

<b>Brice v AB Designbuild</b>
2014 NY Slip Op 30203(U)
January 23, 2014
Sup Ct, New York County
Docket Number: 101098/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 35

Richard Brice

INDEX NO. 101098/2011

-v-

MOTION DATE 12/5/13

AB Designbuild, et al

MOTION SEQ. NO. 013

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the portion of defendant Murray Engineering P.C.'s motion pursuant to CPLR 3212 seeking summary judgment and dismissal of defendant AB Designbuild's cross claim for contribution against it is denied; and it is further

ORDERED that the portions of Murray's motion seeking dismissal of AB Design's cross claims for contractual indemnification, insurance indemnification, and common law indemnification are granted, and said cross claims are hereby severed and dismissed with prejudiced; and it is further

ORDERED that the portion of Murray's motion seeking costs and attorneys' fees incurred in making the instant motion is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that AB Design shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/23/14

[Signature] J.S.C.

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

- 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 35

-----x  
RICHARD A. BRICE,

Index No.: 101098/2011

Plaintiff,

Motion Seq. No. 013

-against-

AB DESIGNBUILD, EAST WILLIAMSBURG  
CONSTRUCTION CORP., ARGYLE DEVELOPMENT II,  
LLC, MURRAY ENGINEERING P.C., MICHAEL SCHMITT  
ARCHITECT P.C., SOIL MECHANICS DRILLING  
CORPORATION and TECTONIC ENGINEERING &  
SURVEYING CONSULTANTS, P.C.,

Defendants.

-----x  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this property damage action, defendant Murray Engineering P.C. ("Murray") moves for summary judgment (CPLR 3212) dismissing all cross-claims asserted by AB Designbuild ("AB Design") against it and an award of costs and attorneys' fees pursuant to CPLR 8303-a.

*Factual Background*<sup>1</sup>

The facts below pertain specifically to the instant motion and are undisputed.

On August 6, 2013, the court granted plaintiff summary judgment against AB Design, ruling that AB Design was liable to plaintiff Richard Brice.

Further, the court granted Murray summary judgment dismissing plaintiff's complaint as asserted against it, granted Murray summary judgment on its contractual cross claim against co-defendant Argyle Development II, LLC, and denied plaintiff's motion for summary judgment

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<sup>1</sup> The court directs the parties to its memorandum decision dated August 6, 2013 (the "Decision") for a complete summary of this action's factual background.

against Murray. It held that (1) Murray (the structural engineer) had no statutory duty to protect plaintiff's property (which adjoined the building at which construction work was being performed); (2) Murray assumed no contractual responsibility to supervise AB Design or its subcontractors without proper written notice, which it did not receive from AB Design; (3) as Murray did not exercise any control or direction over the means and methods of AB Design's underpinning work on the project, Murray did not owe any duty to plaintiff, nor did Murray breach any duty to plaintiff; and (4) plaintiff did not put forth a proper expert affidavit in opposition to Murray's motion to raise a triable issue of fact as to whether Murray's structural engineering work on the project remained within the applicable standard of care for structural engineers (Decision, pp. 17-18).

These rulings were reached despite AB Design's submission of expert affidavits from Timothy G. Galarnyk, a specialist in construction risk management, and Joseph B. Mills, P.E., who opined that the damage to plaintiff's property was caused by Murray's structural engineering errors and that Murray violated the applicable professional standard of care.<sup>2</sup> The court ruled that Galarnyk's affidavit was deficient in that, as a specialist in construction risk management, Galarnyk was not ordinarily called upon to render opinions regarding structural engineering issues.<sup>3</sup> The court also ruled that the Mills affidavit failed to: (a) explain in what way the soils were "nominally unsatisfactory"; (b) describe how the complex nature of the soil rendered

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<sup>2</sup> Specifically, Mills stated that because Soil Mechanics Drilling Corporation's ("Soil") boring logs provided Murray with insufficient insight into the subject soil's complexity, Murray's designs and methodologies were rendered unsuitable pursuant to the Building Code of the City of New York. And, in light of "nominally unsatisfactory" soil conditions, Murray's proposed foundation system and construction methodologies contained therein could not be accomplished without full-time, on-site engineering supervision.

<sup>3</sup> The Galarnyk affidavit is not at issue in the instant motion.

Murray's design unfit for the building code; or (c) explain the code provisions that were allegedly violated. Thus, the court ruled that if offered alone at trial, the Mills affidavit would not support a verdict in AB Design's favor as to the issue of whether Murray's designs deviated from the acceptable standard of care for structural engineers.

It is noted that Murray submitted the affidavit of Peter W. Deming, P.E. to show that its designs and methodologies fell within the applicable standard of care for structural engineers. However, the court declined to consider Deming's affidavit, as it was submitted for the first time in Murray's reply.

In any event, the court ruled that Murray was entitled to summary judgment dismissing plaintiff's complaint against it. However, the court denied the motion as to all cross claims asserted against Murray, as Murray did not specifically identify or address any of the cross claims, and thus failed to make a *prima facie* showing of entitlement to summary judgment.

AB Design did not file a notice to appeal or motion to reargue the decision.

Thereafter, at an October 15, 2013 status conference, at Murray's request, the court granted Murray leave to file a second motion for summary judgment dismissing AB Design's cross claims.<sup>4</sup> The instant motion ensued.

In support of dismissal, Murray argues that AB Design's contribution cross claim fails based the "law of the case" doctrine since there is no longer an issue of fact as to Murray's culpability. Murray contends that based on the court's prior decision, it is established that Murray owed no duty to the plaintiff or to AB Design. The court held that Murray did not owe or

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<sup>4</sup> According to Murray, the court recommended that AB Design voluntarily withdraw its cross claims against Murray and advised that it would likely grant a motion by Murray to dismiss AB Design's cross claims and award costs and attorneys' fees if Murray was required to file the motion.

breach any duty to plaintiff, assumed no contractual responsibility to supervise AB Design, and did not exercise any control or direction over the means and methods of AB Design's underpinning work on the project, and the court cannot revisit its determination. Further, the common law indemnification cross claim fails for the same reason, because the court has already ruled that AB Design is liable for plaintiff's damages, and therefore, AB Design cannot establish its freedom from negligence as required to assert a common law indemnification claim. Murray further argues that the contractual and insurance indemnification claims must be dismissed because it is undisputed that Murray and AB Design never entered into any contract or agreement so as to give rise to such claims.

Lastly, Murray seeks an award of costs and attorneys' fees, asserting that CPLR § 8303-a requires their imposition when a party continues a frivolous action without any reasonable basis in law and fact, and without any good-faith argument for an extension, modification or reversal of existing law.

In opposition, AB Design argues that the court's ruling that Murray is not liable to plaintiff does not foreclose the possibility that Murray may be liable to AB Design, given that a contribution claim can be made even when the contributor has no duty to the injured plaintiff. AB Design maintains that the court's prior denial of Murray's motion meant that its cross claims and the Deming affidavit would be considered at trial. AB Design contends that it had no obligation to appeal or move to renew/reargue the original decision, because the prior decision was favorable to Murray in that it denied Murray's request to dismissal AB Design's cross claims. As such, subsequent to the court's August 2013 decision, AB Design served a "Supplemental Exchange of Expert Witness Information" to: (a) amplify its initial expert

disclosure for trial; and (b) address the deficiencies in the original Mills affidavit noted by the court in the prior decision.

AB Design argues that its supplemental Mills affidavit submitted in opposition incorporates the data provided in the above-mentioned Supplemental Exchange, and provides the factual basis for Mills's conclusion as to how the complex nature of the soil rendered Murray's foundation and underpinning design unfit for the Building Code, as well as the specific Building Code provisions that were violated. AB Design argues that this affidavit satisfies the criteria addressed by the Court so as to support a verdict in AB Design's favor. Thus, Murray's request must be denied again. And, in the event the Court reverses its earlier determination and dismisses AB Design's cross claims against Murray, an order so stating should issue for purposes of appeal.

Lastly, AB Design argues that because its opposition and continuation of the cross claim for contribution have merit and were made in good-faith, Murray's request for costs and attorneys' fees should be denied.

In reply, Murray argues that AB Design's submission of the supplemental expert exchange nearly three weeks after the original decision constitutes an impermissible effort to re-litigate the court's ruling that Murray owed no duty to AB Design. Moreover, AB Design's failure to file a timely notice of appeal or file a motion to reargue forecloses consideration of the supplemental Mills affidavit.

Murray contends that the original decision expressly holds that the evidence submitted in opposition to the original motion failed to a triable issue of fact as to whether Murray owed a duty to plaintiff and AB Design, and /or as to Murray's culpability. As such, the prior ruling

demonstrates that AB Design cannot raise a triable issue of fact as to whether Murray caused or augmented plaintiff's injury.

Murray further notes that AB Design did not oppose the portions in Murray request to dismiss the common law indemnification, contractual indemnification, and insurance indemnification cross claims. Lastly, it reiterates its claims for costs and attorneys' fees, including same related to drafting its reply papers.

#### *Discussion*

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006] (citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985])). Upon such a showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006])). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002])).

At the outset, AB Design did not oppose the branch of Murray's request to dismiss the common law and contractual indemnification, and contractual insurance indemnification cross claims. In any event, Murray established, *prima facie*, its right to dismissal of same, based on the undisputed facts that no contract existed between AB Design and Murray, and that AB Design is

liable, at least in part, for plaintiff's damages (*see, Aiello v. Burns Intern. Sec. Services. Corp.*, 110 AD3d 234, 973 NYS2d 88 [1st Dept 2013]). As such, these cross claims are dismissed.

As to AB Design's contribution cross claim against Murray, a "contribution claim can be made even when the contributor has no duty to the injured plaintiff...[I]n such situations, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable...the 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 AD2d 891, 896, 764 NYS2d 17 [1st Dept 2003] (*citing Raquet v. Braun*, 90 NY2d at 182 [1997])). Thus, contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories (*Raquet*, 90 NY2d at 183). In other words, the nexus of duty between wrongdoers may exist independently of the respective duties (or lack thereof) owing a plaintiff (*Garrett v. Holiday Inns*, 58 NY2d 253 [1983]).

The doctrine of "law of the case" is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned (*see Martin v. City of Cohoes*, 37 NY2d 162 [1975]). It generally operates to preclude successive motions by the same party upon the same proof (*see Ruiz v. Anderson*, 96 AD3d 691, 948 NYS2d 44 [1st Dept 2012]). The doctrine applies only to legal determinations that were necessarily resolved on the merits in the prior decision (*see Grullon v. City of New York*, 297 AD2d 261, 747 NYS2d 426 [1st Dep't 2002] (*citing Baldasano v. Bank of New York*, 199 AD2d 184, 185, 605 NYS2d 293 [1st Dep't 1993])).

Contrary to Murray's contention, the "law of the case" doctrine is inapplicable to the contribution cross claim at bar. It is significant to note that the branch of Murray's motion as to AB Design's cross claims was denied because of *Murray's* failure to identify or address AB Design's cross claims. Further, although the court discussed the content of AB Design's affidavits and legal theories in its original decision, and it is apparent that some of the court's findings appear favorable to Murray, the court's discussion of those facts were in relation to *plaintiff's motion for judgment on their complaint* as against AB Design and Murray, and Murray's motion to dismiss plaintiff's complaint.

Critically, the court did not determine that Murray did not owe or breach a duty *to AB DESIGN*. Rather, the court only ruled that the record was devoid of a triable issue of fact as to Murray's culpability with regard to *plaintiffs*. Specifically, the court previously ruled that: (a) Murray had no statutory duty to protect plaintiff's property; (b) Murray assumed no contractual responsibility to supervise AB Design without written notice, which it did not receive; (c) Murray did not owe or breach any duty to plaintiff; and (d) plaintiff did not put forth a proper expert affidavit in opposition to Murray's motion to raise a triable issue of fact as to whether Murray's engineering work remained within the applicable standard of care for structural engineers.

These prior rulings do not constitute a panacea for all issues of liability between Murray and AB Design; in particular, they are not dispositive of the parties' current points of contention: (1) whether Murray -- to defeat AB Design's contribution cross claim -- has demonstrated *prima facie* that its work was within the applicable standard of care for structural engineers; and (2) if so, whether AB Design has raised a triable issue of fact in opposition.

Murray appears to suggest that the doctrine preclude further consideration of the issues herein because the court suggested, based on the facts before it at the time of the conference, that it would grant a second, "properly-made" motion for summary judgment made by Murray if AB Design refused to withdraw its cross claims. However, because Murray was granted leave to file a second motion, AB Design obtained the concurrent right to submit opposition papers. The court is therefore not precluded from considering the supplemental Mills affidavit submitted with AB Design's opposition. As a result of AB Design's new evidence, the doctrine is inapplicable on additional grounds, as it cannot be said that AB Design is rearguing a previously ruled upon issue "upon the same proof" (*see Ruiz v. Anderson*, 96 AD3d 691, 948 NYS2d 44 [1st Dept 2012]; *Colpitts v. Cascade Valley Land Corp.*, 145 AD2d 750, 535 NYS2d 483 [3d Dept 1988]). Murray's argument might carry some weight had AB Design failed to submit the supplemental Mills affidavit; but this, of course, is not the case.

Further, AB Design's decision to refrain from filing a notice of appeal or motion for leave to renew or reargue does not preclude it from submitting evidence in opposition to the instant motion, as it prevailed in the original motion. It is reasonable to conclude that had Murray not been granted leave to file the instant motion, AB Design would have done nothing subsequent to the original decision, save for preparing to litigate its cross claims at trial. As such, AB Design's filing of a supplemental expert exchange after the court's original decision to address the deficiencies noted by the court in the original Mills affidavit was not without basis.

AB Design's proof, or lack thereof, did not factor into the court's decision to deny Murray's original motion. As such, the original legal determination regarding AB Design's cross claims was not fully and/or necessarily resolved on the merits (*see McCoy v. Metropolitan*

*Transp. Auth.*, 53 AD3d 457, 863 NYS2d 8 [1st Dep't 2008]; *Grullon v. City of New York*, 297 AD2d 261, 747 NYS2d 426 [1st Dep't 2002] (citing *Baldasano v. Bank of New York*, 199 AD2d 184, 185, 605 NYS2d 293 [1st Dep't 1993]). Rather, the only issue necessarily decided in the original decision that is relevant to the instant motion was that Murray failed to establish a *prima facie* case.

In any event, although the court granted Murray leave to file a second motion, Murray's instant motion is premised upon the law of the case doctrine, which this Court finds is inapplicable to AB Design's contribution cross claims. Murray's establishment of AB Design's liability for plaintiff's damages, however, is insufficient to show that it did not have a duty to AB Design, and that it did not breach a duty owed to AB Design. Accordingly, the court rules that Murray has failed to establish *prima facie* its entitlement to summary judgment as to AB Design's cross claim for contribution.

Even assuming that Murray established *prima facie* that it did not breach a duty to AB Design, AB Design raised a triable issue of fact as to Murray's alleged culpability in causing the damages alleged herein by submitting "an affidavit of merit from an expert competent to testify to evidentiary facts which would support [its] claim of professional malpractice" (see *Michaels v Wetsell*, 255 AD2d 298, 298 [2d Dept 1998]; *Sheehan v Pantelidis*, 6 AD3d at 251).

By the supplemental Mills affidavit, AB Design provides an admissible expert opinion regarding additional facts and analysis in support of Mills's original conclusion that Murray deviated from the acceptable standard care of structural engineers.

Specifically, the affidavit provides the factual basis for Mills's conclusions as to how the complex nature of the soil rendered Murray's foundation and underpinning design unfit for the

Building Code, and details which Building Code provision was allegedly violated; both of which were absent from the original affidavit.

In sum, Mills avers that Murray knew (based on Soil's boring logs) that the soils at the bottom of plaintiff's building's foundation were classified as "11-65" and thus "nominally unsatisfactory" according to Section 27-279 of the Building Code. This, according to Mills, should have alerted Murray that the site's soils would be problematic during construction. Moreover, the soils at the depth of the new building's foundation and underpinning against plaintiff's building were fine sandy silt and silty fine sand; as per their Building Code classifications and combined with low blow count figures, Murray should have realized that the soils would have low bearing capacities. Because Murray had access to this information before issuing its report, it should have waited to issue its final design drawings until full exploration pursuant to Section 27-279, as its errors in estimation were confirmed in a subsequent report by Tectonic.

Thus, assuming the truth of AB Design's (and Mills's) assertions, as the court must in resolving the instant motion for summary judgment, AB Design has set forth an admissible basis for its claims that adequately addresses the deficiencies previously touched on by the court.

Moreover, the factual assertions set forth by Mills were not challenged in reply by Murray, which elected to argue only that the law of the case doctrine bars further consideration of the issues herein, and, by implication, that court should not consider the supplemental Mills affidavit. Additionally, Murray failed to provide an expert affidavit in reply.

Accordingly, AB Design has raised a triable issue of fact in opposition, and the branch of Murray's motion as to AB Design's cross claim seeking contribution is denied.

Lastly, because a substantial portion of Murray's motion is denied, its requests for costs and attorneys' fees are denied.

*Conclusion*

Therefore, based on the foregoing, it is hereby

ORDERED that the portion of defendant Murray Engineering P.C.'s motion pursuant to CPLR 3212 seeking summary judgment and dismissal of defendant AB Designbuild's cross claim for contribution against it is denied; and it is further

ORDERED that the portions of Murray's motion seeking dismissal of AB Design's cross claims for contractual indemnification, insurance indemnification, and common law indemnification are granted, and said cross claims are hereby severed and dismissed with prejudiced; and it is further

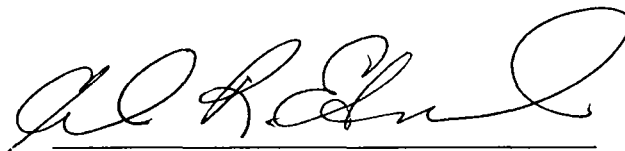
ORDERED that the portion of Murray's motion seeking costs and attorneys' fees incurred in making the instant motion is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that AB Design shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 23, 2014



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**