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| <b>Wales Cluster Corp. v Seneca Ins. Co., Inc.</b>                                                                                                                                                                                                               |
| 2011 NY Slip Op 33856(U)                                                                                                                                                                                                                                         |
| June 13, 2011                                                                                                                                                                                                                                                    |
| Sup Ct, Bronx County                                                                                                                                                                                                                                             |
| Docket Number: 307835/09                                                                                                                                                                                                                                         |
| Judge: Stanley B. Green                                                                                                                                                                                                                                          |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: 1A-6

-----X  
WALES CLUSTER CORP.,

INDEX No.:307835/09

Plaintiff(s),

-against-

SENECA INSURANCE COMPANY, INC.,  
CONCORD MANOR, LLC,  
LIBERTY GENERAL CONTRACTORS, INC.,  
NOTIAS CONSTRUCTION, INC.,  
TOMASKATH CONSTRUCTION, INC., and  
JOT TRUCKING, LLC.,

Defendant(s)

-----X  
LIBERTY GENERAL CONTRACTORS, INC.,  
Third-Party Plaintiff,

-against-

TOMASKATH CONSTRUCTION, INC., and  
JLT TRUCKING, LLC,

Third-Party Defendants

-----X  
CONCORD MANOR, LLC,  
Fourth Third Party Plaintiff,

-against-

LIBERTY GENERAL CONTRACTORS, INC.,  
TOMASKATH CONSTRUCTION, INC.,  
JLT TRUCKING, LLC, WESTERN HERITAGE  
INSURANCE COMPANY and LOPINTO  
INSURANCE AGENCY, LTD,

Fourth Third-Party Defendant

DECISION

-----X  
**HON. STANLEY GREEN:**

The motion by Seneca Insurance Company for an order pursuant to CPLR§ 3211 (a)(7) and © ) and/or CPLR §3212 (b), dismissing all cross-claims asserted against Seneca by defendants Concord Manor, LLC, Liberty General Contractors, Inc., Notias Construction, Inc. and Tomaskath Construction, Inc. and/or awarding summary judgment in favor of Seneca and

against Concord, Liberty, Notias and Tomaskath is granted.

Plaintiff, which had entered into a contract with the Neighborhood Partnership Housing Development Fund Company, Inc. (NPHDFP) to redevelop two buildings located at 627 Wales Avenue and 753 East 151st Street, Bronx, NY, obtained a Commercial Inland Marine Policy from Seneca (No. CIM 31-015-23) to provide builder's risk coverage for the project.

Concord, which owned the property adjacent to plaintiff's property, had retained Liberty and/or Notias to construct a building on the adjacent property.

Plaintiff alleges that on or about October 5, 2007 and January 18, 2008, its property was damaged as a result of negligent construction activities that were taking place on Concord's property.

After the loss, plaintiff submitted a first-party property insurance claim to Seneca, seeking indemnification for the loss under the builders' risk policy. Seneca conducted an investigation of the claim and issued a payment to plaintiff in the amount of \$372,000.00.

Wales claims that its premises sustained damages in the amount of \$1,402,149.52. Thus, it commenced this action against Seneca for breach of contract, alleging that Seneca failed to fully indemnify it for the loss. Plaintiff also commenced this action against Concord, Liberty, Notias and Tomaskath and JLT Trucking for damage allegedly caused by their work on the premises adjacent to plaintiff's plaintiff's building.

In answers to the complaint, Concord, Liberty, Notias and Tomaskath assert cross-claims against Seneca for indemnification/contribution.

Seneca seeks dismissal of the cross-claims on the ground that they lack merit because the sole claim against Seneca sounds in breach of contract and Seneca was not involved in the

construction work that allegedly caused the damage to plaintiff's premises and had no relationship with the owner of the adjacent property or the contractors that performed the work on the adjacent property.

Liberty and Tomaskath contend that plaintiff has alleged that due to Seneca's breach of contract and failure to pay the full amount of damages, it continued to sustain damages. Therefore, triable issues of fact exist as to whether Seneca's alleged delay in making payment to plaintiff exacerbated the alleged non-covered damages against the remaining defendants.

Contribution is generally available as a remedy when two or more tortfeasors share in responsibility for an injury in violation of duties they respectively owe to the injured person (Garrett v. Holiday Inns., 58 NY2d 253). However, an essential requirement for sustaining a claim for contribution is that the parties must have contributed to the same injury (Raquet v. Braun, 90 NY2d 177). Since the allegations against Seneca are for breach of contract arising out of the insurance policy Seneca issued to plaintiff and there is no relationship, contractual or otherwise, between Seneca and Concord, Liberty, Notias, Tomaskath or JLT, co-defendants have no claim against Seneca for contribution for property damage to plaintiff's premises caused by them (Trump Village Section 3, Inc. v. NYS Housing Finance Agency, 307 AD2d 891). Nor do they have a viable claim against Seneca for common law or contractual indemnification or contractual indemnification.

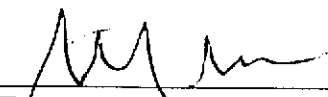
The right to contractual indemnification depends upon the specific language of a contract and a duty to indemnify will not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (Bellefleur v. Newark Beth Israel, 66 AD3d 807). Here, neither Concord, Liberty, Notias, Tomaskath or JLT are parties to

the insurance contract between plaintiff and Seneca and there is no allegation of any other existing contract between Concord, Liberty, Notias, Tomaskath or JLT and Seneca which required Seneca to indemnify any of them for any potential judgment obtained against them by plaintiff. Therefore, defendants' cross-claims against Seneca for contractual indemnification are dismissed.

As to the cross-claims for common law indemnification, since the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (Trustee of Columbia Univ. v. Mitchell-Giurgola Assoc., 109 AD2d 449, citing Rock v. Reed-Prentice Div., 39 NY2d 553). Here, plaintiff's complaint contains allegations of negligence against Concord, Liberty, Notais, Tomaskath and JLT. Therefore, if they are held liable to plaintiff, they would not be entitled to seek common law indemnification from Seneca. Accordingly, the motion by Seneca to dismiss the cross-claims of Concord, liberty, Notais and Tomaskath for contribution and indemnification is granted.

This constitutes the decision and order of the court.

Dated: June 13, 2011

  
STANLEY GREEN, J.S.C.