

Medical Liability Mut. Ins. v United Airconditioning Corp.

2013 NY Slip Op 32686(U)

October 24, 2013

Sup Ct, New York County

Docket Number: 100115/11

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 100115/2011
MEDICAL LIABILITY MUTUAL
vs.
UNITED AIRCONDITIONING CORP.
SEQUENCE NUMBER : 007
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) 1, 2

Answering Affidavits — Exhibits _____ No(s) 3, 4, 5, 6

Replying Affidavits _____ No(s) 7

Upon the foregoing papers, it is ordered that this motion is

FILED

OCT 29 2013

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/29/2013


HON. EILEEN A. RAKOWER 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 15

-----X
MEDICAL LIABILITY MUTUAL INSURANCE

Plaintiff,

- against -

UNITED AIRCONDITIONING CORP., UNITED
AIRCONDITIONING CORP, II, EMPIRE
DISMANTLING, INC., BLACK BULL
CONTRACTING, LLC, JOHNSON CONTROLS, INC.,
STERLING INTERIORS GROUP, INC., MG
ENGINEERING P.C., EAST COAST RESTORATION
& CONSULTING OF NY, CORP., EAST COAST
RESTORATION CORP., HALLEN WELDING SERVICE,
INC., HALLEN STEEL, SKYLIFT MASTER RIGGERS
CORP., SKYLIFT CONTRACTING CORP.,
ABSOLUTE ELECTRICAL CONTRACTING OF NY,
INC.,

Defendants.

-----X
UNITED AIRCONDITIONING CORP. and
UNITED AIRCONDITIONING CORP II.,

Third-Party Plaintiffs,

-against-

L&K HOLDING COMPANY, LLC, PPF OF TWO
PARK AVENUE OWNER, LLC, STERLING
MANAGEMENT, INC., and WISE JANNEY
ELSTNER ASSOCIATES, INC.,

-----X

Index No.
100115/11

**DECISION
and ORDER**

Mot. Seq.
008

FILED
OCT 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by plaintiff Medical Liability Mutual Insurance (“Plaintiff” or “Medical Liability”) on December 20, 2010 for damages for negligently performed construction, renovation and repair work at 2 Park Avenue, New York, New York following water intrusion to the premises. It is alleged that the property damages were the result of the negligence of the named defendants, including United Airconditioning Corp. and United Airconditioning Corp. II (collectively, “United”), stemming from a roof replacement and cooler tower replacement projects.

Defendants/third party defendants United commenced a third party action against third-party defendant Sterling Management, Inc. (“Sterling”), and several other entities, for indemnification and contribution if United is found liable to Plaintiff.

Sterling now moves, pursuant to CPLR §3211(a)(7) and/or alternatively §3211(a)(5), to dismiss the Complaint for failure to state a claim and/or statute of limitations grounds.

In support, Sterling submits the affidavit of Jack Gold, President of Sterling. Opposition is submitted by United, defendant Black Bull Contracting LLC, and third party defendants L&L Holding Company and PPF Off Two Park Avenue Owner.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
- (5) the cause of action may not be maintained because of . . . statute of limitations . . .; or
- (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The Third Party Complaint seeks indemnification and contribution from Sterling.

As for its claim for indemnification against Sterling, the Third Party Complaint alleges that Sterling was retained by United in or around 2008, “to serve as the architect with regard to a cooler tower replacement” at 2 Park Avenue. It alleges that if Plaintiff Medical Liability sustained any damages, the damages were incurred as the result of Sterling’s negligence “in its performance as the owner in failing to properly maintain the subject building located at 2 Park Avenue, New York, New York in around 2008 prior to, and including the time of the subject loss.”

The second cause of action of the Third Party Complaint seeks contribution from Sterling. It alleges, “That if the Plaintiff was caused to sustain damages at the time and place set forth in their complaint and in the manner alleged therein, the damages were caused, aggravated and/or exacerbated by the carelessness, recklessness and/or negligent affirmative acts and/or omissions and/or breach of contract of Third-Party Defendant, Sterling Management, Inc., and if any judgment is recovered herein by Plaintiff by Defendants/Third-Party Plaintiffs, then Sterling Management, Inc. will be liable to contribute to any verdict or judgment recovered against Defendants/Third-Party Plaintiffs ...”

Accepting the allegations as true, the Third Party Complaint states a cause of action for indemnification and contribution as against Sterling. Furthermore, an action for indemnification or contribution considered to be one for express or implied contractual rights and is therefore governed by the six year statute of limitations of CPLR §213(2) governing contractual obligations. The cause of action is not complete until the party seeking indemnification or contribution makes payment on the claim and thus the action accrues upon payment of judgment by the plaintiff seeking the contribution or indemnification. *McDermott v. City of New York*, 50 N.Y. 2d 211, 217 [1980]. Here, as United has not paid any monies to Plaintiff, the statute of limitations on its indemnification and contribution claims have not begun to run. Therefore, there are no grounds for dismissal of the third-party complaint under CPLR §3211(a)(5).

Wherefore it is hereby

ORDERED that third party defendant Sterling Management, Inc’s motion to dismiss the Third Party Complaint is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: OCTOBER 24, 2013


EILEEN A. RAKOWER, J.S.C.

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NEW YORK
COUNTY CLERK'S OFFICE