

**Board of Educ. of the Farmingdale Union Free
School Dist. v Grillo**

2010 NY Slip Op 32256(U)

August 16, 2010

Supreme Court, Nassau County

Docket Number: 3369-06

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

BOARD OF EDUCATION OF THE
FARMINGDALE UNION FREE SCHOOL
DISTRICT,

INDEX No. 3369/06

Plaintiffs,

MOTION DATE: July 8, 2010
Motion Sequence # 004, 007

-against-

JOHN A. GRILLO, ARCHITECT, P.C., JOHN
A. GRILLO, Individually, CHRISTOPHER
HUNT, GREYHAWK NORTH AMERICA,
LLC, STALCO CONSTRUCTION CORP.,
ALAN NAHMIA, ACL CONSTRUCTION
CORP., CARLO LUCARELLI, ANIANO
MASONRY, INC. and MASONRY
CONTRACTORS, INC.,

Defendants.

C.G. MASONRY CONTRACTORS, INC.,

Third-Party Plaintiff,

-against-

CARVALHO CONCRETE CORP. and TRIPLE M
ROOFING CORP.,

Third-Party Defendants.

CARVALHO CONCRETE CORP.,

Fourth-Party Plaintiff,

-against-

WHITESTONE CONSTRUCTION CORP.,
ISLAND BAY WINDOW AND CURTAIN WALL
and WAUSAU WINDOW AND WALL SYSTEMS,

Fourth-Party Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... XXX
- Reply Affidavit/Affirmation XX
- Memorandum of Law..... XX
- Memorandum of Law in Reply..... X

Motion by fourth-party defendant Apogee-Wausau Group, Inc. i/s/h/a Wausau Window and Wall Systems (Wausau) for an order pursuant to CPLR 3211(a)(7) dismissing the fourth-party complaint of Carvalho Concrete Corp. (Carvalho) and all cross-claims asserted by fourth-party defendant Whitestone Construction Corp. (Whitestone) is **granted** in part and **denied** in part.

Cross-motion by fourth-party defendant Whitestone for an order pursuant to CPLR § 3211(a)(7) dismissing Carvalho’s fourth-party complaint is **granted** in part and **denied** in part. Whitestone’s motion for an order staying all disclosure pursuant to Commercial Division Rule 11(d) and CPLR 3124(b) is **denied**.

BACKGROUND

In February 2001, the Board of Education (Board of Ed) entered into a contract with defendant ACL Construction Corp. (ACL) to act as the general contractor supervising the

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installation and waterproofing of interior and exterior walls for the 4 classroom additions to a public school building located at 95 Woodward Parkway, Farmingdale, New York (Woodward School Project). The Board of Ed entered into a contract for a 6 classroom addition for the same school with defendant Stalco Construction Corp.

ACL entered into a contract with defendant/third-party plaintiff C.G. Masonry Contractors, Inc. (C.G.), to perform concrete and masonry work on the 4 classroom addition at the school. C.G. then retained third-party defendant Carvalho to perform concrete and masonry work. Thereafter, fourth-party defendant Whitestone was contracted to install windows with respect to the four classroom addition. The windows were manufactured by fourth-party defendant Wausau.

Defendant Grillo was the School District Architect. Defendant Greyhawk was the construction manager. Defendant Hunt was the project manager from the architectural firm.

In 2006, the Board of Ed commenced an action against various entities which it retained to construct and design the additions to the Woodward School Project. In the main action, plaintiff alleges that Grillo, Hunt, Greyhawk, Stalco, and ACL were negligent in the design and construction of the new additions, resulting in moisture and water leaks from February 2001 and continuing to date. Plaintiff further claims that the damages are so extensive that sections of the school building need to be torn down and reconstructed at a cost of no less than \$6,000,000.00.

Subsequently, C.G. Masonry Contractors, Inc. (C.G.) brought a third-party action against Carvalho and Triple M. Roofing Corp. Carvalho then commenced a fourth-party complaint against Whitestone, Island Bay Window and Curtain Wall and Wausau. Island Bay Window and Curtain Wall (Island Bay) were contracted to remove and uninstall the windows. In the fourth-party complaint, Carvalho seeks contribution and common law indemnification from the fourth-party defendants. In its answer, fourth-party defendant Whitestone asserts a cross-claim against Wausau for contribution and indemnity.

Fourth-party defendants Wausau and Whitestone move for dismissal of the fourth-party complaint on the ground that Carvalho cannot seek contribution or common-law indemnification as Carvalho's potential liability stems from its contractual relationship to other parties in this action, and is not tort based. Wausau also seeks dismissal of Whitestone's cross-claims.

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In opposition to Wausau's motion and Whitestone's cross-motion, Carvalho asserts that plaintiff does allege claims sounding in negligence and questions of fact exist as to whether the subject windows were defectively manufactured and/or installed. Alternatively, Carvalho asserts that in the event that plaintiff's claims stem from contractual obligations, an exception exists as Wausau and Whitestone "launched a force of instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according plaintiff the benefit of every possible inference (See *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Leon & Martinez*, 84 NY2d 83, 87 [1994]). The court's role on a motion to dismiss pursuant to CPLR 3211(a)(7) is to determine whether the factual allegations fit within any cognizable theory, without regard as to whether the allegations ultimately can be established (see *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706 [2nd Dept. 2009]; *Union State Bank v Weiss*, 65 AD3d 584 [2nd Dept. 2009]; *Sokol v Leader*, 64 AD3d 1180 [2nd Dept. 2010]).

"While affidavits may be considered, if the motion has not been converted to a CPLR 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims." (*Nonnon v City of New York*, *supra*; see *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 633, 635-635 [1976]).

INDEMNIFICATION

Implied or common law indemnification arises from principles of equity (*McDermott v New York*, 50 NY2d 211, 216 [1980]). As a matter of simple fairness, a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity (Id). A right to common law indemnification may arise by virtue of the breach of a duty existing because of contractual relations between the parties (23 NY Jur2d § 87).

"The principle of 'common law or implied indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party' " (*Baron v Grant*, 48 AD3d 608 [2nd Dept. 2008], quoting *Tiffany at Westbury Condominium by its Bd. of Managers v Marelli Development Corp.*, 40 AD3d 1073, 1077 [2nd Dept. 2007]). Further, "the party seeking indemnification 'must have

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delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought' and must not have committed actual wrongdoing itself" (*Baron v Grant, supra; Tiffany at Westbury Condominium by its Bd. of Managers v Marelli Development Corp., supra* at 1077).

On this motion to dismiss, the court must assume that Whitestone, the window installer, and Wausau, the window manufacturer, were responsible for the window leaks. Thus, if Carvalho, the masonry contractor, is found liable for the building damage, it may be discharging a duty which should have been discharged by Whitestone or Wausau. Fourth-party defendants Whitestone and Wausau's motion to dismiss the fourth-party claim for common law indemnity is **denied**. Wausau's motion to dismiss Whitestone's cross-claim for indemnity is similarly **denied**.

CONTRIBUTION

There is no common law right to contribution in contract actions (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw and Folley*, 71 NY2d 21, 26 [1987]). Since the parties to a contract have the power to delineate the scope of their liability, there is nothing unfair in defining a contracting party's liability by the terms of the agreement (23 NY Jur2d § 10). CPLR 1401 authorizes contribution in actions where "two or more persons . . . are subject to liability for damages for the same personal injury, injury to property or wrongful death." However, "purely economic loss resulting from a breach of contract does not constitute 'injury to property' " (See *Children's Corner Learning Center v A. Miranda Contracting Corp.*, 64 AD3d 318 [1st Dept. 2009]; *Richards Plumbing & Heating Co., Inc. v Washington Group Intern, Inc.*, 59 AD3d 311 [1st Dept. 2009]. Further, "the touchstone for 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, supra; see Trump Village Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dept. 2003], *lv denied* 1 NY3d 504 [2003]).

Inasmuch as the underlying claims seek purely economic damages, the contribution claims are precluded. Fourth-party defendants Whitestone and Wausau's motion to dismiss the fourth-party claim for contribution is **granted**. Wausau's motion to dismiss Whitestone's cross-claim for contribution is similarly **granted**.

The branch of Fourth-party defendant Whitestone's cross-motion which seeks to

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stay disclosure is **denied**. Counsel are requested to take note of the third and fourth party designations in the caption and refer to the parties by those designations in all further papers filed in the action.

This constitutes the order and judgment of this Court.

Dated **AUG 16 2010**



J.S.C.

ENTERED
AUG 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE