

**Estrategia Corp. v Lafayette Commercial Condo**

2010 NY Slip Op 31119(U)

April 19, 2010

Sup Ct, NY County

Docket Number: 100147/2008

Judge: Martin Shulman

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4-19-10

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

PRESENT: SHULMAN  
Justice

PART 1

Index Number : 100147/2008  
ESTRATEGIA CORP.  
VS.  
LAFAYETTE COMMERCIAL CONDO  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. 100147/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-E  
Answering Affidavits — Exhibits A-C  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
APR 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 19, 2010

MARTIN SHULMAN 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 : I.A.S. PART 1

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ESTRATEGIA CORP. and ALLEN HIRSCH,  
Plaintiffs,

-against-

LAFAYETTE COMMERCIAL CONDO,  
Defendant.

Index No. 101147/2008  
Motion Sequence 002 & 003  
**DECISION & ORDER**

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LAFAYETTE COMMERCIAL CONDO,  
Third-Party Plaintiff,

-against-

INTERIOR AUTOMATIC SPRINKLER, INC.,  
CHOLO DINERO LLC, 114 KENMARE  
ASSOCIATES, LLC d/b/a LA ESQUINA, OBIVIA,  
LLC and KAM CHEUNG CONSTRUCTION, INC.,  
Third-Party Defendants.

Third-Party Index No.  
591126/2009

**FILED**  
APR 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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**MARTIN SHULMAN, J.:**

Third-party defendant Kam Cheung Construction, Inc. ("Kam Cheung") moves to dismiss the third-party complaint against it pursuant to CPLR 3211(a)(1) and (7), on the grounds that documentary evidence disposes of the claim against it (MS002).

Additionally, third-party defendants Cholo Dinero LLC ("Cholo") and 114 Kenmare Associates, LLC d/b/a La Esquina ("La Esquina") (collectively the "restaurants") move to dismiss the third-party complaint against them pursuant to CPLR 3211(a)(7), on the grounds that it fails to state a cause of action (MS003). Defendant and third-party plaintiff Lafayette Commercial Condo (the "condo") opposes both motions, which are consolidated for disposition.

The condo is a mixed-use commercial and residential condominium building located at 199-203 Lafayette Street, New York County. Plaintiff Estrategia Corp.

("Estrategia") is a New York corporation owned by co-plaintiff Allen Hirsch ("Hirsch") (collectively "Plaintiffs"). Estrategia owns units 1B and 1C in the condo, which it apparently leases to the restaurants, and was the "beneficial owner" of a portion of the basement used for storing oil paintings and drawings created by Hirsch, a professional artist. The complaint alleges that on January 20, 2005 a water pipe in the condo's lobby froze and burst, causing water to flow into the basement. As a result, 81 of Hirsch's art works were destroyed and 33 others substantially damaged, according to the complaint which asserts causes of action for negligence and trespass.

The third-party complaint asserts causes of action against all third-party defendants for common-law negligence, common-law indemnification, contractual indemnification, and breach of contract. Kam Cheung, a general contractor, acknowledges Plaintiffs hired it to do construction work and interior alterations in their units (Qiao Aff. in Support of Motion [seq. 002] at ¶ 4). It attaches, as Exhibit D to its motion, both a proposal for work dated January 22, 2005 and a work permit issued by the New York City Department of Buildings ("DOB") dated January 27, 2005. On the basis of this documentary evidence, Kam Cheung argues that, not having commenced work on or by January 20, 2005, it could not be liable for the incident and dismissal of the third-party complaint is warranted, citing *Bronxville Knolls, Inc. v Webster Town Ctr. P'ship*, 221 AD2d 248 (1st Dept 1995) ("In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211[a][1], the documents relied upon must definitively dispose of plaintiff's claim").

