

As for plaintiff's additional allegations that the installation work was defective in minor respects, this does not establish a breach of the Imperial-Kassl agreement. The unrefuted evidence establishes that the defects were insubstantial "punch list items." Kassl has substantially performed under its agreement. *See 845 UN Ltd. Partnership v. Flour City Architectural Metals,*

Inc., 28 A.D.3d 271 (1st Dept. 2006) (court found no breach where there was substantial compliance).

In any event, Kassl has agreed to make the needed repairs on payment of the monies due. Plaintiff does not deny that it has failed to make the requisite additional payments. Under the circumstances, since plaintiff is claiming that the windows have to be replaced and not just repaired, any claim of damage resulting from defective installation of the *wrong* type of windows is speculative and unsustainable on the evidence. To the extent that the defective work is quantifiable, since the Court intends to grant Kassl's Cross-Claim against plaintiff for breach of contract, the true amount of Kassl's damages can be reduced, as determined at an inquest.

Kassl's Counterclaim Against Plaintiff

Kassl denies that it had a contract directly with plaintiff to fabricate and install the windows. Kassl bases its claim that plaintiff owes it \$18,0548.74 for the window work, on the assertion that plaintiff, by paying Kassl some money directly, has acknowledged that it "owed at least part of the unpaid money" to Kassl since the work was done for the benefit of plaintiff.

Plaintiff, through Omansky, claims it stopped paying because the defendants stopped doing the work. Defendants claim that plaintiff failed to pay for completed work, and that the payments were supposed to be made regularly. Although Kassl denies there was a contract between it and plaintiff, plaintiff says otherwise. Plaintiff points to a series of correspondence in 2003, beginning with an April 2, 2003 letter from Nathanson to Imperial and copied to Kassl and Omansky, in which Nathanson describes their "understanding" that Kassl *and Imperial* will fabricate and install "12 sets of new sash designed for a double hung window configuration," and the payment terms, including payment of an additional \$3,000 for the new sashes, as well as

three payments of \$12,000 with the last payment to occur “upon completion of the job,” and an additional \$6,058.74 “after 30 days of job completion.” This letter was responding to a March 6, 2003 letter from Kassl to Imperial noting an overdue balance of \$39,058.74 and a commitment to fabricate twelve sets of new sash on issuance of a change-order, at a cost of \$6,480.

By letter dated April 3, 2003, Kassl rejected the “terms” of the April 2, 2003 letter from plaintiff. In a subsequent letter identified as an “invoice,” Kassl, however, listed the amounts due, noting the job total as \$53,058, minus \$14,000 paid to date, plus the change-order amount of \$6,000 for replacement sashes, coming to a total of \$45,058.74. Kassl then states, “Invoice Amount as per agreement of April 2, 2003 _____ \$12,000.” The Court finds that the date of August 9, 2002 on this letter is in error, and that the correct date is April 2, 2003 as confirmed by the context of the letter and subsequent correspondence. There were then two payments of \$12,000. Kassl claims it is still owed \$18,058.74. This amount strongly indicates that Kassl agreed to reduce the \$6,000 it wanted for replacing the sashes, to the \$3,000 Nathanson wanted to pay. Reduction of the balance due by the additional \$24,000 in payments comes to \$18,058.74 if the cost for the new sashes is \$3,000, and \$21,058.74 if the cost is \$6,000.00.

The Court simply cannot, based on this record, find as a matter of law that there was a novation extinguishing the Imperial-Kassl agreement and replacing it with a new plaintiff-Kassl agreement. The requisite elements of a novation, each of which must be present, include a previous valid obligation, agreement of all parties to the new obligation, extinguishment of the old contract, and a valid new contract. *Wasserstrom v. Interstate Litho Corp.*, 114 A.D.2d 952 (2d Dept. 1985). *See DCA Adver., Inc. v. Fox Group, Inc.*, 2 A.D.3d 173, 174 (1st Dept. 2003) (finding no issue of fact as to two elements of novation). The record does not support the

conclusion that the old contract between Imperial and Kassl was extinguished.

To the extent that Kassl performed additional replacement work based on its understanding that it would be paid by plaintiff for previous monies owed, the parties' communications are evidence of some agreement in this regard, although the exact terms of payment remain unclear. The Court finds that plaintiff and Kassl had an independent agreement regarding replacement work, for which it appears Kassl received payment.

