

Board of Mgrs. of the Lido Beach Towers Condominium v Caseworks Architect, PLLC
2012 NY Slip Op 30885(U)
March 28, 2012
Sup Ct, Nassau County
Docket Number: 012554/08
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

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**THE BOARD OF MANAGERS OF THE LIDO BEACH
TOWERS CONDOMINIUM, suing on behalf of the
Unit Owners,**

Plaintiff,

-against-

**CASEWORKS ARCHITECT, PLLC and JOHN PAUL
MURRAY,**

Defendants.

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**CASEWORKS ARCHITECT, PLLC and JOHN PAUL
MURRAY,**

Third Party Plaintiffs,

-against-

**SATO CONSTRUCTION CO., INC. d/b/a FLAG
WATERPROOFING AND RESTORATION AND
ANTHONY S. COLAO, SR.,**

Third Party Defendants.

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TRIAL/IAS PART 17

INDEX # 012554/08

**Motion Seq. 2, 3
Motion Date 12.8.11
Submit Date 2.14.12**

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The following papers were read on this motion:

Papers Numbered

Notice of Motion, Cross Motion Affidavits (Affirmations), Exhibits Annexed....	1, 2
Answering Affidavit	3
Reply Affidavit.....	4

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Motion (Seq. No. 2) by the attorneys for Sato Construction Co., Inc. d/b/a Flag Waterproofing & Restoration (Flag), the third-party defendant, for an order pursuant to CPLR 3212 dismissing the third-party complaint against Flag is **GRANTED**. Cross-motion (Seq. No. 3) by the attorneys for Caseworks Architect, PLLC and John Paul Murray (Caseworks), for an order pursuant to CPLR 3025(b) and 3025(c) allowing Caseworks to serve an Amended Third-Party Complaint is **DENIED**.

The complaint alleges that the plaintiff and the defendant entered into a contract pursuant to which the defendants were to act as design professionals and perform architectural services in connection with the exterior repair and facade restoration project at the plaintiff's building. The first cause of action alleges that the defendants breached their contractual obligations to the plaintiff in that the project and plans were designed in an unworkmanlike manner, with material design and construction defects substantially below applicable construction standards for a residential condominium. It is further alleged that as a result of the breach of contract, the plaintiff suffered significant damages necessary to remedy and/or replace the defective work and to perform and complete the project in accordance with good construction standards and practices. The allegations in the second cause of action in the complaint are similar to those allegations against the defendants with respect to both liability and damages except that it is labeled a negligence cause of action and claims that the defendants were negligent in failing to insure that the project was designed and planned with reasonable care, and failed to properly inspect the building. It is alleged that as a result of the negligence of the defendants, the plaintiff has suffered significant damages and will be compelled to expend large sums of money to remedy and/or replace the defective work and to perform and complete the project in accordance

with good construction standards and practices. The third cause of action in the plaintiff's complaint contains the same allegations as in the first cause of action both as to liability and damages except that it is labeled a claim for professional malpractice.

On or about October 31, 2008, defendants interposed a verified answer. On or about September 8, 2009, the defendants commenced a third-party action against third-party defendants Flag and Anthony Colao, Sr. The action against Anthony Colao, Sr. was discontinued.

The third-party complaint alleges that in or before 2005 the third-party defendants entered into a contract with the plaintiff (Lido Beach Towers) to perform construction and/or consultation and/or renovation and/or alteration and/or remodeling and/or waterproofing services in connection with the plaintiff's exterior repair and facade restoration project. The third-party complaint alleges the damages allegedly sustained by the plaintiff arose out of and/or are related to the services that third-party defendants provided and performed at the subject premises; were caused or occasioned, in whole or in part, by the acts of omissions of the third-party defendants performed at the subject premises; and the third-party defendants were negligent at the subject location.

The first cause of action in the third-party complaint alleges that if any judgment is recovered against the defendants/third-party plaintiff then the third-party defendants will be obligated to indemnify the defendants under principals of common law indemnity and/or implied indemnification. The second cause of action in the third-party complaint alleges that in the event the plaintiff obtains judgment against the defendants/third-party plaintiffs, then the third-party defendants will be liable in contribution to the defendants/third-party plaintiffs.

In support of the motion for summary judgment dismissing the third-party complaint, the attorneys for Flag argue that the third-party action for implied or common law indemnification must be predicated on a claim that the defendant is liable to the plaintiffs as a result of vicarious liability without any actual fault on the part of the proposed defendant indemnitee. In the within action the plaintiff alleges that the defendants are themselves at fault. Therefore, Flag asserts that since it is alleged the defendants themselves are liable to the plaintiff by reason of their own fault, they cannot receive the benefit of the doctrine of implied or common law indemnification (*City Dormitory Authority of State of New York v Scott*, 160 AD2d 179).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (see *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). Flag, the third-party plaintiff has made an adequate *prima facie* showing of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (*Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; see *Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app diss.* 53

NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition to the motion for summary judgment, the attorney for the defendant cross-moves to serve an amended third-party complaint to add a cause of action for contractual indemnity. Leave to amend a pleading should be freely given (see CPLR 3025[b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*Ruby Land Dev. v Toussie*, 4 AD3d 518, 519). The defendant's underlying substantive arguments upon which the proposed amended third-party complaint is based lacks any merit to defeat the motion for summary judgment and to rebut the *prima facie* showing by Flag. Defendant is not entitled to common law indemnification where in the underlying action the damages asserted against the defendant arise from the defendant's own breach of contract which is the gravamen of the complaint by the plaintiff Lido against defendant Caseworks (see *City Dormitory Authority of State of New York v Scott*, *supra*). Defendant argues that the "General Condition of the Contract for Construction" contains a clause requiring the contractor to indemnify and hold harmless the architect. However, the indemnification provisions in the contract that would be subject to the proposed amended complaint only applies to instances of personal injury or property damage. Discovery has been completed and there is no proof in the record of personal injury or property damage caused by Flag. The underlying action is a commercial dispute between the plaintiff and defendants arising out of plaintiff's dissatisfaction with the plans and specifications prepared by Caseworks.

[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of CPLR 1401. *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Creashak & Forely*, 71 NY2d 21, 26. Furthermore, "[t]ort language [in the plaintiff's complaint] notwithstanding . . . absent some form of tort liability, contribution is unavailable." *Rockefeller University v Tishman Const. Corp. of New York*, 232 AD2d 155, citing *Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685; *Board of Educ. v Sargent, Webster, Creashak & Foley*, *supra*; see also, *Trump Village Section 3, Inc. v New York Housing Finance Agency*, 307 AD2d 891.

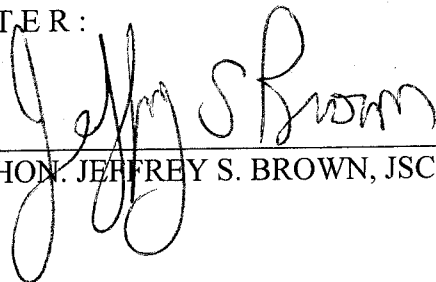
The record demonstrates that Flag was hired by the plaintiff to act as contractor in connection with the plans and specifications for the work that was designed by Caseworks. Due to plaintiff's dissatisfaction with the plans and specifications prepared by Caseworks, none of the designs were implemented. The plaintiff has not commenced a direct action against Flag. On the contrary, the plaintiff provided Flag with a letter of recommendation once the project was completed as designed by Jordan Ruiz, P.E., the design professional who succeeded Caseworks on the project. Plaintiff stated it was satisfied with Flag's work as well as its ethical and work standards and interaction with the Board, residents and employees of Lido Beach Towers. Flag was reliable and responsive to the needs and best interests of Lido Beach Towers. The motion to amend the complaint is **DENIED** because it is lacking in merit.

The third-party complaint against Flag is **DISMISSED**. Sato Construction Co., Inc. d/b/a Flag Waterproofing & Restoration and Anthony Colao, Sr., shall be deleted from the caption as third-party defendants.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
March 28, 2012

ENTER:


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ENTERED
APR 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE