

**Antoine v Stone Creek Home Owners' Assoc.**

2012 NY Slip Op 33251(U)

November 29, 2012

Sup Ct, Westchester County

Docket Number: 50997/2012

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. ORAZIO R. BELLANTONI**  
**JUSTICE OF THE SUPREME COURT**

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JUDITH NUSBAUM ANTOINE,

Plaintiff,

- against -

STONE CREEK HOME OWNERS'  
ASSOCIATION, ANKER MANAGEMENT  
CORP. and HUDSON LANDSCAPE  
CONTRACTORS & TREE CARE SPECIALISTS,  
INC.,

Defendants.

**SHORT FORM ORDER**

Index No. 50997/12

Motion Date: 11/14/12

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STONE CREEK HOMEOWNERS ASSOCIATION,  
INC. s/h/a STONE CREEK HOME OWNERS'  
ASSOCIATION and ANKER MANAGEMENT CORP.,

Third-Party Plaintiffs,

- against -

BALTER PROPERTIES INC. and RALPH  
G. MASTROMONACO, P.E., P.C.,

Third-Party Defendants.

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Third-Party Defendant Balter Properties, Inc. (Balter) moves for an order, pursuant to CPLR §1003 and CPLR §1001, joining BPI Stone Creek Associates, L.P. (BPI) as an

additional third-party defendant and upon joinder, amending the caption accordingly. Additionally, upon joinder third-party defendants Balter and BPI also move for an order, pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint against them.

The following papers were read:

Notice of Motion-Affidavit-Affirmation-Exhibits A-E-Memorandum of Law	1-9
Affirmation in Opposition-Exhibits A-F-Affidavit of Service	10-17
Memorandum of Law in Reply	18

Upon the foregoing papers, the motion is decided as follows:

By way of background, plaintiff brings this action seeking damages for alleged injuries sustained a result of a slip and fall on ice on January 11, 2011, at or near 38 Mill Lane, Briarcliff Manor, New York.

Initially this Court notes that the third-party plaintiffs have no objection to the portion of the motion which seeks joinder of BPI and amendment of the caption. Accordingly, this branch of the motion is granted without opposition.

Upon joinder and amendment, this Court must next turn to the branch of Balter and BPI's motion which seeks dismissal. Dismissal is warranted under CPLR 3211(a)(1) only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see Leon v. Martinez*, 84 NY2d 83 [1994]). Further, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Nonnon v. City of New York*, 9 NY3d 825 [2007]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus (*see EBC I v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

Looking to the defendants/third-party plaintiffs' complaint, it alleges four causes of action as to the movants. This first cause of action alleges an agreement existed between movants and third-party plaintiffs at the time of the accident and alleges that this agreement entitled it to indemnification. The second cause of action alleges breach of contract for failure to obtain liability insurance. The third cause of action seeks contribution in the event of plaintiff's recovery. The fourth cause of action states that third-party defendants were wholly or partially negligent.

Movant alleges that dismissal is warranted as: (1) in the absence of privity, Balter is not a proper party to this action; (2) third-party plaintiff was actively negligent and is not being sued on a theory of vicarious liability, thus precluding a claim for either common law or contractual indemnification; (3) the six (6) year statute of limitations applicable to a breach of contract claim under CPLR §213 has expired; (4) neither Balter or BPI Stone Creek had a duty to maintain the common area and the three (3) year statute of limitations applicable to a negligence cause of action under CPLR 214 has expired; and (5) neither Balter or BPI Stone Creek owed any duty to the injured plaintiff.

Upon reviewing the motion as one to dismiss pursuant to CPLR 3211(a)(1), i.e. based upon the documentary evidence, this Court if forced to examine two documents; the first a document entitled “*Declaration of Covenants and Restrictions Stone Creek Homeowners Association, Inc.*” and second the offering plan. Specifically, in reference to the first document, Section 9.7 read as follows: “SPONSOR shall indemnify, defend and hold harmless the ASSOCIATION, and the OFFICERS and DIRECTORS, against any suits, proceedings, liabilities and expenses claimed by third parties and arising out of SPONSOR’S acts or omissions.” Sponsor is defined as BPI Stone Creek Associates, L.P., 2 John E. Walsh Boulevard, Peekskill, New York 10566 (*see* Declaration at Paragraph 1.1[2][hh]). The offering plan essentially shifts to the Association the responsibility of maintenance of the common areas throughout the document. The plan also defines the sponsor as BPI Stone Creek Associates, L.P.

Dismissal, pursuant to CPLR 3211(a)(1), of the third-party plaintiff’s first and second causes of action are warranted as to Balter, as the sponsor was clearly defined by the parties agreements as BPI Stone Creek Associates, L.P. However, the documentary evidence submitted does not conclusively establish a defense to the asserted claims, as a matter of law, as to the third-party plaintiff’s third and fourth causes of action as to Balter, nor does it establish a defense a matter of law as to the causes of action as asserted as to BPI (*see Leon v. Martinez*, 84 NY2d 83 [1994]).

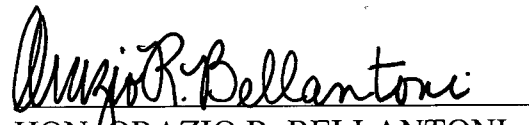
Turning next to consideration of the motion as a motion to dismiss pursuant to CPLR 3211(a)(7), this Court recognizes, as aforementioned, that whether a plaintiff or third-party plaintiff can ultimately establish its allegations is not part of the calculus in determining the motion (*see EBC I v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). Here, the second and fourth causes of action must be dismissed as time barred (*see* CPLR §214). The second cause of action alleging breach of contract for the failure to procure insurance coverage, alleges breach of an agreement entered into between the parties on November 22, 1995. At the time of the execution of this document it is alleged that the sponsor was required to obtain additional insurance, thus the breach would have occurred on the aforementioned date. Thus, as a breach of contract action is governed by a six year

statute of limitations and knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the statute of limitations running, the third-party plaintiff's second cause of action is time barred and dismissed (*see* CPLR §213[2]; *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 NY2d 399 [1993]). The fourth cause of action alleging negligence is also dismissed. The statute of limitations based upon a cause of action for defective/negligent construction generally accrues upon completion of the construction (*see Newburgh School v. Stubbins*, 85 NY2d 535 [1995]). Here, the latest date that completion occurred is when the property was transferred to the Association by the sponsor on November 22, 1995. Accordingly, the three year period applicable to the third-party plaintiff's negligence claim has long since run (*see Lucchesi v. Perfetto*, 72 AD3d 909 [2<sup>nd</sup> Dept 2010]).

This Court finds that the third-party complaint sufficiently sets forth a cause of action for contractual indemnification as against BPI and for contribution as against both BPI and Balter (*see generally Cohn v. Lionel Corp.*, 21 NY2d 559 [1968]; *Crow-Crimmins-Wolff & Munier v. County of Westchester*, 90 AD2d 785 [2<sup>nd</sup> Dept 1982]).

Accordingly, Balter and BPI's motion is granted to the extent that BPI is joined as a third-party defendant and the caption is amended accordingly on consent of the third-party plaintiffs, the third-party complaint is dismissed with exception of the first cause of action as to BPI and the fourth cause of action as to both Balter and BPI. This matter is scheduled for a Preliminary Conference on February 5, 2013 at 9:30 a.m. in Room 800 at the Westchester County Courthouse, 111 Dr. Martin Luther, King, Jr. Boulevard, White Plains, New York. This order has been filed electronically.

Dated: November 29, 2012  
White Plains, New York

  
HON. ORAZIO R. BELLANTONI  
Justice of the Supreme Court

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