

**Board of Mgrs. of Hester Gardens Condominium v
Well-Come Holdings, LLC**

2013 NY Slip Op 32947(U)

November 18, 2013

Supreme Court, New York County

Docket Number: 111148/2011

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 111148/2011
BOARD OF MANAGERS
vs
WELL-COME HOLDINGS, LLC
Sequence Number : 005
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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: 11/18/13

Acc, J.S.C.

HON. ANIL C. SINGH
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 HESTER GARDENS
CONDOMINIUM,

Plaintiff,

-against-

Index No.

WELL-COME HOLDINGS, LLC, NELSON YEUNG, LAI
YIM YEUNG, SHING WAH YEUNG, PETER F. POON
ARCHITECT, P.C., PETER F. POON, and THORNTON
TOMASETTI, INC.,

111148/11

Defendants.

-----X
WELL-COME HOLDINGS, LLC, NELSON YEUNG, LAI
YIM YEUNG, SHING WAH YEUNG,

Third-Party Plaintiffs,

-against-

Third-Party
Index No.

PETER F. POON ARCHITECT, P.C., PETER F. POON and
FLINTLOCK CONSTRUCTION SERVICES, LLC.,

590195/13

Third-Party Defendants.

-----X
HON. ANIL C. SINGH, J. :

Defendants/third-party defendants Peter F. Poon Architect, P.C. and Peter F. Poon (hereinafter the Poon Defendants) move, pursuant to CPLR 7503, to stay the third-party action and compel the claims asserted in the third-party complaint to be subject to arbitration, or, alternatively, to the extent that said claims are not subject to arbitration, to dismiss the claims on the ground that they lack merit.

This case arises from a suit brought by the board of managers of a condominium against two sets of defendants, the architect of a project involving residential and commercial property

(the Project) and its associate (the Poon Defendants), and the original sponsors of the Project, Well-Come Holdings, LLC, Nelson Yeung, Lai Yim Yeung and Shing Wah Yeung (the Well-Come Defendants). Both sets moved separately for dismissal of the claims brought specifically against them. Subsequently, this court issued an order, dated January 24, 2013, dismissing all claims brought against the Poon Defendants and some claims against the Well-Come Defendants. The remaining claims brought against the Well-Come Defendants are breach of contract (first cause of action), breach of common-law implied housing merchant warranty (third cause of action), fraud (fourth cause of action), constructive fraudulent conveyance (twelfth cause of action), and intentional fraudulent conveyance (fourteenth cause of action).

Prior to the commencement of this new motion, the Well-Come Defendants brought a third-party action against the Poon Defendants, seeking common-law and/or contractual indemnification and contribution in the event that they are found liable to plaintiff. Defendant Thornton Tomasetti, Inc. (Thornton), a defendant in the original action, is not being sued as a third-party defendant. A new third-party defendant has been added in the third-party action, Flintlock Construction Services, LLC (Flintlock).

The Poon Plaintiffs move to dismiss the third-party complaint on the ground that the third-party claims are subject to arbitration pursuant to an arbitration provision in the contract executed by Well-Come Holdings LLC (Well-Come) and Peter F. Poon Architect, P.C. (Poon P.C.) that relates to the Project. The provision provides, in part:

“Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.”

The Poon Defendants argue that all the claims for indemnification and contribution have arisen from services performed pursuant to the aforesaid contract. Thus, the Poon Defendants contend that the claims should be arbitrated as a matter of law.

Alternatively, in the event that this court finds that all or some of the claims are not subject to arbitration, the Poon Defendants argue that the claims in the third-party complaint are not legally viable. According to them, any contribution claim is barred by the economic loss doctrine, in that CPLR 1401 provides that recovery for contribution is allowed only when damage relates to personal injury, property damage or wrongful death. The Poon Defendants assert that in its action, plaintiff is not seeking such damages, and only wants its benefit of the bargain under its agreement with the Well-Come Defendants.

As for the indemnification claims, the Poon Defendants state that such claims are invalid because the Well-Come Defendants are being sued for their own wrongdoing. The Poon Defendants also state that the contract between Well-Come and Poon P.C. provides that Poon P.C. is only required to indemnify Well-Come to the extent that Well-Come is held liable due to Poon P.C.'s actions. The Poon Defendants aver that this is not the case here.

The Well-Come Defendants oppose this motion, claiming that the third-party action is intertwined with the main action and not connected to the aforesaid contract. The allegations raised by plaintiff in the main action are that the subject premises was defective due to negligent design, construction or oversight. According to them, plaintiff is not a party to the contract, nor is Thornton and Flintlock. The Well-Come Defendants argue that their claims are not subject to arbitration and should be resolved in this forum, along with plaintiff's claims.

The Well-Come Defendants also argue that dismissal of their indemnification claims is

premature because it has yet to be determined whether they are at fault and barred from indemnification. They contend that, regardless of the nature of plaintiff's claim against them, they may properly seek contribution against the Poon Defendants, since their pending claims sound in tort and are not covered by the economic loss doctrine.

With respect to the Well-Come Defendants' claim for indemnity, they refer to section 26.1 of the "Rider" to the contract between Well-Come and Poon P.C., which is an indemnity provision. This provision provides:

"Architect (Poon P.C.) will protect, indemnify and save and hold harmless Owner (Well-Come), its agents, officers, directors and lenders (the 'Indemnities') from and against any damages, losses or claims arising out of the negligent acts, errors, omissions [or] material breaches of the Agreement or intentional acts of the Architect, its principals, employees, agents and consultants."

Thus, the Well-Come Defendants argue that, pursuant to the express terms of this contract, the Poon Defendants are required to indemnify them under certain circumstances.

In reply, the Poon Defendants argue that the claims in the two actions are not intertwined and that this does not preclude arbitration of the third-party claims. They aver that there is a well-settled policy in this jurisdiction favoring arbitration and upholding a party's right to contract.

The Poon Defendants also argue that it is not premature to dismiss nonviable claims for contribution and indemnification on a motion to dismiss. Again, they insist that the contribution claim is barred by the economic loss doctrine and that these defendants are being sued solely for their own wrongdoing.

"New York public policy favors enforcement of contracts for arbitration." *Cooper v Bruckner*, 21 AD3d 758, 758 (1st Dept 2005). "Whether arbitration is mandated ... turns entirely

on the language of the agreement between the parties.” *See Gomez v Brill Sec., Inc.*, 95 AD3d 32, 36 (1st Dept 2012). The effect of the provisions in the contract between Well-Come and Poon P.C. is clearly confined to these two parties. Thornton and Flintlock, as parties, are not bound by this contract or its arbitration provision. The other individual defendants who constitute the Well-Come Defendants, Nelson Yeung, Lai Yim Yeung and Shing Wah Yeung, who are charged with various fraudulent conveyance claims, are not bound by the contract. These parties did not execute the contract.

The claims in the main action brought specifically against Well-Come that have not been previously dismissed are breach of contract, breach of the common-law implied housing merchant warranty, and fraud. The first two claims sound in contract and common law, in which the Poon Defendants have no connection. Therefore, these claims are not subject to arbitration. The fraud claim is based on alleged misrepresentations about the quality of the premises made by Well-Come during the construction period. Well-Come has brought a third-party claim against the Poon Defendants, seeking indemnification and/or contribution from this fraud claim. The court must decide whether this third-party claim is subject to arbitration.

The complaint in the main action includes two separate claims of fraud against the Poon Defendants and Well-Come. The former claim alleges misrepresentations made by the Poon Defendants about the premises during construction. The court subsequently dismissed this claim, on the grounds that the representations were too conditional to constitute fraud and that there was a lack of scienter. The latter claim involved alleged misrepresentations made by Well-Come alongside the terms of the Offering Plan, the agreement between Well-Come and units owners of the premises. The court upheld this claim as it alleged a proper fraud claim. The two claims are

separate ones, alleging different misrepresentations. The claim brought against Well-Come is not related to the contract between Well-Come and Poon P.C. and so is not subject to the arbitration provision.

The alternate remedy sought in this motion is dismissal of the third-party claims on the ground of lack of merit. The Well-Come Defendants seek indemnity and/or contribution from the Poon Defendants in the event that they are found liable to plaintiff. "The purpose of all contribution and indemnity rules is the equitable distribution of the loss occasioned by multiple defendants." *Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 (1990). "Basically, in contribution the loss is distributed among tort-feasors, by requiring joint tort-feasors to pay a proportionate share of the loss to one who has discharged [its] joint liability, while in indemnity the party held legally liable shifts the entire loss to another." *Rosado v Proctor & Schwartz*, 66 NY2d 21, 23-24 (1985). "[I]t is well settled that these remedies are not available in actions seeking recovery for purely economic loss resulting from the breach of contractual obligations." *Lawrence Dev. Corp. v Jobin Waterproofing*, 186 AD2d 634, 636 (2d Dept 1992).

The outstanding tort claims brought against the Well-Come Defendants in the main action are based on fraud and fraudulent conveyances. The complaint in the main action alleges that Well-Come misrepresented material facts with the intent to defraud plaintiff. Here, the complaint charges Well-Come and the Poon Defendants with different misrepresentations. To recover on the ground of indemnity or contribution, the Well-Come Defendants would have to show that the Poon Defendants were in some way responsible for Well-Come's misrepresentations. In this case, the Well-Come Defendants provide no proof of liability on the Poon Defendants' part in their papers. Therefore, the Poon Defendants are not subject to

indemnity or contribution as related to the fraud claim.

As for the claims regarding fraudulent conveyances, there are no allegations in the complaint that the Poon Defendants were involved in the conveyance of property. It is apparent that plaintiff is suing the Well-Come Defendants for their own wrongdoing. Therefore, the Poon Defendants are not subject to indemnity or contribution as related to the fraudulent conveyance claims.

The non-tort claims, breach of contract and breach of implied merchant liability, involve a contract of which the Poon Defendants are not parties, and to liability confined to Well-Come in its capacity as a sponsor-merchant. Moreover, the claims are based on economic loss. Whereas the Well-Come Defendants contend that plaintiff's claims are based on theories of negligence and statutory liability, plaintiff is relying on theories of contract and common-law warranty liability. There are no allegations related to personal injury or property damage. The Poon Defendants are not subject to indemnification or contribution here.

With respect to the indemnity provision in the aforesaid contract, the terms of this provision refer to negligence, breach of the contract and intentional acts on the part of Poon P.C. and its agents. In certain situations, Well-Come would be able to apply this provision in the event that it is held vicariously liable for Poon P.C.'s wrongdoing. Here, plaintiff in the original action is suing Well-Come for its own wrongdoing. Therefore, this provision is not applicable.

The court finds that the third-party claims brought by the Well-Come Defendants are not covered by the arbitration provision of the contract between Well-Come and Poon P.C. and not subject to arbitration. However, these claims are not of a sufficient nature as to subject the Poon Defendants to liability via indemnity or contribution. These claims are without merit.

Accordingly, it is

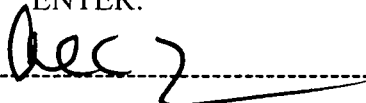
ORDERED that Defendants Peter F. Poon Architect, P.C. and Peter F. Poon's motion to stay litigation of this action and to compel arbitration is denied; and it is further

ORDERED that Defendants Peter F. Poon Architect, P.C. and Peter F. Poon's motion to dismiss the third-party complaint brought by Defendants Well-Come Holdings, LLC, Nelson Yeung, Lai Yim Yeung and Shing Wah Yeung is granted, and the third-party complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the remainder of this action is severed and continued against the remaining third-party defendant, Flintlock Construction Services, LLC.

DATED: 11/18/13

ENTER:



HON. ANIL C. SINGH
SUPREME COURT JUSTICE