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SHORT FORM ORDER

INDEX No. 07-12900

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-22-11 (#001)
MOTION DATE 3-24-11 (#002 & #003)
MOTION DATE 6-9-11 ((#004)
MOTION DATE 6-3-11 (#005 & #006)
MOTION DATE 6-30-11 (#007)
ADJ. DATE 6-30-11
Mot. Seq. # 001 - MD # 002 - MD
003 - XMotD # 004 - MD
005 - MD # 006 - MD
007 - MD

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515 RESTAURANT, LLC.,

Plaintiff,

- against -

SUFFOLK PLATE GLASS CO., INC.,

Defendant.

SUFFOLK PLATE GLASS CO., INC.,

Third-Party Plaintiff,

- against -

KARIM RASHID INC., KARIM RASHID, DURITE CONCEPTS, INC., ROSNER CONSTRUCTION, LLC, AND D3 ARCHITECTURE, P.C.,

Third-Party Defendants.

DOUGLAS J. BILOTTI, ESQ.
Attorney for Plaintiff
515 Broad Hollow Road
Melville, New York 11747

BAXTER SMITH & SHAPIRO, P.C.
Attorney for Suffolk Plate Glass Co., Inc.
99 North Broadway
Hicksville, New York 11801

TROMELLO , McDONNELL & KEHOE
Attorney for Karim Rashid Inc. & Karim Rashid
P.O. Box 9038
Melville, New York 11747

MORITT HOCK & HAMROFF LLP
Attorney for Durite Concepts, Inc.
400 Garden City Plaza
Garden City, New York 11530

EDWARD J. YULE, P.C.
Attorney for Rosner Construction, LLC
46 Woodbine Avenue
Northport, New York 11768

SHAUB, AHMUTY, CITRIN & SPRATT, LLP
Attorney for D3 Architecture, P.C.
1983 Marcus Avenue
Lake Success, New York 11042

Upon the following papers numbered 1 to 130 read on this motions and cross motions for summary judgment and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-15; 16-24; 25-57; 58-66; 67-68; 69-71;otice of Cross Motion and supporting papers 72-80; Answering Affidavits and supporting papers 81-99; 100-103; 104-107; 108-109; 110-116; 117-123; 124-125; 126-127; 128-130; Replying Affidavits and supporting papers 131-132; 133-134; 135-136; 137-138; Other D3 Architecture's Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 005) by plaintiff 515 Restaurant, LLC, for summary judgment in its favor on the issue of liability is denied; and it is further

ORDERED that the motion (# 004) by defendant Suffolk Plate Glass Co., Inc. for, inter alia, the imposition of sanctions pursuant to CPLR 3126, leave to amend it pleadings, and summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion (# 002) by third-party defendant D3 Architecture, P.C., pursuant to CPLR 3126, for dismissal of the claim and cross claims against it is denied; and it is further

ORDERED that the cross motion (# 003) by third-party defendants Karim Rashid and Karim Rashid Inc., pursuant to CPLR 3126, for dismissal of the claim and cross claims against them is denied; and it is further

ORDERED that the motion (# 007) by third-party defendant Rosner Construction, LLC, for, inter alia, dismissal of the claim and cross claims against it is denied; and it is further

ORDERED that the motions (# 001 & #006) by third-party defendant Durite Concepts Inc. for summary judgment dismissing the third-party claim and the cross claims against it for contribution and indemnification are determined as follows:

Plaintiff 515 Restaurant, LLC ("515"), is the owner of commercial premises known as Four Food Studio Restaurant and Cocktail Salon, located at 515 Broad Hollow Road, Melville, New York. During the construction of the restaurant, 515 entered into a contract with defendant Suffolk Plate Glass Co., Inc. ("SPG") to install, among other things, a double glass door, sidelights, and a transom at the entrance of the restaurant. Subsequent to SPG's installation of the glass vestibule door, it allegedly fell out of alignment, thereby causing chips to form in all three pieces of the installation. SPG made several repairs to the door at 515's expense during 2006, including replacement of the door's pivot, arms and cylinders. Despite the repairs, the door allegedly fell out of alignment in February 2007 and one of its sidelights shattered. After receiving several estimates, 515 allegedly replaced the vestibule doors and the broken sidelight at a cost of $29,328. 515 and incurred additional expenses replacing a glass door SPG installed in the restaurant's male restroom.

