

Beck v Studio Kenji, Ltd.

2011 NY Slip Op 30040(U)

January 7, 2011

Sup Ct, New York County

Docket Number: 108995/09

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____ J.S.C. _____

PART 2

Index Number : 108995/2009

BECK, ANDREW

VS.

STUDIO KENJI

SEQUENCE NUMBER : 006

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JAN 10 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/7/11

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 2

-----x

ANDREW BECK III,

Plaintiff,

Index No. 108995/09

- against -

STUDIO KENJI, LTD., JUSTIN MIYAMOTO
WEINER, and ELLEN HONIGSTOCK,

Defendants.

-----x

ELLEN HONIGSTOCK,

Third-party Plaintiff,

- against -

JOSEPH VANCE, AIA, JOSEPH VANCE ARCHITECTS,
JOSEF PRINI, AIA, JOSEPH PRINI ASSOCIATES,
LLC., GOODWOOD BUILDING, LLC SEAMUS HENCHY
& ASSOCIATES, INC., DeMEZA + ARCHITECTURE,
169 HUDSON CONDOMINIUM, and SANDRA GRIER,
PARTNER,

Third-party Defendants.

-----x

FILED

JAN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. LOUIS B. YORK, J.:

Third-party defendant Goodwood Building, LLC ("Goodwood")
moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party
Complaint.

BACKGROUND

Plaintiff, Andrew Beck III, commenced this action seeking to
recover damages from defendants Studio Kenji, Ltd. ("Kenji"),
Justin Miyamoto Weiner ("Weiner"), and Ellen Honigstock
("Honigstock") for allegedly defective design related work
performed on Unit PH7/8N, a duplex condominium unit located on
the seventh and eighth floors of 169 Hudson Street, New York, New

York (the "subject premises"). The Complaint includes the following factual allegations.

Plaintiff owns the subject premises. In 2004, plaintiff hired Kenji and Weiner to perform design-related services on the subject premises. Weiner engaged Honigstock as the architect of record for the project.

From 2004 through early 2008, plaintiff paid defendants more than \$1 million for their work on the project. In January 2008, after lengthy delays in the project's completion, plaintiff retained a new architect to review defendants' work, and instructed defendants to cease their work on the project. The new architect determined that defendants' work on the project failed to meet DOB Code and other requirements, and needed to be completely undone and redone. In particular, the architect found, *inter alia*, that the removal of portions of the floor/ceiling between the seventh and eighth floors violated certain DOB fire division Code requirements; that the architectural plan for a spiral staircase to access the roof on top of the eighth floor did not satisfy the egress requirements under the DOB Code; that the fireproofing of the seventh and eighth floors also violated the DOB Code; that defendants failed to obtain the requisite approvals for roof top chimney flues; that the wood used by defendants on the eighth floor terrace did not meet DOB Code requirements; and that defendants failed to meet smoke and carbon monoxide requirements.

Plaintiff commenced this action essentially claiming that as a result of defendants' gross mismanagement of the project, and failure to investigate New York City rules, regulations and codes, he was forced to incur substantial expenses to undo and redo portions of the project. The Complaint alleges claims for breach of contract against all defendants, (first cause of action); breach of fiduciary duty against Kenji and Weiner (second cause of action); breach of a third-party beneficiary contract against Honigstock (third cause of action); breach of the covenant of good faith and fair dealing against all defendants (fourth cause of action); unjust enrichment against all defendants (fifth cause of action); negligence against all defendants (sixth cause of action); gross negligence against all defendants (seventh cause of action); and professional malpractice against all defendants (eighth cause of action).

The submissions do not include answers filed by defendants. However, Honigstock commenced a third-party action seeking contribution, common law indemnification, or contractual indemnification from third-party defendants Joseph Vance AIA, Joseph Vance Architects, Joseph Prini ("Prini"), Joseph Prini Associates, LLC ("Prini Associates"), and DeMeza + Architecture, the new architects on the project; third-party defendant Goodwood Buildings, LLC ("Goodwood"), the general contractor; third-party defendant Seamus Henchy & Associates, Inc., the construction manager; third-party defendant 169 Hudson Street Condominium, the owner; and Sandra Grier, a partner of the owner. The third-party

complaint also refers to Honigstock's answer to the underlying Complaint.

Prini and Prini Associates interposed two answers, one to the Complaint and the other to the third-party Complaint, essentially denying the allegations therein and asserting numerous affirmative defenses. The answer to the third-party Complaint also alleges cross claims against third-party codefendants for contribution or indemnification, and against plaintiff for contractual indemnification.

Goodwood now seeks to dismiss the third-party Complaint for failure to state a cause of action.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As stated, the third-party complaint alleges claims for contribution, common law indemnification, and contractual

indemnification. Honigstock claims that third-party defendants reviewed or approved her plans for the project, but failed to properly implement the work associated with said plans during the design and construction phase, resulting in the damages claimed by plaintiff. Honigstock further claims that plaintiff's damages were caused solely by the conduct of third-party defendants.

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trustee of Columbia Univ. v Mitchell Giurgola Assocs.*, 109 AD2d 449, 451 [1st Dept 1985]). "The right to indemnification may be created by express contract, or may be implied by law to prevent an unjust enrichment or an unfair result" (*id.*).

In order to recover under a theory of contractual indemnity, a party must be in contract with the entity from which indemnity is sought (*SSDW Co. v Feldman-Misthopoulos Assocs.*, 151 AD2d 293, 295 [1st Dept 1989]). In the absence of a contractual relationship with any of the third party defendants, Honigstock's claim for contractual indemnification cannot be sustained (see *id.*). Honigstock's attempt to establish a compelling argument for privity or its functional equivalent is patently insufficient to survive a motion to dismiss. Thus, the claim for contractual indemnification must be dismissed.

Nor does Honigstock state a viable claim for common law indemnification. The predicate for common law indemnification is vicarious liability without actual fault on the part of the proposed indemnitee (*Trustee of Columbia Univ. v Mitchell Giurgola Assocs.*, *supra*, at 453). Here, however, Honigstock does not assert a claim based on vicarious liability. Instead, Honigstock alleges third-party defendants failed to properly perform their design-related obligations to plaintiff, resulting in damage. Thus, the claim for common law indemnification must also be dismissed.

Turning to the claim for contribution, CPLR 1401 provides, in part, that "two or more persons who are subject to liability for damages for the same ... injury to property ... may claim contribution among them whether or not an action has been brought or a judgment rendered against the person from whom contribution is sought." The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty owed by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought (see *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 (1988)). However, CPLR 1401 does not permit contribution between two parties whose potential liability to a third party is for economic loss resulting only from a breach of contract (*Board of Educ. v Sargant, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]).

Here, the Complaint in the main action seeks to recover damages for economic loss based on defendants' breach of contractual obligations for which no viable contribution claim can be stated. Furthermore, although the Complaint also alleges causes of action sounding in negligence, said causes of action do not support a claim for contribution. The determining factor as to the availability of contribution is not the theory behind the underlying claim, but rather, the measure of damages sought (see *Rockefeller Univ. v Tishman Constr. Corp. of New York*, 240 AD2d 341, 343 [1st Dept 1997]). Notwithstanding the tort language, all of plaintiff's claims against Honigstock seek identical damages for economic loss. In the absence of tort liability, contribution is unavailable (see *id.*).

Accordingly, it is

ORDERED that the third-party action is severed and dismissed, and the Clerk is directed to enter judgment in favor of third-party defendants dismissing the third-party action, together with costs and disbursements to third-party defendants, as taxed by the Clerk upon presentation of a single bill of costs.

Dated: 1/7/11

FILED

JAN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

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J. S. C.

LOUIS B. YORK
J.S.C.