There was also sufficient consideration for plaintiff's agreement to pay, based on the agreement to provide additional work and the fact that the prior work had been completed to plaintiff's benefit. *Gen. Oblig. 5-1105* provides,

A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

Plaintiff and Kassl, in their various writings, repeatedly refer to the past consideration, the windows that Kassl manufactured pursuant to its agreement with Imperial. Plaintiff received the benefit of this consideration and made substantial payments directly to Kassl for it.

Nor does UCC Article 2 require a different result. The windows were manufactured according to certain specifications and plaintiff received the benefit. UCC 2-201 provides, in relevant part,

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

* * *

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

© with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

The exact terms of Kassl's agreement with plaintiff are unclear, particularly the terms as to timing. Their dealing and writing do, however, show an agreement that plaintiff would pay for the work that was already done, and that Kassl had already manufactured and installed the windows *before* plaintiff rejected them. In fact, plaintiff made direct payments to Kassl for the windows and engaged Kassl to do additional work before rejecting the completed windows on the stated ground of non-compliance with Landmarks specifications. Plaintiff also claims in its Complaint/Bill of Particulars that it has a contract with Kassl, a contract it alleges includes Landmarks compliance, a term the Court has already rejected.

Finally, Kassl claims unjust enrichment, which is based on quasi contract. It is axiomatic that where "there is an express contract.... between the general contractor and the subcontractor, the owner ... may not be held directly liable to the subcontractor on a theory of implied or quasi-contract, unless he has in fact assented to such an obligation; the mere fact that [the owner] has consented to the improvements provided by the subcontractor and accepted their benefit does not

render him liable to the subcontractor, whose sole remedy lies against the general contractor.”

Worlock Paving Corp. v. Camperlino, 207 A.D.2d 975, 976 (4th Dept. 1994), citing,

Metropolitan Elec. Mfg. Co. v Herbert Constr. Co., 183 AD2d 758, 759).(2d Dept. 1992)

(finding that where services performed at behest of someone other than defendant, plaintiff must

look to that person for recovery). *Accord Heller v. Kurz*, 228 A.D.2d 263, 264 (1st Dept. 1996)

(broker plaintiff failed to show performed additional services for shareholder defendants to

justify quasi-contract claim for benefit from stock sale through public offering).

Here, there is evidence that Kassl performed additional services at plaintiff's behest aside from those covered by the Imperial-Kassl agreement. Kassl performed retrofit-repair work after the original installation. There is also evidence that plaintiff paid Kassl directly for work it had performed under the Imperial-Kassl agreement, and for retrofit and repair work that it undertook independent of that agreement. The Court understands Kassl's denial of a contract with plaintiff to be referring to the initial agreement to manufacture the windows. That agreement was with Imperial. But plaintiff then agreed to pay Imperial's debt to Kassl after receiving the benefit of their bargain, and based in part on new consideration. Kassl claims it is owed approximately \$18,000, which the evidence supports. Its motion for summary judgment on its counterclaim against plaintiff is granted in part as to liability only.

Kassl's Cross-Claim against Imperial

As set forth above, the unrefuted evidence shows there was a contract between Imperial and Kassl. Under that contract, Imperial agreed to pay Kassl a specified amount of money for the fabrication and installation of specified windows. Additional unrefuted evidence establishes that Kassl substantially performed its obligations under the contract. Although Imperial breached the

agreement by failing to pay Kassl the agreed-upon money and by walking away from that agreement, Kassl elected to deal directly with plaintiff, who then paid Kassl. Kassl claims, however, that it continued to look to Imperial. That Kassl is owed money for work it completed is undisputed, but there remain disputed issues regarding the exact amount of damages. Imperial has not presented evidence sufficient to raise an issue of fact, and has not established there was a novation. Kassl's motion for summary judgment on its cross-claim against Imperial is granted in part as to liability only.

B. Imperial's Motion

The Complaint

Imperial argues that Kassl did all the work and replaced it as the sole contractor responsible for the window project, which requires granting summary judgment for Imperial. The argument is based entirely on principles of negligence, which the Court has already found do not apply to this case. Imperial's only mention of a contract claim is to assert that plaintiff failed to allege one, which the Court discussed above and rejected. With respect to Imperial's broader assertion that it is not liable to plaintiff, the Court agrees, although not on the theory Imperial proposes.

