Village of Greenport v Manning Plumbing & Heating Corp.
2012 NY Slip Op 31274(U)
May 9, 2012
Sup Ct, Suffolk County
Docket Number: 26981-09
Judge: Elizabeth H. Emerson

[* 1]

SHORT FORM ORDER

INDEX
NO.: 26981-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 11-3-11
SUBMITTED: 12-1-11
MOTION NO.: 012-MOT D
013-XMD

VILLAGE OF GREENPORT,

Plaintiff,

-against-

MANNING PLUMBING & HEATING CORP., BRIAN MANNING, ARA PLUMBING CORP., BJLA ARCHITECTURE & PLANNING, PLLC, BRUCE J. LEVY, THE HASTINGS DESIGN GROUP, CENTENNIAL INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, FEDERATED MUTUAL INSURANCE COMPANY, FEDERATED SERVICES INSURANCE COMPANY, QBE INSURANCE CORPORATION, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, EXCELSIOR INSURANCE COMPANY, SHOP/SHARPLES HOLDEN PASQUARELLI, SHARPLES HOLDEN PASQUARELLI, CASHIN, AND MARK OURS,

Defendants.

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Upon the following papers numbered 1-52 read on this motion and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-29 ; Notice of Cross Motion and supporting papers 45-46 ; Answering Affidavits and supporting papers 30-37; 42-43; 47-49 ; Replying Affidavits and supporting papers 40-41; 44; 50-52 ; it is,

ORDERED that the branches of the motion by the defendant ARA Plumbing

Corp. which are for summary judgment dismissing the complaint insofar as asserted against it and the cross claims of the defendants BJLA Architecture & Planning, PLLC; Bruce J. Levy; the Hastings Design Group; Shop/Sharples Holden Pasquarelli; Sharples Holden Pasquarelli; Cashin; and Mark Ours are granted; and it is further

ORDERED that the motion is otherwise denied as academic; and it is further

ORDERED that the branch of the cross motion by the defendant QBE Insurance Corporation which is for summary judgment dismissing the cross claim of the defendant ARA Plumbing Corp. is granted; and it is further

ORDERED that the cross motion is otherwise denied as academic.

This action arises out of the alleged negligent design and construction of the East and West Piers at the Mitchell Park Marina (the "Marina") in the Village of Greenport (the "Village"). The Village's plans for the development of the Marina called for the construction of two piers, the East and West Piers, for use by large vessels and included the construction of a standpipe fire suppression system. On July 25, 2005, the Village entered into a contract with the defendant Manning Plumbing & Heating Corp. ("Manning") for the fire suppression system. When Manning abandoned the project, the Village retained the defendant ARA Plumbing Corp. ("ARA"), to complete it. The Village and ARA had entered into a contract on April 27, 2005, for plumbing work on a related construction project known as the Floating Docks at Mitchell Park Marina. In March 2006, the Village, ARA, and the defendant BJLA Architecture & Planning ("BJLA") executed Change Order #1 to the Floating Docks contract for the completion by ARA of Manning's plumbing work at the East and West Piers, which included service connections for the fire suppression system and an overall test of the system. The specifications for the fire suppression system required it to be tested at a pressure of 200 pounds per square inch (p.s.i.) for a period of two hours.

The fire suppression system was tested on June 23, 2006, after ARA had completed its work thereon. By a letter dated July 28, 2006, which was copied to BJLA, ARA notified the Village that the system had failed the test at 150 p.s.i. and that a 200-pound test might render the system inoperable if it failed. Two days earlier, on July 26, 2006, the Village had pressurized the system in order to fill a Coast Guard vessel that had docked at the Marina, causing the piping and connections to rupture or burst. After the system was repaired, ARA performed another test. The results of that test were that ARA was able to pressurize the system to only 100 p.s.i. The Village subsequently commenced this action against ARA and others. The complaint contains three causes of action against ARA for breach of contract, negligence, and quantum merit. ARA moves for summary judgment dismissing the complaint and all cross claims asserted against it.

The contract between the Village and ARA is a standard form agreement

promulgated by the American Institute of Architects (AIA Document A101-1997). It incorporates by reference AIA Document A201-1997, General Conditions of the Contract for Construction ("General Conditions"). General Conditions ¶ 4.3.2 provides, "Claims by either party must be initiated within 21 days after occurrence of the event giving rise to the Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party." General Conditions ¶ 4.4.1 provides, "Claims...shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation...."[1] General Conditions ¶ 4.3.1 defines a "Claim" as "a demand or assertion by one of the parties seeking, as a matter of right adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between [the Village] and [ARA] arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the claim."

The Village contends that ARA had actual notice of the failed condition of the fire suppression system on July 26, 2006, and that ARA provided written notice of such failure to the Village and the architect on July 28, 2006. It is undisputed that ARA notified the Village that the fire suppression system had failed by a letter dated July 28, 2006, which was copied to BJLA. While the July 28, 2006, letter clearly evinces that ARA had notice of the condition giving rise to this litigation, it does not constitute a "Claim" by the Village within the meaning of General Conditions ¶ 4.3.1. The July 28, 2006, letter was not initiated by the Village, nor did it advise ARA or BJLA that the Village was making a demand against ARA for the payment of money or other relief under the contract. Since the Village never submitted a claim to ARA and BJLA, BJLA never made an initial decision thereon. Dismissal is warranted when, as here, the plaintiff fails to comply with the contractual requirement for timely notice of its claim, which is a condition precedent to suit or recovery (*see*, **Diontech Consulting, Inc. v New York City Housing Auth.** 78 AD3d 527, *citing* **A.H.A. Gen. Constr. v New York City Housing Auth.**, 92 NY2d 20, 30-31). Accordingly, the complaint is dismissed insofar as it is asserted against ARA.

The Village's causes of action for quantum meruit and negligence are dismissed insofar as they are asserted against ARA for the foregoing reason and for the following additional reasons. The existence of a valid and enforceable contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter (**Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.**, 70 NY2d 382, 388). The relationship between the Village and ARA is defined by a written contract, the scope of which clearly covers their dispute.

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[1]General Conditions ¶ 4.5.1 also provides, "Any Claim arising out of or related to the Contract...shall, after initial decision by the Architect...be subject to mediation as a condition precedent to the initiation of legal or equitable proceedings against either party."

Thus, the Village may not seek damages under the theory of quantum meruit (**Id.** at 389). Moreover, a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. Merely employing language familiar to tort law does not, without more, transform a simple breach of contract into a negligence claim (**Id.** at 389-390). The Village does not allege that ARA violated a legal duty independent of the contract. Rather, the Village alleges that ARA performed the contract in a negligent manner, which is merely a restatement, in slightly different language, of ARA's contractual obligations (**Id.** at 390).

The defendants BJLA Architecture & Planning, Bruce J. Levy, and the Hastings Design Group do not oppose the branch of ARA's motion which is for summary judgment dismissing their cross claims against ARA. Accordingly, that branch of ARA's motion is granted without opposition.

Turning to the cross claims of the defendants Shop/Sharples Holden Pasquarelli and Sharples Holden Pasquarelli (the "Shop/Sharples defendants"),[2] the first cross claim is for contribution. Purely economic loss resulting from a breach of contract does not constitute injury to property within the meaning of New York's contribution statute (CPLR 1401) (**Galvin Bros. Inc. v Town of Babylon**, 91 AD3d 715). When, as here, the plaintiff seeks damages for purely economic loss, the contribution claim is properly dismissed (**Id.**). Accordingly, the Shop/Sharples defendants' first cross claim is dismissed insofar as it is asserted against ARA.

The second and third cross claims are for contractual indemnification. General Conditions ¶ 3.18.1 provides that ARA shall indemnify the Village, the architect, and the architect's consultants, agents, and employees against claims, damages, losses and expenses attributable to bodily injury or the destruction of tangible property other than the work itself. The plaintiff does not allege any injury to property other than the fire suppression system itself. Thus, ARA has no contractual duty to indemnify the Shop/Sharples defendants. Moreover, ARA was not obligated to include them as additional insureds on ARA's liability insurance policies (General Conditions ¶ 11.3.3). Accordingly, the second and third cross claims of the Shop/Sharples defendants are dismissed insofar as they are asserted against ARA.

The fourth cross claim is for common-law indemnification. Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*see,* **Trump Village Section 3, Inc., v**

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[2]Shop/Sharples Holden Pasquarelli, Sharples Holden Pasquarelli, and Mark Ours provided architectural and construction-management services along with BJLA Architecture & Planning, Bruce J. Levy, and the Hastings Design Group. The cross claims are asserted by the defendants Shop/Sharples Holden Pasquarelli and Sharples Holden Pasquarelli. No cross claims are asserted by the defendant Mark Ours.

New York State Housing Finance Agency, 307 AD2d 891, 895). Thus, a party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for tort-based indemnification (**Mathis v Central Park Conservancy**, 251 AD2d 171, 172). Because the Village does not seek to hold the Shop/Sharples defendants vicariously liable for any negligence by ARA, they have no cause of action against ARA for common-law indemnification (**Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, 252 AD2d 951, 952). Accordingly, their fourth cross claim is dismissed insofar as it is asserted against ARA.

ARA's insurance carrier, the defendant QBE Insurance Company ("QBE"), cross moves for summary judgment dismissing ARA's cross claim for a judgment declaring that QBE has a duty to defend and indemnify ARA. Since the complaint and all cross claims asserted against ARA have been dismissed, there is no longer a justiciable controversy for the court to determine pursuant to CPLR 3001 (*see*, **Matter of Ideal Mut. Ins. Co.**, 174 AD2d 420, 421). Accordingly, ARA's seventh cross claim against QBE is dismissed.

HON. ELIZABETH HAZLITT EMERSON

Dated: May 9, 2012

J.S.C.