

**Dundy v Hanover Riv. House, Inc.**

2009 NY Slip Op 31726(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 108394/06

Judge: Joan A. Madden

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

PRESENT: Hon ~~Judge~~ Joan A. Mader

PART 11

Index Number : 108394/2006  
**DUNDY, ALISON**  
 vs.  
**HANOVER RIVER HOUSE**  
 SEQUENCE NUMBER : 004  
 REARGUMENT/RECONSIDERATION

INDEX NO. 108394/06  
 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 is decided in accordance with the attached Memorandum Decision + OLC

**FILED**

AUG 04 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: July 29, 2009

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 11

-----X

ALISON DUNDY and RICHARD DUNDY,

Plaintiffs,

Index No.: 108394/06

-against-

HANOVER RIVER HOUSE, INC., and  
MIDBORO MANAGEMENT, INC.,

Defendants.

-----X

HANOVER RIVER HOUSE, INC., and  
MIDBORO MANAGEMENT, INC.,

Third-Party Plaintiffs,

-against-

RAND ENGINEERING AND ARCHITECTURE, P.C.  
AND MASCON RESTORATION, LLC,

Third-Party Defendants.

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JOAN A. MADDEN, J.

In this action arising out of severe water damage to plaintiffs' cooperative apartment, third-party defendant Rand Engineering and Architecture, P.C. ("Rand"), moves pursuant to CPLR 2221(d) for an order granting reargument of this court's decision and order dated March 4, 2009 ("the original decision") to the extent that it denied Rand's motion for summary judgment dismissing the third party claims against it for contribution. Defendants/third-party plaintiffs Hanover River House, Inc. ("Hanover") and Midboro Management, Inc. ("Midboro"), oppose the

motion.

### Background

Plaintiffs Alison and Richard Dundy are the shareholders and proprietary lessees of cooperative apartment 12B at 335 Greenwich Street in Manhattan. In April 2006, plaintiffs were caused to vacate their apartment due to water infiltration problems that had become severe beginning in late 2004, and resulted in a mold condition. Defendant/third-party plaintiff Hanover is the cooperative corporation that owns the building and defendant/third-party plaintiff Midboro is Hanover's managing agent. In May 2000, Hanover hired Rand to perform engineering services in connection with the renovation and repair of the facade of the building. In March 2002, by a separate contract, Hanover hired Rand to perform engineering services in connection with the replacement of the roof. Hanover hired third-party defendant Mascon Restoration, LLC ("Mascon") as the contractor to perform the facade repairs and replace the roof.

In June 2006, plaintiffs commenced the instant action against Hanover and Midboro. The amended complaint asserts a first cause of action against Hanover for breach of the proprietary lease; a second cause of action against Hanover and Midboro for breach of the implied warranty of habitability; a third cause of action against Hanover for negligence; a fourth cause of action against Midboro for negligence; a fifth cause of

action against Hanover and Midboro for gross negligence; a sixth cause of action against Hanover for breach of the duty of good faith and fair dealing; a seventh cause of action against Hanover for constructive eviction; an eighth cause of action against Hanover and Midboro for injunctive relief; and a ninth cause of action against Hanover for attorney's fees.<sup>1</sup>

Hanover and Midboro thereafter commenced a third-party action against Rand and Mascon. The third-party complaint asserts first and second causes of action for indemnification and contribution, against Rand and Mascon, respectively.

Rand and Mascon moved for summary judgment dismissing the third-party complaint. In the original decision, the court granted the motions to dismiss the third-party claims for indemnification, but denied them with respect to the contribution claims. In reaching this conclusion that court wrote:

... "[c]ontribution is generally available as a remedy 'when two or more tortfeasors share in responsibility for an injury in violation of duties they respectively owed to the injured person.'" Id (quoting Garrett v. Holiday Inns, Inc., 58 NY2d 253, 258 [1983]). A claim for contribution can be asserted even when the contributor owes no duty to the injured persons, as long as there has been a

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<sup>1</sup>By a decision and order dated December 1, 2008, this court awarded plaintiffs partial summary judgment on the issue of liability as to the second cause of action for breach of the implied warranty of habitability. The court also denied partial summary judgment on the first cause of action for breach of the proprietary lease, and dismissed the seventh cause of action for constructive eviction.

breach of a duty that runs from the contributor to the defendant who has been held liable. Id.

Here, as the engineering firm and contractor hired to address the problem of water leaking into plaintiff's apartment, Rand and Mascon owed duties to Hanover and its managing agent, Midboro. Moreover, the record establishes that triable issues of fact exist as to whether Rand and Mascon are responsible, at least in part, for plaintiffs' damages and injuries.

(original decision at 4-5)

Specifically, in the original decision the court noted that the record shows that beginning in April and October 2004, Rand continually advised that the east wall, through which the water was infiltrating plaintiffs' apartment, could neither be inspected nor repaired without a suspended scaffolding, which required access to the neighboring building at 16 Jay Street. In addition, the record revealed that the inability to obtain that access was the excuse Hanover and Midboro consistently provided to plaintiffs for the delay in inspecting and repairing the exterior wall, and the delay in repairing plaintiffs' apartment.

The court also pointed out that at the end of 2005, Hanover fired Rand and hired a new architect who advised that an alternative method of rigging was available which did not require access to 16 Jay Street. The new architect also advised that the rigging need go up only once, as opposed to the two separate riggings, Rand said were necessary to first inspect and later repair the east wall of building.

The court thus concluded that under these circumstances, "where the record indicates that the east wall of the building could have been repaired without access to 16 Jay Street, material issues of fact are raised as to Rand's and Mascon's role in delaying the repair work to the exterior wall, which not only delayed the repairs to plaintiffs' apartment, but also resulted in additional water damage to the apartment" (original decision at 11).

Rand now moves for reargument, asserting that third-party claims for contribution must be dismissed against it as (1) plaintiffs' claimed damages are for purely economic loss resulting from a breach of contract, and (2) Hanover and Midboro failed to submit an affidavit from an expert necessary to establish a claim for professional malpractice.

Hanover and Midboro oppose the motion, arguing that as noted in the original decision, the claims against Rand are based on allegations that the damage to plaintiffs were directly caused by the active negligence and/or professional malpractice of Rand and not for breach of contract. In addition, Hanover and Midboro argue that as the negligence/and or professional malpractice of Rand can be determined by a lay person, an expert affidavit is not needed to support the contribution claims against Rand.

#### Discussion

A motion for reargument is addressed to the discretion of

the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part, 80 NY2d 1005 (1992).

Here, even assuming that it granted reargument, the court would adhere to its original decision. The first issue raised is whether a third-party claim for contribution can be properly asserted against Rand. It is well established that a third-party claim for contribution is not permitted under New York's contribution statute (CPLR 1401), when the plaintiff in the underlying action seeks purely economic loss arising out of a breach of contract. See Board of Educ. of Hudson City School Dist. v. Sargeant, Webster, Crenshaw & Folley, 71 NY2d 21, 27 (1987) (noting that the "existence of some form of tort liability is a prerequisite to application of [New York's contribution] statute"). However, in this case, plaintiffs have asserted not only contract claims, which do not provide a basis for a third-party claim for contribution, but also a tort claims for negligence and gross negligence.

Moreover, while "the touchstone for the purposes of whether

one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein," (Children's Corner Learning Center v. A. Miranda Contracting Corp., \_\_\_ AD3d \_\_\_\_, 879 NYS2d 418, 422 [1<sup>st</sup> Dept 2009]), a review of the complaint in this action reveals that plaintiffs do not seek only economic or benefit-of-the bargain type of damages associated with a breach of contract claim but also traditional tort damages, including damages for substantial impairment to or loss of their personal property. Accordingly, contrary to Rand's position, a third-party claim for contribution is properly asserted against it insofar as the complaint alleges claims for negligence and gross negligence and seeks tort damages.

Rand also argues that the third-party claim for contribution which is purportedly based on allegations of professional malpractice cannot be asserted in the absence of an expert affidavit. While expert testimony is generally required to support allegations of malpractice except where the alleged act falls within the competence of the lay jury (530 East 89<sup>th</sup> Street v. Unger, 43 NY2d 776, 777 (1977)), it cannot be said at this stage of the litigation whether an expert will be required to sustain contribution claim against Rand. See Hammer v. Rosen, 7 NY2d 376 (1960); Barrata v. ABF Real Estate Co., Inc., 215 AD2d 518 (2d Dept 1995).

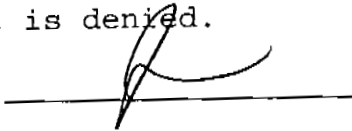
Notably, the contribution claim against Rand is not based on

any design error but, rather, on Rand's alleged failure to advise defendants of an alternative method of rigging which would have avoided the delay involved in obtaining the approval from the neighboring building. compare Travelers Indem. Co. v. Zeff Design, 60 AD3d 453, 455 (1<sup>st</sup> Dept 2009) (affirming trial court's grant of summary judgment dismissing professional malpractice claim against engineering firm in the absence of an expert affidavit supporting allegations that the firm's design failed).

Accordingly, it is

ORDERED that Rand's motion for reargument is denied.

Dated: July 29, 2009

  
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J.S.C.

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