

**Board of Mgrs. of the Baxter St. Condominium v  
Baxter St. Dev. Co. LLC**

2013 NY Slip Op 30209(U)

January 30, 2013

Sup Ct, New York County

Docket Number: 114281/10

Judge: Anil C. Singh

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

PRESENT: \_\_\_\_\_  
Justice

PART 61

Index Number : 114281/2010  
BRD OF MGRS OF THE BAXTER  
vs.  
BAXTER STREET DEVELOPMENT  
SEQUENCE NUMBER : 003  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1/30/13

*Anil C Singh*  
HON. ANIL C. SINGH, J.S.C.  
SUPREME COURT JUSTICE

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X  
BOARD OF MANAGERS OF THE BAXTER STREET  
CONDOMINIUM,

Plaintiff,

Index No. 114281/10

-against-

BAXTER STREET DEVELOPMENT COMPANY LLC,  
123 BAXTER OWNERS COMPANY, LLC, SRC  
BAXTER INVESTMENT GROUP, LLC, BAXTER  
CONDO SALES LLC, MARK ENGEL, PERRY  
FINKELMAN, NARCZEN LLC, ZENAIDA LEWIS,  
KUSHNER STUDIOS ARCHITECTURE & DESIGN,  
P.C., and ADAM KUSHNER,

Defendants.

-----X  
BAXTER STREET DEVELOPMENT COMPANY LLC,  
123 BAXTER OWNERS COMPANY, LLC, and PERRY  
FINKELMAN,

Third-Party Plaintiffs,

Index No. 590161/12

-against-

IN HOUSE CONSTRUCTION SERVICE, INC., et al.,

Third-Party Defendants.

-----X  
**Hon. Anil C. Singh, J.:**

In motion sequence 003, third-party defendant Wexler Associates (Wexler) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the third-party complaint. Wexler alternatively moves, pursuant to CPLR 3211 (c), with the court's notice, to treat the motion as one for summary judgment. In addition, third-party defendant Unitone Communication Systems, Inc.

(Unitone) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims asserted against it.

### **Background**

As the factual background has been discussed in detail in the court's prior decision, dated September 12, 2012, there is no need for an extensive discussion of the facts, except those that are relevant for the purposes of these motions.

On November 11, 2011, the Board of Managers of the Baxter Street Condominium (First-Party Plaintiff) commenced an action against 123 Baxter Street Owners Company, LLC, Baxter Street Development Company LLC, and Perry Finkelman (Defendants/Third-Party Plaintiffs), among others, for the alleged defective design and construction of the building located at 123 Baxter Street, New York, New York (the Building), as well as alleged fraudulent practices in connection with the sale of the condominium units in the Building (the First-Party Action). In the First-Party Action, Defendants/Third-Party Plaintiffs moved to dismiss the complaint. On September 12, 2012, this court issued an order dismissing First-Party Plaintiff's causes of action for breach of the common law of implied housing merchant warranty, negligence, negligent misrepresentation, and fraudulent conveyance. The court granted First-Party Plaintiff leave to replead its cause of action for fraudulent conveyance. First-Party Plaintiff filed

its most recent amended complaint on November 15, 2012 (the Second Amended Complaint), alleging causes of action against Defendants/Third-Party Plaintiffs for breach of the offering plan, fraud, violations of the New York General Business Law, and constructive and intentional fraudulent conveyances.

On February 22, 2012, Defendants/Third-Party Plaintiffs commenced a third-party action against various contractors and subcontractors, including Wexler and Unitone (the Third-Party Action). Wexler and Unitone now move and cross-move, respectively, to dismiss the third-party complaint.

### **Analysis**

#### Claims against Wexler and Unitone

In their first cause of action, Defendants/Third-Party Plaintiffs allege that, if damages are awarded to First-Party Plaintiff, it is due to negligence of Wexler and Unitone. This cause of action seeks contractual and common-law indemnification and/or contribution. In their second cause of action, Defendants/Third-Party Plaintiffs allege that if damages are sustained by First-Party Plaintiff through any negligence besides its own, it is due to the sole negligence of Wexler and Unitone, or their agents, servants, or employees. Although at first glance this appears to be a claim for negligence by Third-Party Plaintiffs, this claim actually seeks to shift the burden of any loss suffered by First-Party Plaintiff onto Wexler and Unitone,

and not Defendants/Third-Party Plaintiffs. Thus, this too is a claim for indemnification (see *Metro. Steel Indus., Inc. v Perini Corp.*, 6 Misc 3d 1002[A], \*11-12, 2004 NY Slip Op 51698[U] [NY Sup County 2004], *affd* 23 AD3d 205 [1<sup>st</sup> Dept 2005]).

Defendants/Third-Party Plaintiffs' third cause of action also seeks indemnification from Wexler and Unitone, pursuant to the terms of the "General Conditions/Prime Contract" (the General Contract), allegedly entered into by Defendants/Third-Party Plaintiffs and Wexler and Defendants/Third-Party Plaintiffs and Unitone. Therefore, the first, second, and third causes of action are really all claims for contractual and common-law indemnification and/or contribution, and will be treated as such (*id.*).

Defendants/Third-Party Plaintiffs' fourth cause of action is an independent claim for breach of contract against Wexler and Unitone for their failure to obtain insurance coverage on behalf of Defendants/Third-Party Plaintiffs.

#### Wexler's Motion to Dismiss

##### *Contractual Indemnification*

Defendants/Third-Party Plaintiffs assert that they have a contractual relationship with Wexler through the General Contract, which was supposed to be incorporated into any proposal/contract entered into by the contractors and subcontractors retained to work on the 123 Baxter Street project.

However, Wexler argues that, even if there was a contractual relationship between itself and Defendants/Third-Party Plaintiffs<sup>1</sup>, the General Contract's indemnification provision, Section 3.18, limits Wexler's indemnification duty, and the claims in the First-Party Action do not trigger any duty to indemnify under Section 3.18.

Section 3.18 of the General Contract states, in relevant part,

"...the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses... arising out of or resulting from performance of the Work, provided that such damage, loss, or expense is attributed ... to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(Memorandum in Opposition to Motion by Wexler, Exhibit A).

This provision is clearly intended to cover situations where the owner is sued for property damage occurring as a result of the contractor's work, but not when the claim challenges the contractor's work itself.

Here, Defendants/Third-Party Plaintiffs are not being sued

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<sup>1</sup>Wexler denies any contractual relationship with Defendants/Third-Party Plaintiffs. Wexler asserts that the only contract it entered into was with CBA Construction, an alleged contractor on the 123 Baxter Street project.

by the First-Party Plaintiff for property damages arising as a result of the construction, but rather, First-Party Plaintiff's claims challenge the sufficiency of the Building's construction, i.e., the "the Work itself," as its claims, brought under the theories of breach of the offering plan, fraud, violations of the New York General Business Law, and fraudulent conveyances, rest on allegations of defective construction, the failure to adhere to proper building standards, and the failure to abide by applicable building codes and regulations. These claims do not trigger the above-quoted indemnification provision. Thus, Defendants/Third-Party Plaintiffs' claims for contractual damages are dismissed.

#### *Common-Law Indemnification*

It is well settled that common-law indemnification "permit[s] one who is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1<sup>st</sup> Dept 1985] [citations omitted]; see also *Miloscia v B.R. Guest Holdings, LLC*, 94 AD3d 563 [1<sup>st</sup> Dept 2012]). "Implied indemnification has permitted a vicariously liable building owner and contractor to shift all liability to a subcontractor whose negligence actually caused the loss" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1<sup>st</sup> Dept 1999]). The fact that

the underlying claims are for breach of contract, rather than tort, does not defeat a claim for common-law indemnification (*id.* at 81). However, “[t]he party seeking indemnification ‘must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,’ and must not have committed actual wrongdoing itself” (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2d Dept 2007]), citing *17 Vista Fee Assn.*, 259 AD2d at 80).

Here, the third-party complaint is devoid of any allegations that Defendants/Third-Party Plaintiffs delegated exclusive responsibility to Wexler, giving rise to the loss suffered by Defendants/Third-Party Plaintiffs as a result of their alleged breach of the offering plan due to the defect construction and design of the Building. Further, the third-party complaint lacks allegations that Defendants/Third-Party Plaintiffs committed no actual wrongdoing themselves in regard to that loss. Thus, the claim for common-law indemnity is dismissed, but without prejudice to replead.

The court notes that any recovery for the claims based on allegations of fraud in the First-Party Action are predicated on proof of Defendants/Third-Party Plaintiffs’ intentional conduct, and thus, by the very nature of these claims, indemnity cannot be implied (*Massachusetts Mut. Life Ins. Co. v Weinbach*, 635 F Supp 1460, 1462 [SD NY 1986]).

### Contribution Claim

Pursuant to CPLR 1401,

"two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

"[I]t is well established that purely economic loss resulting from a breach of contract does not constitute injury to property" (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1<sup>st</sup> Dept 2009] [internal quotes and citation omitted]). Thus, Defendants/Third-Party Plaintiffs cannot seek contribution based on the claims for breach of the offering plan in the First-Party Action. Further, "the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein" (*id.* at 324). Here, the damages sought by First-Party Plaintiff are purely economic, even for its claims based on allegations of fraud.

However, even if this court held otherwise, the fraud claims in the First-Party Action are based on the allegation that Defendants/Third-Party Plaintiffs made misrepresentations in the offering plan and other marketing and sales materials. There are no allegations that Wexler was involved in the preparation or execution of the offering plan or any marketing and sales materials involving the Building. Thus, Wexler cannot be held

liable for damages arising out of such conduct under the theory of contribution, and any claims for contribution are dismissed.

*Breach of the General Contract*

Defendants/Third-Party Plaintiffs' fourth cause of action alleges that Wexler is liable to them for damages resulting from a breach of General Contract. Specifically, Defendants/Third-Party Plaintiffs argue that, pursuant to Section 11.3.1 of the General Contract, Wexler was required to obtain Project Management Protective Liability Insurance. Even if the court assumes that Wexler was bound by the General Contract, the plain language of Section 11.3.1 clearly states that such insurance was an option that could be exercised by Defendants/Third-Party Plaintiffs, and if it was, they were required to reimburse the contractor/subcontract by increasing the contract price. The Third-Party complaint is devoid of any allegations that Defendants/Third-Party Plaintiffs exercised this option and made arrangements to reimburse Wexler by increasing the contract sum as required under this provision. Thus, this cause of action is dismissed, but without prejudice to replead.

Unitone's Cross Motion for Summary Judgment

In its cross motion, Unitone moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment

as a matter of law. (*People v Grasso*, 50 AD3d 535, 545 [1<sup>st</sup> Dept 2008]). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient enough to raise an issue of fact warranting a trial (*id.*)

#### *Contractual Indemnification*

The allegations against Unitone in the third-party complaint are identical to those alleged against Wexler, including that Unitone is bound by the General Contract and its indemnification provision, Section 3.18. As discussed above, even if there was a contractual relationship between Unitone and Defendants/Third-Party Plaintiffs, the General Contract's indemnification provision limits Unitone's indemnification duty, and the claims alleged in the First-Party Action do not trigger any duty by Unitone to indemnify Defendants/Third-Party Plaintiffs under Section 3.18. Therefore, Defendants/Third-Party Plaintiffs' claims against Unitone for contractual indemnification are dismissed as a matter of law.

#### *Common-Law Indemnification*

As discussed above in detail, a claim for common-law indemnification allows "a vicariously liable building owner and contractor to shift all liability to a subcontractor whose negligence actually caused the loss" (*17 Vista Fee Assn*, 259 AD2d at 80). However, the party seeking indemnification "must have delegated exclusive responsibility for the duties giving rise to

the loss to the party from whom indemnification is sought,' and must not have committed actual wrongdoing itself" (*Tiffany at Westbury Condominium*, 40 AD3d at 1077, quoting *17 Vista Fee Assn.*, 259 AD2d at 80).

Here, Unitone argues that this matter cannot be construed to predicate Defendants/Third-Party Plaintiffs' liability on the basis of vicarious liability because the First-Party Action does not seek to hold Defendants/Third-Party Plaintiffs vicariously liable, but rather, asserts claims for breach of contract and fraud. Unitone is correct that, as a matter of law, any recovery for the claims based on allegations of fraud in the First-Party Action are predicated on proof of Defendants/Third-Party Plaintiffs' intentional conduct, and thus, indemnity cannot be implied (*Massachusetts Mut. Life Ins. Co.*, 635 F Supp at 1462). However, there can be a claim for common-law indemnification where the underlying claim is for breach of contract, rather than a tort (*17 Vista Fee Assoc. v Teachers Ins. and Annuity Assn.*, 259 AD2d at 81). Thus, this argument does not does not defeat a claim for common-law indemnification for the underlying breach of contract claim.

Further, as it is Unitone's motion for summary judgment, it has the burden of making a prima facie showing that it was not delegated exclusive responsibility for the duties giving rise to the loss; in this case, to properly design and install the

intercom and concierge system, which was specifically mentioned as one of the defects in the First-Party Action, and was not responsible for any defects in the intercom system. The work proposal submitted is not enough. This simply evidences what was agreed upon, not what actually happened, especially where it is not clear what defects happened with the system. Thus, Unitone's motion for summary judgment to dismiss this cause of action is denied as to Defendants/Third-Party Plaintiffs' common-law indemnification claim arising out of the First-Party Action's claim for breach of the offering plan.

#### *Contribution Claim*

Pursuant to CPLR 1401,

"two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

"[I]t is well established that purely economic loss resulting from a breach of contract does not constitute injury to property" (*Children's Corner Learning Ctr.*, 64 AD3d at 323). Thus, as a matter of law, Defendants/Third-Party Plaintiffs cannot seek contribution based on the claims for breach of the offering plan in the First-Party Action. Further, "the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein" (*id.* at 324). Here, the damages sought by First-

Party Plaintiff are purely economic, even for its claims based on allegations of fraud.

However, even if this court held otherwise, the fraud claims in the First-Party Action are based on the allegation that Defendants/Third-Party Plaintiffs made misrepresentations in the offering plan and other marketing and sales materials. Unitone has made a prima facie showing that it only worked on the intercom system in the Building, having nothing to do with the preparation or execution of the offering plan or any marketing and sales materials involving the Building. Defendants/Third-Party Plaintiffs fail to raise a triable issue of fact as to whether Unitone was involved in preparing or executing the offering plan. Thus, any claims for contribution are dismissed.

*Breach of the General Contract*

Defendants/Third-Party Plaintiffs' fourth cause of action alleges that Unitone is liable to them for damages resulting from a breach of the General Contract. Specifically, Defendants/Third-Party Plaintiffs argue that, pursuant to Section 11.3.1 of the General Contract, Unitone was required to obtain Project Management Protective Liability Insurance. As stated above, even if the court assumes that Unitone was bound by the General Contract, pursuant to the plain language of Section 11.3.1, such insurance was an option that could be exercised by Defendants/Third-Party Plaintiffs, and if it was, they were

required to reimburse the contractor/subcontract. There is no evidence that Defendants/Third-Party Plaintiffs exercised this option and made arrangements to reimburse Unitone by increasing the contract sum as required under this provision.

Defendant/Third-Party Plaintiffs submit a copy of a certificate of commercial general liability insurance procured by Unitone listing Defendant/Third-Party Plaintiff 123 Baxter Owners Company, LLC as an additional insured, but this does not prove, or even raise an issue of fact, in regard to whether Unitone was contractually obligated to procure Project Management Protective Liability Insurance. This does not show that Defendant/Third-Party Plaintiffs exercised their option requiring Unitone to secure such insurance and that Unitone was reimbursed through a higher contract sum. This proof is irrelevant to this issue. Thus, this cause of action is dismissed.

In House Construction Service, Inc.'s Cross Claims

On March 16, 2012, third-party defendant In House Construction Service, Inc. (In House) interposed an answer to the third-party complaint, asserting affirmative defenses and interposing cross claims against Unitone for common-law and contractual indemnification and contribution. In House opposes Unitone's motion for summary judgment dismissing the third-party complaint and all cross claims.

### *Contractual Indemnification*

In support of its motion, Unitone submits two signed proposal agreements that it entered into with In House, neither of which contain an indemnification provision (see Unitone's Notice of Cross Motion, Exhibit D). In House does not dispute that these agreements were the agreements the parties entered into, and does not present evidence of any other contractual agreement to indemnify. Therefore, In House has not raised a triable issue of fact, and its claim for contractual indemnification against Unitone is dismissed.

### *Common-Law Indemnification*

For common-law indemnification, "the party seeking indemnification 'must have delegated exclusive responsibility for the duties giving rise to the loss'", and "must not have committed any actual wrongdoing itself" (*Tiffany at Westbury Condominium*, 40 AD3d at 1077, quoting *17 Vista Fee Assn*, 259 AD2d at 80). Here, there are issues of fact as to whether Unitone was delegated the exclusive responsibility of installing the intercom system, and by whom, and whether they failed to properly design and install the system. Thus, Unitone's motion for summary judgment to dismiss this cross claim is denied.

### *Contribution Claim*

Contribution cannot be sought in this action, as the claims in the First-Party Action are based on breach of the offering

plan and fraud, and are purely economic (*Children's Corner Learning Ctr.*, 64 AD3d at 324), and even if the damages for the fraud claims were not found purely economic, the underlying allegations of those claims involve misrepresentations in the offering plan and other marketing and sales materials. Unitone has made a prima facie showing that it only worked on the intercom system in the Building, and is not subject to liability for the preparation or execution of the offering plan or any marketing and sales materials involving the Building. Thus, the claim for contribution is dismissed.

Accordingly, it is

ORDERED that third-party defendant Wexler Associates' motion to dismiss is granted; and it is further

ORDERED that third-party complaint's causes of action for common-law indemnification and breach of the General Contract for failure to procure insurance are dismissed without prejudice with leave to replead and that Defendants/Third-Party Plaintiffs 123 Baxter Street Owners Company, LLC, Baxter Street Development Company LLC, and Perry Finkelman are granted leave to serve an amended third-party complaint so as to replead these causes of action within 20 days after service on Wexler's attorney a copy of this order with notice of entry; and it is further

ORDERED that Unitone Communication System, Inc.'s motion for summary judgment is granted in part to the extent that all claims

and cross claims for contractual indemnification and contribution are dismissed, as well as the claim for breach of contract for failure to procure insurance.

Dated: January 30, 2013

ENTER:

  
\_\_\_\_\_

J.S.C.

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**