

NYP Holdings, Inc. v McLier Corp.

2010 NY Slip Op 30905(U)

April 12, 2010

Supreme Court, New York County

Docket Number: 601404/2004

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK
J.S.C.

PART 39

Index Number : 601404/2004
NYP HOLDINGS
vs.
MCCLIER
SEQUENCE NUMBER : 023
DISMISS

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

n 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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
APR 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/10

[Signature]
BARBARA R. KAPNICK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----X
NYP HOLDINGS, INC.,

Plaintiff,

-against-

Index No.
601404/04
Mot Seq. No. 023

McCLIER CORPORATION, LEONARD J. SKIBA,
FRANCIS N. CAVALIER, CONSOER TOWNSEND
ENVIRODYNE ENGINEERS, INC., CONSOER
TOWNSEND ENVIRODYNE ENGINEERS OF NEW YORK,
INC., SERGIO DE LOS REYES and MICHAEL LORCZAK,

Defendants.

-----X

McCLIER CORPORATION, LEONARD J. SKIBA, and
FRANCIS N. CAVALIER,

Third-Party Plaintiffs,

-against-

Index No.
591080/04

RUTTURA & SONS CONSTRUCTION COMPANY, INC.,
BOTTO MECHANICAL CORPORATION, FRED GELLER
ELECTRICAL, INC., PILE FOUNDATIONS CONTRACTORS,
INC., INTERSTATE IRON WORKS CORP., LYNBROOK
GLASS & ARCHITECTURAL METALS CORP., PROTO
CONSTRUCTION & DEVELOPMENT CORP., ASM
MECHANICAL SYSTEMS, BASS MECHANICAL CORP.,
STALLONE TESTING LABORATORIES, INC., S.D.L.
CONSTRUCTION CORP f/k/a BLANDFORD LAND
DEVELOPMENT CORP., FIRST WOMEN'S FIRE SYSTEMS
CORP., ARCHITECTURAL ROOFING & SIDING, INC.,
and BAYSIDE FENCING, INC.,

Third-Party Defendants.

-----X

BARBARA R. KAPNICK, J.S.C.:

This action arose out of a contract under which
defendant/third-party plaintiff McClier Corporation ("McClier")

agreed to perform the design and construction of a New York Post printing plant at East 132nd Street in the Bronx for plaintiff NYP Holdings, Inc.

Plaintiff's Complaint set forth causes of action against McClier for professional errors and omissions, malpractice, defective construction, fraud, delay damages and overbilling.

McClier impleaded various subcontractors, including third-party defendant Ruttura & Sons Construction Company, Inc. ("Ruttura"), which was retained by McClier as the concrete subcontractor, seeking indemnification on plaintiff's allegations of defective construction.

During the course of the litigation, plaintiff and McClier, together with McClier's professional liability carrier, Lloyd's of London ("Lloyd's") entered into a mediation which resulted in a settlement. None of the third-party defendants were part of the mediation.

Plaintiff was paid \$23,115,000.00 by Lloyd's and \$750,000.00 by McClier.

Ruttura now moves for an order pursuant to CPLR § 3211(a)(7) and § 3212 dismissing the third-party Complaint against it on the ground that there are no disputed issues of material fact.

The third-party Complaint alleges that Ruttura's work was poorly done, and sets forth five causes of action: (1) judgment over based on breach of their Subcontract; (2) contractual indemnification; (3) common-law indemnification; (4) contribution; and (5) breach of contract.¹

McClier argues in the first instance that the motion is barred because Ruttura made a prior motion for summary judgment (mot. seq. no. 018 dated November 13, 2007) based only on the voluntary payment doctrine, that was denied by the Hon. Herman Cahn (2008 WL 2950756 [aff'd 65 AD3d 186, 1st Dept 2009]), and because three of the other third-party defendants, to wit, Stallone Testing Laboratories, Inc. (Stallone), Fred Geller Electrical, Inc. (Geller), and First Women's Fire Systems Corp. (First Women's), previously made summary judgment motions on the same grounds alleged herein, which were also denied.