On May 1, 2007, 515 commenced this action against SPG following its rejection of a demand to provide compensation for the costs of repair and replacement of the defective doors. Shortly thereafter, 515 commenced a separate action under Index No. 07-17405 against defendant Durite Concepts, Inc. ("Durite"), the contractor responsible for the installation of the restaurant's flooring. SPG joined issue on May 23, 2007,

and its answer asserts defenses, based upon, among other things, contributory negligence, failure to mitigate damages, and failure to name necessary parties, including the restaurant's architect and its general contractor. In July 2009, SPG commenced a third-party action which impleaded Durite as a third-party defendant. The third-party complaint also names as third-party defendants Karim Rashid and Karim Rashid Inc. ("Rashid"), the restaurant's interior designer, Rosner Construction, LLC ("Rosner"), the construction project's general contractor, and D3 Architecture, P.C. ("D3 Architecture"), the project's architect. The third-party complaint asserts causes of action for contribution and indemnification against all defendants. By way of their answers, the third-party defendants have all asserted counter claims and cross claims for contribution and indemnification. On August 12, 2009, 515 and Durite executed a settlement agreement in which it agreed to release Durite from any and all claims related to damages it incurred as a result of defects on its premises.

515 now moves for summary judgment on the issue of liability, arguing, inter alia, that SPG breached the one year guarantee provision of the installation agreement by failing to install defect-free doors or paying the costs of repair and replacement of the defective doors. SPG opposes the motion on the ground triable issues exists as to whether the alleged defects to the doors occurred as a result of defective workmanship by other contractors hired by 515, misuse by patrons of the restaurant, wind damage related to snow storms, and/or the design and placement of the vestibule door. SPG also cross-moves, pursuant to CPLR 3126, for an order striking the complaint or precluding 515 from offering at trial any evidence based on its alleged spoilation of key evidence, namely the sidelights, the double glass door, fittings, fins and pivots. SPG also seeks leave, pursuant to CPLR 3025, to amend its answer to include as an affirmative defense to the action an offset and release under General Obligations Law § 15-108, related to the settlement and release 515 executed in favor of Durite. SPG further seeks dismissal of plaintiff's complaint pursuant to CPLR 3212(b) on the basis of its newly proposed defense.

The guarantee provision of the agreement between 515 and SPG states, in pertinent part, as follows:

> Unless a longer period is required in the specifications, the Contractor agrees to repair at his own expense and at the convenience of the OWNER, any defects in workmanship or material discovered within one year from the date of acceptance of the work included in the contract. In any event, the Contractor agrees to and shall pay for all damage to the building resulting from defects in his work and all expenses necessary to remove, replace and/repair his work or any other work which may be damaged in removing or repairing his work.

The contract further states that the "Contractor shall furnish all labor and materials and pay all applicable taxes for a complete and perfect job".

The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and unambiguous, the intent of the parties must

be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Nevertheless, "[l]anguage in contracts placing one party at the mercy of the other is not favored" (***Tibbetts Contr. Corp. v O&E Contr. Co.***, 15 NY2d 324, 337, 258 NYS2d 400 [1965]), and "[a] court will endeavor to give the contract construction most equitable to both parties instead of the construction which will give one of them an unfair and reasonable advantage over the other" (***Fleischman v Ferguson***, 223 NY 235, 241, 119 NE 400 [1918]; *see also* ***Metropolitan Life Ins. CO. v Noble Lowdes Intl.***, 84 NY2d 430, 618 NYS2d 882 [1994]).

Here, 515 failed to make a prima facie showing of entitlement to summary judgment as a matter of law (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Significantly, 515's submissions, namely, repair bills it obtained from SPG, raise triable issues as to whether the vestibule door was damaged by wind and snow storms, and, if so, whether the repairs were covered under the contract's one year warranty. Similarly, the portions of the deposition by SPG's principal, wherein he indicates the existence of design and flooring problems which affected the installation of the doors, raise significant issues of fact warranting denial of the motion.

In addition, 515's reliance on the provision of the contract which states that SPG "shall furnish all labor and materials and pay all applicable taxes for a complete and perfect job" is misplaced. Rather than guaranteeing a "perfect job," the provision merely holds SPG responsible for taking all necessary steps to avoid less than optimal conditions for the completion of the job. Indeed, the parties' inclusion of the "guarantee" provision reveals that they always contemplated that a less than perfect job was possible, and that SPG would be liable for repair or replacement costs related to any defects caused by its performance. Even assuming, arguendo, that the provision required SPG to deliver a "perfect job," such a provision would be disfavored as it would give 515 an unfair and unreasonable advantage and place SPG at its mercy (*see* ***Metropolitan Life Ins. CO. v Noble Lowdes Intl.***, *supra*; ***Tibbetts Contr. Corp. v O&E Contr. Co.***, *supra*). Therefore, 515's motion for summary judgment in its favor on the issue of liability is denied (*see* ***Alvarez v Prospect Hosp.***, *supra*).

SPG's cross motion for an order pursuant to CPLR 3126 striking 515's complaint is denied. The Uniform Rules for Trial Courts 22 NYCRR §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Further, a party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence before it had a chance to inspect them, and that such disposal fatally comprised its ability to defend the action (*see* ***Kirschen v Marino***, 16 AD3d 555, 792 NYS2d 171 [2d Dept 2005]). "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from spoilation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (***Iannucci v Rose***, 8 AD3d 437, 438, 778 NYS2d 525 [2d Dept 2004]; *see* ***Favish v Tepler***, 294 AD2d 396, 397, 741 NYS2d 910 [2d Dept 2002]).

Here, SPG failed to submit an affirmation demonstrating that a good faith effort was made to resolve the disclosure dispute between the parties (22 NYCRR §202.7 [a]; *see* ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]), or that 515's disposal of the evidence was done in bad faith and leaves it without a means to defend the action (*see* ***Cohen v Jordan Servs., Inc.***, 49 AD3d 680, 852 NYS2d 851 [2d Dept 2008]; ***Kerman v Martin Friedman v C.P.A., P.C.***, 21 AD3d 997, 801 NYS2d 387 [2d Dept 2005]). SPG's moving papers indicate that the vestibule door unit was disposed prior to commencement of the lawsuit; that SPG was permitted to inspect and photograph the unit before such disposal; and that SPG also disposed of allegedly defective components during previous repairs it made to the door. SPG's submissions also include numerous invoices detailing repairs it made to the vestibule door unit, the causes of the alleged damage, and recommendations made by its employees with respect to preventing further damage. In light of SPG's familiarity with the vestibule door unit and the availability of photographs it took prior to the unit's disposal, SPG failed to demonstrate the required showing of prejudice necessary for imposition of sanctions (*see* ***Quinn v City Univ. of N.Y.***, 43 AD3d 679, 841 NYS2d 306 [1st Dept 2007]; ***Kirschen v Marino***, *supra*; *see also* ***Lawson v Aspen Ford, Inc.***, 15 AD3d 628, 791 NYS2d 119 [2d Dept 2005]).

The portion of SPG's motion seeking leave to amend its answer to include as a defense to the action an offset and release under General Obligations Law §15-108 is denied. Generally, leave to amend pleadings under CPLR 3025 (b) is to be freely given, unless the proposed amendment is plainly lacking in merit (*see* ***Water Club Homeowner's Assn., Inc. v Town Bd. of Town of Hempstead***, 16 AD3d 678, 792 NYS2d 533 [2d Dept 2005]; ***Smith v City of New York***, 288 AD2d 293, 733 NYS2d 446 [2d Dept 2001]; ***Bonnen v Chin Hua Chiang***, 272 AD2d 357, 707 NYS2d 365 [2d Dept 2000]). Moreover, it is well settled that General Obligations Law §15-108 applies exclusively to tort claims, and not claims for breach of contract (*see* ***MDS Health Group, Inc. v Carmichael***, 258 AD2d 876, 684 NYS2d 742 [4th Dept 1999]; ***Bauman v Garfinkle***, 235 AD2d 245, 652 NYS2d 32 [1st Dept 1997]). Here, 515 only seeks economic loss based upon breach of contract (*see* ***Children's Learning Corner Ctr. v A. Miranda Contr., Corp.***, 64 AD3d 318, 879 NYS2d 418 [1st Dept 2009]). The proposed amendment, therefore, plainly lacks merit (*see* ***MDS Health Group, Inc. v Carmichael***, *supra*; ***Bauman v Garfinkle***, *supra*). In light of the foregoing, the portion of SPG's motion requesting summary judgment based on the newly proposed defense also is denied.

Durite moves for partial summary judgment dismissing the third-party claim by SPG and the cross claim by D3 Architecture for contribution and indemnification based on its allegedly negligent installation of the restaurant's flooring. Durite also served an amended notice of motion in which it seeks the same relief as against SPG, D3 Architecture, and Rashid. Durite argues that its settlement with 515 relieves it from any claims for contribution, and that it neither agreed to contractual indemnification nor engaged in conduct that would make it vicariously liable for the parties' conduct. SPG opposes the motion on the ground Durite's negligent installation of the restaurant's flooring was the cause of the damage to the glass door unit.

General Obligations Law §15-108 provides, in pertinent part, that a release given by the injured party to one of several tortfeasors relieves the settling tortfeasor from liability to any other person for contribution (*see* ***Gliglio v NTIMP, Inc.***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]; ***Cover v Cohen***, 113 AD2d 502,

497 NYS2d 382 [2d Dept 1985]). Such releases are effective if the claimant receives consideration greater than $1.00, the release substantially terminates the dispute between the settling parties, and it is completed prior to entry of judgment (*see* GOL 15-108 (d)(1); ***Gliglio v NTIMP, Inc.***, *supra*). Here, the settlement executed by 515 and Durite provided a general release of all disputes between the parties in exchange for a payment of $75,000. The settlement, therefore, precludes all claims against Durite for contribution (*see* ***Gliglio v NTIMP, Inc.***, *supra*; ***F.W. Woolworth Co. v Southbridge Towers***, 101 AD2d 434, 476 NYS2d 299 [1st Dept 1984]; ***Kelly v New York Tel. Co.***, 100 AD2d 537, 437 NYS2d 480 [2d Dept 1984]). Accordingly, the portion of Durite's motion seeking summary judgment dismissing the third-party claim and cross claims against it for contribution is granted.

While General Obligations Law §15-108 precludes any further claim against Durite for contribution, it does not preclude claims for contractual or common law indemnification (*see* ***McDermott v City of New York***, 50 NY2d 211, 428 NYS2d 643 [1986]; ***Baron v Grant***, 48 AD3d 608, 852 NYS2d 374 [2d Dept 2008]; ***Sarmiento v Klar Realty Corp.***, 35 AD3d 834, 829 NYS2d 134 [2d Dept 2006]). "A cause of action for indemnification must be based upon either an express contract or a common-law theory of implied indemnity" (*see* ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 125 AD2d 754, 756, 509 NYS2d 177 [3d Dept 1986]). "The principle of common law, or implied indemnification, permits . . . one held vicariously liable solely on account of the negligence of another to shift the entire burden to the actual wrongdoer" (*see* ***17 Vista Free Assocs. v Teachers Ins. & Annuity Assn of Am.***, 259 AD2d 75, 80, 693 NYS2d 554 [1st Dept 1999]). Moreover, "[c]ommon law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

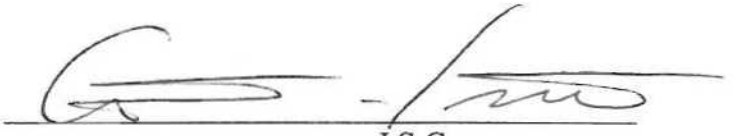
Here, the claims by SPG, Rashid and D3 Architecture seeking contractual indemnification against Durite are dismissed, as none of them shared a contractual relationship with Durite during the project (*see* ***Tonking v Port Auth. of N.Y. & N.J.***, 3 NY3d 486, 787 NYS2d 708 [2004]; ***Ascenio v Briarcrest at Macy Manor, LLC***, 60 AD3d 606, 874 NYS2d 562 [2d Dept 2009]; ***Mitchell v County of Jefferson***, 217 AD2d 917, 629 NYS2d 605 [4th Dept 1995]). However, inasmuch as no discovery has been conducted into the cause of the damage to the glass door and to what degree, if any, the parties' respective performances caused such damage, dismissal of the claim and cross claims against Durite for common law indemnification is denied, as premature (*see* ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]; ***Perri v Gilbert Johnson Enters. Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; ***Murphy v WEP 245 Park Co., L.P.***, 8 AD3d 161, 779 NYS2d 69 [1st Dept 2004]).

As for the motions by Rosner, D3 Architecture, and Rashid seeking dismissal of the third-party claim and cross claims for contribution and indemnification based upon alleged spoilation by SPG and 515, none of the moving defendants have submitted affirmations demonstrating that a good faith effort was made to resolve the disclosure dispute between the parties (*see* ***Quiroz v Beitia***, *supra*; ***Cestaro v Chin***, *supra*). Moreover, the movants failed to demonstrate that the alleged disposal of the evidence was done in bad faith and leaves them without any means to defend the action (*see* ***Cohen v Jordan Servs., Inc.***, *supra*; ***Kerman v Martin Friedman C.P.A., P.C.***, *supra*). As previously noted, the disposal of the double glass door by 515

and of its component parts by SPG during repairs made to the unit, occurred prior to the commencement of the action. Further, as the general contractor, architect and interior designer, the movants are familiar with the design, placement and installation of the double glass door. The Court notes that the third-party defendants, if so inclined, may obtain photographs, repair records, and any factual data relating to the door collected by 515 and SPG during discovery.

In addition, the Court finds the cases of ***Kirkland v New York City Hous. Auth.***, 236 AD2d 170, 666 NYS2d 609 (1st Dept 1997) and ***430 Park Ave. Co. v Bank of Montreal***, 9 AD3d 320, 781 NYS2d 67 (1st Dept 2004) distinguishable from the instant action. In the former case, the subject stove was disposed by a defendant after commencement of litigation and there were no photographs, repair invoices or other records relating to the allegedly defective gas connection device. In the latter case, although dismissal of the plaintiff's claim was upheld due to its spoilation of evidence, the Appellate Division, First Department, modified and reinstated the plaintiff's other claims where evidence of repairs and photographs were available and deemed sufficient to allow a defense. Accordingly, the motions by Rosner, D3 Architecture, and Rashid seeking dismissal of the third-party claim and cross claims for contribution and indemnification based upon alleged spoilation of crucial evidence are denied.

Dated: October 18, 2011



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**