The May 7, 2002 contract between Imperial and Plaintiff provided that Imperial would complete the work described in the contract documents, which included the agreement and the architect's drawings and specifications dated 9/30/00. The contract specified that Imperial would supply 45 window units "per [its] ... Proposal" and that Plaintiff would pay Imperial \$20,000 "on delivery of windows at the jobsite," then make monthly payments "according to work progress...." The contract further provided,

A. Notwithstanding anything to the contrary contractor is obligated to supply all materials, material handling, labor, equipment and work necessary to implement the architectural plans, and the Scope of Work rider. In the event said scope of work rider does not conform with the plans then unless plans are wrong or unviable and/or the change has been consented to in writing then and in that event contractor obligated at its own cost and expense to comply with plans and no adjustment to price.

The agreement between Imperial and Plaintiff is not integrated and in fact refers to other documents, including Imperial's "proposal." Virtually all of the subsequent correspondence, facsimiles, proposals, and drawings reflect the parties' understanding that the "arched" windows to be installed, would be square topped windows with curved infills and *not* arched. Jay Sanchez of Imperial explained in his EBT that Nathanson and plaintiff, through its owner Omansky, agreed to this arrangement because the fabrication and installation of arched windows would be prohibitively expensive. So, regardless of what the architect's specifications showed, plaintiff agreed to the fabrication and installation of square topped windows with curved infills.

There also is unrefuted evidence that neither Imperial nor Kassl had any responsibility for dealing with Landmarks. That was exclusively the responsibility of the construction manager Nathanson or the architect JK Design. Their failure to ensure that the project was being constructed in accordance with the Landmarks permit does not in any way preclude granting summary judgment to Imperial against plaintiff on the Complaint.

Plaintiff has not submitted evidence sufficient to raise a triable issue of fact. The evidence it has submitted includes an architect's drawing that it claims shows that Landmarks approved the project based in part on its understanding that the windows would be arched on top. The drawing that plaintiff has submitted, however, bears a date later than the architect's drawings incorporated by reference into the Imperial-plaintiff agreement as "contract documents," which

documents include architect specifications and drawings. These latter documents have not been submitted to the Court by any party. Consequently, there is no evidence that the drawing submitted here by plaintiff was relied on or even seen by Imperial.

In any event, evidence that Imperial knew the windows had to be in conformity with Landmarks requirements does not in and of itself make Imperial liable for the lack of compliance. The responsibility to comply lay with plaintiff and not the subcontractors. Nor does the evidence establish that the subcontractors even knew what Landmarks required. Plaintiff chose to cut corners and save money by having its subcontractors fabricate and install less expensive windows. It must now pay the price for the resulting lack of Landmarks compliance.

Even if there were decisive evidence that Imperial knew that Landmarks had to approve the windows, which there is not, the bulk of this evidence is not admissible. Plaintiff submits an affidavit of its construction manager Nathanson, in support of its cross-motion/opposition. Nathanson testified at an EBT, and the Court will disregard his affidavit to the extent it contradicts his prior sworn testimony. *Amaya v. Denihan Ownership Co., LLC., supra*, 30 A.D.3d at 328. Nathanson now attests that Imperial not only understood that the windows had to be arched to comply with the Landmarks permit, it agreed to pay for new windows if Landmarks rejected the ones Kassl had fabricated and installed. In his EBT, however, Nathanson testified only that he had told Sanchez of Imperial that the square-topped windows were a problem, but that he let the installation continue because the tenants needed windows.

Nathanson also tried to change his EBT testimony in a tardy errata sheet to conform to the statements in his affidavit. This errata sheet and a signed copy of the EBT transcript were not provided to defendants until October 31, 2008, more than ten months after Nathanson's

December 19, 2007 EBT. Pursuant to CPLR 3116(a), the errata sheet will be disregarded by the court, and the unsigned transcript will be used as if signed.

Further, testimony by Nathanson and Omansky that Sanchez understood the windows he was agreeing to furnish had to be approved by Landmarks, is speculative and conjecture and, is therefore, insufficient to defeat summary judgment. *Chang v. Rodriguez*, 57 A.D.3d 295 (1st Dept. 2008). Imperial's summary judgment motion as to plaintiff's complaint against Imperial is granted.

The Cross-Claims

Imperial has no basis for its cross-claims against Kassl. The undisputed evidence establishes that Kassl did not breach its contract with Imperial. Nor does Imperial have a legal basis on which to seek either indemnity or contribution from Kassl. A contribution or indemnity claim arises only from tort and not contract liability. *See, e.g., Board of Ed. Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21 (1987) (discussing basis of contribution liability in New York). There is also no claim or issue of vicarious liability that could support a claim for indemnity. *See Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680, 690 (1990) (finding that key element of common-law cause of action for indemnification is not duty running from indemnitor to injured party, but "a separate duty owed the indemnitee by the indemnitor.") Imperial's motion for summary judgment as to its cross-claim against Kassl, and as to Kassl's cross-claim against Imperial, is denied.

C. Plaintiff's Cross-Motion for Summary Judgment

Plaintiff's cross-motion against Imperial and Kassl for summary judgment on the Complaint is denied for the reasons stated above.

D. JBF's Cross-Motion for Summary Judgment

JBF seeks dismissal of Imperial's third-party complaint for contribution and indemnity. The motion is unopposed. For the reasons stated above regarding dismissal of Imperial's cross-claims against Kassl, Imperial has no basis for seeking contribution or indemnity from JBF. JBF's cross-motion is granted. The court, after searching the record, further dismisses Imperial's third-party claim for contribution and indemnity as to all third-party defendants.³

E. JK Design's Motion to Dismiss

This is JK Design's second attempt to dismiss the Third-Party Complaint. This attempt must fail for the same reason previously stated by the court in its denial of the first motion. As the court found, "JK Design Group's ... motion to dismiss the third-party complaint against it is denied, with leave to renew, upon submission by JK Design of a motion which includes copies of both the original and third-party complaint to this action." 11/24/08 Decision, citing, *Washington Temple of God In Christ, Inc. V. Global props. & Assoc. Inc.*, 15 Misc.3d 1142A (Sup Ct, Bronx County 2007), *aff'd in part*, 55 A.D.3d 727 (2d Dept. 2008). Again, JK Design has failed to attach copies of the operative pleadings to its motion to dismiss, which the Court now dismisses. *See 344 E. 72 Ltd. Partnership v. Dragatt*, 188 A.D.2d 324 (1st Dept. 1992) (affirming denial of motion to dismiss).

F. Kassl's Request to Preclude Omansky

Kassl's request that Omansky be precluded from representing both plaintiff and JK Design due to a conflict of interest is moot in light of the court's dismissal of the third-party

³JK Design, alternative to its motion to dismiss the third-party complaint against it, requests summary judgment, which the court grants.

complaint. Accordingly, it is hereby

ORDERED that defendant Kassl's motion for summary judgment against plaintiff 6 West on the complaint is granted and the complaint against Kassl is dismissed; and it is further

ORDERED that Kassl's motion for summary judgment on its counterclaim against plaintiff 6 West is granted in part as to liability only, and its damages claim for the original and additional window work is severed; and it is further

ORDERED that Kassl's motion for summary judgment on its cross-claim against defendant Imperial is granted in part as to liability only, and the damages claim for the original window work is severed; and it is further

ORDERED that defendant Imperial's motion for summary judgment dismissing the Complaint against it by plaintiff 6 West is granted; and it is further

ORDERED that defendant Imperial's motion for summary judgment granting its cross-claims against defendant Kassl and denying Kassl's cross-claim, is denied; and it is further

ORDERED that plaintiff 6 West's cross-motion for summary judgment against defendants Imperial and Kassl on the complaint, is denied; and it is further

ORDERED that third-party defendant JBF's cross-motion for summary judgment is granted, and the third-party complaint against JBF is dismissed; and it is further

ORDERED that third-party defendant JK Design's renewed motion to dismiss the third-party complaint is denied, and JK Design's alternative motion for summary judgment and dismissal of the third-party complaint, is granted; and it is further

ORDERED that on searching the record, the court grants summary judgment as to all remaining third-party defendants and the third-party complaint in its entirety is dismissed; and it

is further

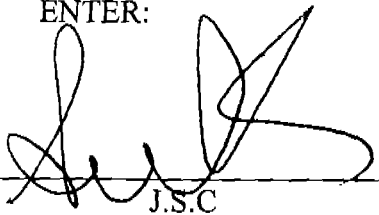
ORDERED that defendant Kassl's claim for attorney's fees and costs against JK Design is denied; and it is further

ORDERED that the caption shall be amended to reflect that Imperial's name is Imperial Glassworks, Inc.; and it is further

ORDERED that, because the remaining claimed damages fall within the jurisdictional limits of the New York State Civil Court, the Clerk is directed to transfer this matter to Civil Court pursuant to pursuant to CPLR 325(d) for a trial on damages only in the remaining main action.

Date: June 15, 2009
New York, N. Y.

ENTER:



J.S.C

FILED
JUN 17 2009
COUNTY CLERK'S OFFICE
NEW YORK