Ruttura's earlier motion, which was joined in by nine other third-party defendants, was made as court-appointed lead third-party defendant and was based on the argument, common to all of the movants, that the real party in interest in the third-party action was Lloyd's, which had no claim against the third-party defendants, because it had voluntarily settled the first-party claim. The instant motion is made upon completely different legal grounds,

¹ The only third-party defendants remaining in this case are Ruttura, First Women's Fire Systems Corp., and Architectural Roofing & Siding, Inc.

and, because it rests, at least in part, on Ruttura's contract with McClier, those grounds could not have been asserted in that prior motion. Accordingly, the instant motion is not improper on that ground. See *Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349 (1st Dept 2005).

Nor is this motion barred by Justice Cahn's decision, entered on December 13, 2007, denying the motions of Stallone, Geller, and First Women's for summary judgment. The law of the case doctrine bars a party from relitigating a matter that, in the same proceeding, has been decided against it, or against a party with whom it is in privity, where there was previously a full and fair opportunity to address the issue. *In re Liquidation of Midland Ins. Co.*, __AD3d__, 893 NYS2d 31,34 (1st Dept 2010). Privity is established where the interests of the party against whom the doctrine is being asserted "can be said to have been represented in the prior proceeding" or prior stage of the same proceeding. *Id.* at 34, quoting *Green v Santa Fe Indus.*, 70 NY2d 244, 253 (1987).

McClier cites *Buechel v Bain* (97 NY2d 295 [2001]) for the proposition that co-parties to an action are in privity with each other. However, the parties whom the *Buechel* Court held to be subject to collateral estoppel were not co-parties with the party with whom they were held to have been in privity. Rather, they had all been partners in a law firm at the time that it had entered into the fee arrangement that was later found to be invalid.

Here, McClier advances no basis for holding Ruttura to be bound by the denial of its three co-parties' motions other than the fact that Ruttura is their co-party. To be sure, co-parties may be bound by a decision that directly adjudicates the rights of only one of them. *Matter of Juan C. v Cortines*, 89 NY2d 659 (1997). However, this Court is not aware of any case in which privity, for purposes of claim preclusion, has been found solely on the basis of a party's status as a co-party.

Turning now to the merits of the motion, the second cause of action is for contractual indemnification. Ruttura's Subcontract with McClier provides in Article 4.6.1 that Ruttura

shall hold harmless [McClier and others] from and against claims, damages, losses, and expenses ... arising out of or resulting from performance of [Ruttura's] Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to ... injury to or destruction of tangible property (other than the Work itself) ... (emphasis supplied).

Consequently, Ruttura's potential liability for property damage pursuant to its Subcontract is limited to damage to property other than the Project.

The third-party Complaint does not expressly allege damage to any other property resulting from the construction of the Project; nor has McClier presented any evidence of damage to any other property. Moreover, the Complaint against McClier fails to specify any other property that may have been damaged, merely alleging that

"in connection with the performance of the Construction Work, the Post has been damaged and continues to suffer damages to itself and to other property in an amount to be determined at trial" (Compl. ¶90) Consequently, the second cause of action must be dismissed.

The fourth cause of action seeks contribution. CPLR §1401 provides, in relevant part, that:

two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

In *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, (71 NY2d 21, 28 [1987]), the Court of Appeals held that "the existence of some form of tort liability is a prerequisite to application of [CPLR 1401]." Even where tort liability is alleged, contribution may not be had if the only damages sought in the underlying complaint are economic, that is, where the plaintiff seeks no more than the benefit of its bargain. *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318 (1st Dept 2009).

Here, McClier has acknowledged that it has no specific claim against Ruttura sounding in tort. In response to a number of third-party defendants' joint Demand for a Bill of Particulars, McClier answered Demand 11 seeking "whether any of the third-party defendants owed any duty to third-party plaintiffs independent of

its obligations under the respective [subcontracts]" by stating, in relevant part,

the Third Party Defendants were obligated to perform all work within the terms and conditions of the Subcontract Agreement and the construction documents. Additionally, the Third Party Defendants were and are obligated to perform all work within reasonable construction standards.

In response to Demand 14, seeking to identify "with particularity" any claims for damages "for negligence, carelessness, culpable conduct or strict liability ... different from [the] claims for breach of contract or breach of warranty," McClier stated, "Please see response to Demand 11."

Moreover, the sole reference in the first-party Complaint that McClier adduces as referring to non-economic damages, other than the allegation that unspecified property other than the Project had been damaged, is the allegation that repair of the allegedly faulty work performed by McClier "will result in physical damage to the Printing Plant." (Compl. ¶64) Inasmuch as McClier contracted to design and construct the Project from the ground up, Paragraph 64 of the first-party Complaint alleges no more than economic damages, that is, a portion of the cost of making the Project what it would have been, had it been properly designed and properly built.

In *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.* (58 AD3d 178 [1st Dept 2008]), an engineering firm that was sued on a claim that its malpractice had directly led to the collapse of a

retaining wall, was allowed to seek contribution from the engineers that it had hired to design and implement measures for the stabilization of the wall. Here, by contrast, there was no structure subject to being damaged prior to McClier's work.

Accordingly, the fourth cause of action for contribution is also dismissed.

Common-law indemnification is available to a party that, without any fault of its own with regard to the claim for which it seeks indemnification, is vicariously liable on that claim, for the fault of another. *17 Vista Fee Assoc. v Teachers Ins. and Annuity Assn. of America*, 259 AD2d 75 (1st Dept 1999). In order to show that McClier was, at least partly at fault for the damages for which it seeks indemnification, Ruttura relies upon three documents: (1) a June 23, 2004 reservation of rights letter from attorneys for Lloyd's of London; (2) a redacted January 3, 2005 report from the same law firm; and (3) a May 14, 2004 Memorandum from an Engineering Consulting Firm that the Post had retained to review the structural steel framing system designed by McClier to support the concrete deck constructed by Ruttura.

In addition, Ruttura relies upon the deposition testimony of McClier's claims adjuster, that one of the Post's claims, the settlement of which she authorized, was for design errors on McClier's part. That McClier settled that claim is not evidence

that, in fact, McClier was, even in part, responsible for the damages for which it seeks indemnification. Accordingly, as to the third cause of action, Ruttura has not made a prima facie showing that it is entitled to judgment as a matter of law.

Ruttura further contends, correctly, that the third-party Complaint fails to allege any damages resulting from Ruttura's alleged breach of contract that are separate from the damages alleged in the indemnification claims. However, it is possible that McClier will be able to prove at trial that Ruttura breached its subcontract, but that McClier will be found to have been partly responsible for the damages resulting from that breach. In that case, while McClier would be unable to prevail on its common-law indemnity claim, it could still prevail on its breach of contract claim. Accordingly, the Court will leave in the first cause of action for breach of contract. However, as McClier essentially acknowledged at the oral argument held on the record on December 2, 2009, the fifth cause of action is duplicative of the first cause of action for breach of contract, and thus will be dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted to the extent that the second, fourth and fifth causes of action in the third-party Complaint are dismissed as against third-party defendant Ruttura & Sons Construction Company, Inc. only. The first

and third causes of action of the third-party Complaint against Ruttura are severed and continued.

Oral argument on Ruttura's discovery motions (motion seq. nos. 021 and 022), previously scheduled for April 14, 2010 at 2:15 P.M., is adjourned by this Court to April 21, 2010 at 3:30 P.M.

This constitutes the decision and order of this Court.

Dated: April 12, 2010



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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