

<b>Grontas v Kent N. Assoc. LLC</b>
2013 NY Slip Op 31196(U)
June 3, 2013
Supreme Court, New York County
Docket Number: 603482/2009
Judge: Cynthia S. Kern
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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

PART \_\_\_\_\_

Index Number : 603482/2009  
GRONTAS, PETER  
vs  
KENT NORTH ASSOCIATES  
Sequence Number : 009  
DISMISS \_\_\_\_\_

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

is decided in accordance with the annexed decision.

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

## FILED

JUN 06 2013

COUNTY CLERK'S OFFICE  
NEW YORK

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Dated: 6/3/13

CR, J.S.C.

- 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: PART 55

-----X  
PETER GRONTAS and VALENTINA SCHEMBRI,

Plaintiffs,

Index No. 603482/2009

-against-

**DECISION & ORDER**

KENT NORTH ASSOCIATES LLC, et al.,

Defendants.  
-----X

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

**FILED**  
JUN 06 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs commenced the instant action seeking both equitable and monetary relief for alleged economic damages they sustained as a result of continued water infiltration into their apartment. Defendant Consulting Associates of NY, Inc. ("CANY") now moves for an order pursuant to CPLR § 3212 dismissing defendant Kent North Associates, LLC's (hereinafter the "Sponsor") cross-claims for contribution and indemnity. Defendant Karl Fischer Architecture PLLC d/b/a Karl Fischer Architect ("Fischer") has also cross-moved for the same relief. Additionally, defendant Gene Kaufman Architect, P.C. ("Kaufman") has cross-moved pursuant to CPLR § 3211(a)(1) and (7) and CPLR § 3212 seeking to dismiss the Sponsor's cross-claims asserted against it. For the reasons set forth below, CANY's motion and Fischer and Kaufman's

respective cross-motions are granted.

The relevant facts are as follows. On July 16, 2005, plaintiffs Peter Grontas and Valentina Shembri entered into a contract with the Sponsor to purchase a unit in the newly constructed condominium building located at 440 Kent Avenue in the Williamsburg section of Brooklyn, New York (the "Building"). Plaintiffs closed on their unit in the Building on November 16, 2006 and thereafter moved into the unit. Shortly after plaintiffs moved in to the unit, they experienced significant and persistent water intrusion and leaks in the living room of the unit during periods of heavy rain. The leaks and water infiltration created damp, wet and uninhabitable conditions and caused damage to plaintiffs' personal property. Plaintiffs allegedly promptly, regularly and repeatedly complained to the Sponsor. However, the issue was never resolved and after two years, on October 1, 2008, plaintiffs vacated the unit and moved to an apartment in Manhattan.

Plaintiffs initiated this action by the filing of a summons and complaint on or about November 16, 2009, alleging that despite numerous promises and requests for access to their unit by the Sponsor and its representatives, the water infiltration problem had not been satisfactorily remedied. In their complaint, plaintiffs asserted direct causes of action against the various defendants for breach of warranty, breach of contract, negligence, negligent misrepresentation, breach of fiduciary duties, aiding and abetting the breach of the fiduciary duties and violations of General Business Law § 349 and 350. On or about March 11, 2010, the Sponsor served an answer to the complaint denying the allegations asserted against it and asserting cross-claims for contribution and indemnity against the co-defendants. Thereafter, by order dated September 25, 2012, this court, among other things, dismissed all direct claims asserted against CANY, Fisher

and Kaufman. Additionally, this court dismissed plaintiffs' twelfth and thirteenth causes of action against the Sponsor. Accordingly, the only causes of action asserted against the Sponsor to survive the various motions to dismiss are: (1) the first cause of action for breach of contractual warranties; (2) the second cause of action for breach of contract; (3) the ninth cause of action for breach of contract; (4) the tenth cause of action sounding in negligence; (5) the eleventh cause of action for negligent misrepresentation; and (6) the fourteenth and fifteenth causes of action seeking declaratory and injunctive relief. Plaintiffs' fourth and eighth causes of action also survived the various motions to dismiss but they are not asserted against the Sponsor.

Defendants CANY, Fisher and Kaufman now move to dismiss the Sponsor's cross-claims for contribution and indemnity on the grounds that said claims are not legally viable as contribution is not available for purely economic loss such as plaintiffs' damages resulting from a breach of contract and the Sponsor cannot seek indemnification as any liability it faces is based on its own wrongdoing. The Sponsor opposes CANY, Fisher and Kaufman's motions on the grounds that: (1) it continues to face tort liability, not just recovery from purely economic loss resulting from a breach of contract; (2) it is entitled to indemnification as any liability found against it under the fourth, eighth, or tenth causes of action will be vicarious liability for the negligence of its contractors; and (3) summary judgment is premature as there remains outstanding discovery.

The court first turns to the Sponsor's cross-claim for contribution. Under New York's contribution statute, "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.” CPLR § 1401. It is well settled that “purely economic loss resulting from a breach of contract does not constitute ‘injury to property’ within the meaning of New York’s contribution statute.” *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987). As such, “under the economic loss doctrine, ‘contribution under CPLR 1401 is not available where the damages sought . . . are exclusively for breach of contract.’” *Galvin Bros., Inc. v. Town of Babylon, N.Y.*, 91 A.D.3d 715 (1<sup>st</sup> Dept 2012). Instead, “[t]he existence of some form of tort liability is a prerequisite to application of the statute.” *Board of Educ. of Hudson City School Dist.*, 71 N.Y.2d at 28. “[T]he determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought.” *Rockefeller University v. Tishman Construction Corp.*, 240 A.D.2d 341 (1<sup>st</sup> Dept 1997).

In the present case, the Sponsor’s cross-claims for contribution against CANY, Fisher and Kaufman are barred by the economic loss doctrine as plaintiffs’ remaining claims against the Sponsor only seek damages for purely economic loss stemming from the contract between plaintiffs and the Sponsor. “It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. *Clark-Fitzpatrick, Inc. v. Long Is. R. R. Co.*, 70 N.Y.2d 382, 389 (1987) (internal citations omitted). Thus, “merely charging a breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.” *Board of Educ. of Hudson City School Dist.*, 71 N.Y.2d at 29 (quoting *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at

390); *see also SSDW Co. v. Feldman-Misthopoulous Assoc.*, 151 A.D.2d 293, 295 (1<sup>st</sup> Dept 1989).

Here, plaintiffs remaining claims against the Sponsor do not assert the violation of a legal duty independent of the contract between plaintiffs and the Sponsor. The Sponsor's argument that it still faces tort liability and that plaintiffs are not only seeking to recover economic loss resulting from a breach of contract is without merit. In making this argument, the Sponsor alleges that the fourth, eighth and tenth causes of action assert negligence claims against it. However, the fourth and eighth causes of action are not asserted against the Sponsor. Moreover, contrary to the Sponsor's contention, it never moved to dismiss the tenth cause of action sounding in negligence in its prior motion for summary judgment and this court never "implicitly held" that such claims were not duplicative of the breach of contract claim. Indeed, while plaintiffs' remaining tenth cause of action sounds in negligence, it is merely duplicative of the breach of contract claim. No legal duty independent of the Sponsor's contractual obligations to cure the water infiltration problems or properly supervise such remediation work is claimed to have been breached. Stated another way, absent the contract between plaintiffs and the Sponsor, Sponsor would owe no duty of due care to plaintiffs in regards to plaintiffs' unit. Additionally, plaintiffs' eleventh cause of action for negligent representation asserted against the Sponsor cannot sustain a cross-claim for contribution as none of the moving defendants can be held liable for the alleged negligent misrepresentations of the Sponsor's agents to plaintiffs. In the absence of any tort liability on the part of the Sponsor, it does not have any valid claim for contribution against CANY, Fisher or Kaufman.

The court now turns to the Sponsor's remaining cross-claim for indemnity. A claim for

“indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer.” *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1<sup>st</sup> Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows 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.” *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1<sup>st</sup> Dept 1999). As the First Department has stated, “[s]ince 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.” *SSDW Company*, 151 A.D.2d at 296 (quoting *Trustees of Columbia Univ.*, 109 A.D.2d at 453).

In the instant case, the Sponsor cannot maintain indemnity claims against CANY, Fischer and Kaufman as there is no valid claim asserted against it based on vicarious liability. The Sponsor is being charged with liability for allegedly breaching its contractual obligations to cure the water infiltration problems or properly supervise such remediation work. As such, the Sponsor is being charged with liability for its own alleged wrongdoing and not merely vicariously for the work done by CANY, Fischer or Kaufman on the Building and plaintiffs’ unit.

The Sponsor’s contention that it is entitled to indemnification as any liability found