The documentary evidence is not, however, as definitive as Kam Cheung suggests. The proposal is addressed to Mr. Derek Sanders, 203 Lafayette Street, for a

job location at 203B Lafayette Street. It is not countersigned and refers to a work plan "dated 08-19-04." Only in the affidavit of Mark Nucci, an investigator the condo engaged ("Nucci Affidavit"), is Sanders identified as an owner of Cholo, the restaurant occupying Estrategia's unit 1C (Sulit Aff. in Opp. at Exh. A). The work permit is less helpful to Kam Cheung's position. It is issued for the location "114 Kenmare Street" on January 27, 2005, though it was approved on July 2, 2004. While the relationship between 203 Lafayette Street and 114 Kenmare Street is deducible, Kam Cheung never mentions or explains the inconsistency. Application of CPLR 3211(a)(1) requires a standard of certainty which Kam Cheung fails to meet and thus its motion to dismiss the third-party complaint against it (MS002) is denied.

The restaurants argue that they had no ownership interest in, control over or responsibility for the lobby area where the pipe, which allegedly froze and burst, was located. Nor were the damaged art works located in an area where they had any duties or responsibilities. They maintain that they cannot be found negligent absent a duty of care.

On a motion to dismiss for failure to state a cause of action, the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

The elements of a negligence cause of action are: (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof. *Akins v Glens Falls City Sch. Dist.*, 53 NY2d 325, 333 (1981). The

third-party complaint (Exh. B to Motion [seq. 003]) offers no facts regarding the restaurants' alleged negligence in regard to the frozen pipe and resulting flood. In fact, other than being named, the third party complaint says nothing about the restaurants. The only inference that can be drawn from the third-party complaint is that the restaurants exist, but that is many steps removed from attributing negligent conduct to them.

However, Nucci states that, on several visits to the building after the incident, he spoke to tenants including Hirsch and Sanders. In aggregate, he was told that at or around the time of the incident, the restaurants were doing work in the building, Kam Cheung was the contractor employed, workers were going in and out of the building, and a complaint had been made "to the building's superintendent about the front door being propped open on a very cold day." Nucci Affidavit, at ¶¶ 3-6. This information is sufficient to sustain the first cause of action against the restaurants for negligence and the second cause of action for common-law indemnification.

The condo attaches to its opposition a copy of the lease between Estrategia and Cholo executed on March 23, 2004 (Exhibit A) and a copy of the assignment of the lease by Cholo for at least a portion of the premises to La Esquina as of February 1, 2005 (Exhibit B). Aside from Kam Cheung's contract proposal to Cholo's purported owner, nothing else documents the relationships, and the associated duties and responsibilities, among the parties. For instance, there is no insurance policy or certificate of insurance for any party and there is no executed contract between Kam Cheung and Plaintiffs or the restaurants, singly or together. Discovery is clearly needed

[\* 6]  
and, at least until then, the third-party complaint's third and fourth causes of action for contractual indemnity and breach of contract shall remain.

Accordingly, it is

ORDERED that third-party defendant Kam Cheung Construction, Inc.'s motion (MS002) to dismiss the third-party complaint against it is denied; and it is further

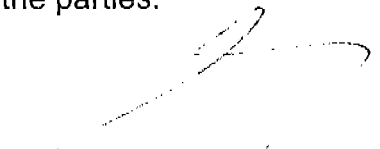
ORDERED that third-party defendants Cholo Dinero LLC and 114 Kenmare Associates, LLC d/b/a La Esquina's motion (MS003) to dismiss the third-party complaint against them is denied; and it is further

ORDERED that the third-party defendants shall file and serve an answer to the third-party complaint within 20 days of service of a copy of this order with notice of entry.

Counsel for the parties are directed to appear for a status conference on May 25, 2010 at 9:30 a.m. at I.A.S. Part 1, Room 325, 60 Centre Street, New York, New York.

The foregoing constitutes this Court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York  
April 19, 2010

  
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Hon. Martin Shulman, J.S.C.

**FILED**  
APR 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE