

**Guardsman El. Co. Inc. v AIMCO Capital Dev.**

2009 NY Slip Op 32825(U)

November 18, 2009

Supreme Court, New York County

Docket Number: 116447/06

Judge: Martin Shulman

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

PRESENT: HON MARTIN SHULMAN, J.S.C.  
*Justice*

PART 1

Guardman Elevator

INDEX NO. 116447/06

- v -

Apartment Investment

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 in accordance with the attached decision and order.*

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

**FILED**  
DEC 03 2009  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: Nov. 18, 2009

*[Signature]*  
HON MARTIN SHULMAN, 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: I.A.S. PART 1

-----X  
GUARDSMAN ELEVATOR CO. INC.,

Plaintiff,

Index No. 116447/06

-against-

AIMCO CAPITAL DEVELOPMENT, OP PROPERTY  
MANAGEMENT, LLC, 107-145 WEST 135<sup>TH</sup>  
STREET ASSOCIATES, LLP, FRANK J.  
SLUBOWSKI, III,

Defendants.

-----X  
AIMCO CAPITAL DEVELOPMENT, OP PROPERTY  
MANAGEMENT, LLC, 107-145 WEST 135<sup>TH</sup>  
STREET ASSOCIATES, LLP, FRANK J.  
SLUBOWSKI, III,

TP Index No. 590804/08

Third-Party Plaintiffs,

-against-

PARRY C. BERKOWITZ, and B SQUARED  
ENGINEERING, LLC.,

Third-Party Defendants.

-----X

MARTIN SHULMAN, J.:

Third-party defendants Parry C. Berkowitz and B Squared Engineering, LLC.  
(hereafter the "B Squared Defendants") move, pursuant to CPLR 3211 (a) (7), for an  
order dismissing the third-party action brought by defendants/third party plaintiffs  
AIMCO Capital Development, OP Property Management, LLC ("OP"), 107-45 West  
135th Street Associates, LLP ("West 135th Street Associates") and Frank J. Slubowski,  
III (hereinafter, collectively "AIMCO"), granting the B Squared Defendants leave to enter  
a judgment against third-party plaintiffs for statutory costs and disbursements, or

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NEW YORK  
COUNTY CLERK'S OFFICE

alternatively, granting them additional time to serve an answer, in the event that the court should deny their motion.

The main action by plaintiff Guardsman Elevator Co., Inc. ("Guardsman") sought to recover damages arising from the termination of its 2006 contract (the "Contract") with OP and West 135th Street Associates. Guardsman originally commenced the action against OP, West 135th Street Associates, other related AIMCO entities and the B Squared Defendants, which OP had hired to perform quality-control inspections of Guardsman's work modernizing the elevators at 107-145 West 135th Street, New York, New York (the "Subject Premises"). By decision and order dated July 16, 2007, this court granted the B Squared Defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) in the main action, dismissing the fourth cause of action for tortious interference with a contract, the sole claim asserted against them (Motion at Exh. B). Guardsman subsequently sought to reargue this court's determination. By decision and order dated February 14, 2008, this court granted reargument, and adhered to its original determination (Motion at Exh. C).

Thereafter, on September 10, 2008, AIMCO commenced a third-party action against the B Squared Defendants, asserting three causes of action: common-law indemnity (first), contribution (second) and contractual indemnity (third). The B Squared Defendants now move, pursuant to CPLR 3211 (a) (7), to dismiss the third-party complaint as asserted against them.

On a motion pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The

complaint, in this case, the third party complaint, must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (*id.*; *Morone v Morone*, 50 NY2d 481 [1980]). Affidavits and other evidence submitted by plaintiff may be considered for the limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially meritorious claims (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

The B Squared Defendants first argue that the common-law indemnification cause of action must be dismissed because in the main complaint, Guardsman sued AIMCO for its own alleged wrongdoing, rather than on a theory of vicarious liability. “A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification” (*Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 212 [1st Dept 2006], quoting *Mathis v Central Park Conservancy, Inc.*, 251 AD2d 171, 172 [1st Dept 1998]). Thus, a party who has actually participated to some degree in the wrongdoing is not entitled to indemnification (see *Richards Plumbing & Heating Co., Inc. v Washington Group Int’l, Inc.*, 59 AD3d 311, 312 [1st Dept 2009]; see also *17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass’n of Am.*, 259 AD2d 75 [1st Dept 1999]).

In the main action, the remaining claims asserted against AIMCO are prima facie tort and conversion.<sup>1</sup> As reflected in the third-party complaint, Guardsman’s prima facie tort claim is based on AIMCO’s purported termination of its contract with Guardsman in

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<sup>1</sup>This court previously dismissed the breach of contract claim asserted against AIMCO on July 16, 2007.

retaliation for Guardsman's cooperation with an AIMCO internal audit that resulted in the replacement of several AIMCO personnel (Complaint, ¶¶ 23, 27, 29 & 35; Third-Party Complaint, ¶ 17). While AIMCO argues that any damages arising from plaintiff's prima facie claim solely arose from the B Squared Defendants' intentional or negligent interference with its contractual relationship with Guardsman, the allegations in the main complaint attribute the sole cause of Guardsman's termination to AIMCO's alleged retaliation, and not upon any theory of vicarious liability.

The conversion claim alleges that AIMCO locked Guardsman out of the Subject Premises, depriving it of its equipment and tools (Complaint, ¶ 26 & 40; Third-Party Complaint ¶ 17). Thus, it is clear that under this claim, Guardsman is suing AIMCO for its own alleged wrongdoing, and not for any wrongdoing by the B Squared Defendants.

Since AIMCO's liability would be based on its own participation as a wrongdoer in the acts giving rise to the loss, it is precluded from seeking recovery on the basis of common law indemnity (*Edge Mgmt. Consulting, Inc. v Blank*, 25 AD3d 364 [1st Dept], *lv dismissed* 7 NY3d 864 [2006]). Therefore, the first cause of action for common law indemnity is dismissed.

With respect to the second cause of action for contribution, the B Squared Defendants argue, inter alia, that the facts as presented in AIMCO's complaint are insufficient to sustain a contribution claim. "Contribution is generally available as a remedy 'when two or more tortfeasors share in responsibility for an injury, in violation of duties they respectively owe[d] to the injured person'" (*Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept], *lv denied* 1 NY3d 504

[2003], quoting *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258 [1983]). A contribution claim may, however, be asserted if there has been a breach of duty owed by the contributor to the defendant who has been held liable (*see Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]; *see also Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency, supra*).

The third-party complaint, in essence, claims a right to contribution from the B Squared Defendants, alleging that “if the plaintiff was caused to sustain the damages as alleged in the plaintiff’s Verified Complaint, ... then such damages were brought about by reason of the intentional conduct, negligence, carelessness, breach of contract, breach of warranty, and culpable conduct on the part of the [B Squared Defendants]” (Motion at Exh. D, Third-Party Complaint, ¶ 28). Here, AIMCO not only fails to allege any facts that could give rise to the breach of any duty by the B Squared Defendants to either Guardsman or AIMCO, but also does not plead any predicate tort liability upon which their contribution claim may be based (*see also Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency, supra*). While AIMCO argues that its contribution claim arises out of the B Squared Defendants’ intentional and/or negligent engineering consultation services to them, the third-party complaint is bereft of any assertions of any particular acts or omissions on the part of the B Squared Defendants that could support any legally cognizable theory of liability. The allegations are insufficient to support a negligence claim, in that they fail to allege, *inter alia*, the existence of a duty the B Squared Defendants owed, and a breach thereof (*see Espinal*

*v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]; *see also Solomon v City of New York*, 66 NY2d 1026 [1985]).

Further, the law of the case doctrine provides that “a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case” (*Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc.*, 128 AD2d 467, 468 [1st Dept 1987]). AIMCO’s allegations of intentional conduct by the B Squared Defendants in the third-party complaint are essentially duplicative of those Guardsman asserted in its tortious interference with contract claim against the B Squared Defendants in the main complaint (Compare the B Squared Defendants’ Exhs. A & D, the underlying Complaint and Third-Party Complaint, respectively, ¶ 55 in the complaint, ¶¶ 24, 25 in the Third-Party Complaint), claims which this court previously dismissed (Motion at Exh. B), and upon reargument, adhered to the dismissal (Motion at Exh. C).

Additionally, the third-party complaint seeks contribution based on theories of breach of contract and breach of warranty. However, this pleading does not contain any facts supporting a breach of contract claim (*Sud v Sud*, 211 AD2d 423 [1st Dept 1995] [plaintiff must allege, in nonconclusory language, the essential terms of the agreement and the specific contract provisions upon which liability is predicated]) or a breach of warranty claim (*see Ito v Marvin Lumber & Cedar Co.*, 54 AD3d 1001, 1002 [2d Dept 2008] [a breach of warranty occurs “when tender of delivery is made”]). Thus, the second cause of action fails to state a cause of action for contribution and is dismissed.

In the third cause of action for contractual indemnification, AIMCO relies on that portion of the agreement between them and the B Squared Defendants which provides indemnification for "any and all claims and actions for injuries to persons or for damage to property, and for all liabilities, claims, demands, actions, costs, suits or matters in connection therewith, including reasonable attorneys' fees, if caused by reason of or as a result of the negligent performance of [the B Squared Defendants] ..." (Motion at Exh. I, the Architectural and Engineering Services Contract dated 2/24/06, ¶ 10.1, at 16) (the "Subject Agreement").

The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009]). It is clear from the language utilized in the Subject Agreement that an indemnification claim was to be triggered only in the event of a finding of negligence on the part of the B Squared Defendants. Here, a review of the complaint and third-party complaint disclose that they are devoid of any allegations attributing any negligent acts to the B Squared Defendants in the performance of their work, which could support a finding of negligence under the indemnification clause of the contract. In view of the foregoing, the B Squared Defendants' motion to dismiss the third-party complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action is granted.

Accordingly, it is

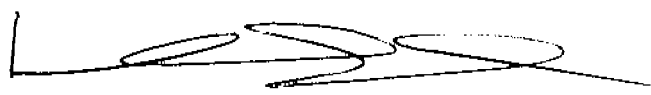
ORDERED that the motion to dismiss the third-party complaint is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Counsel for the parties in the main action are directed to appear for a status conference on December 15, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York  
November 18, 2009



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HON. MARTIN SHULMAN, J.S.C.

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