

**Board of Mgrs. of the 2 Dag Hammarskjold
Condominium v Wolf Haldenstein Alder Freeman &
Herz LLP**

2014 NY Slip Op 31643(U)

June 23, 2014

Supreme Court, New York County

Docket Number: 156375/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 156375/2013
BOARD OF MANAGERS OF THE 2
vs.
WOLF HALDENSTEIN ADLER
SEQUENCE NUMBER : 003
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):

Dated: 6/23/14

CK, J.S.C.

CYNTHIA S. KERN

- 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
BOARD OF MANAGERS OF THE 2 DAG
HAMMARSKJOLD CONDOMINIUM,

Plaintiff,

Index No. 156375/2013

-against-

DECISION/ORDER

WOLF HALDENSTEIN ALDER FREEMAN & HERZ
LLP, STUART M. SAFT, BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT LLC and
BRUCE LEBOW,

Defendants.

-----X
BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT LLC and
BRUCE LEBOW,

Third-Party Plaintiffs,

Index No.590212/2014

-against-

DECISION/ORDER

WOLF HALDENSTEIN ALDER FREEMAN & HERZ
LLP,

Third-Party Defendant.

-----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
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	_____

Third-party defendant Wolf Haldenstein Adler Freeman & Herz LLP (“Wolf”) has brought the present motion to dismiss the third-party complaint against it for contribution. Third-party plaintiffs Brown Harris Stevens Residential Management LLC and Bruce Lebow had initially brought claims against Wolf for contribution and indemnification but have voluntarily agreed to withdraw their indemnification claims. For the reasons stated below, the contribution claim is also dismissed.

The relevant background facts, which are set forth in the court’s prior decision dismissing the underlying action as against Wolf, are as follows. In 1968, plaintiff in the underlying action, a condominium association, entered into a lease (the “Lease”) for the property located at 862 Second Avenue, New York, New York (the “Property”). Thereafter, in or about December of 2006, plaintiff retained defendant law firm Wolf to analyze the Lease and prepare a sublease in order for plaintiff to sublet the Property to Ali Baba’s Terrace Inc. (“Ali Baba”). By letter dated December 11, 2006, Wolf provided plaintiff with an analysis of the Lease. In this letter, Wolf informed plaintiff that its current fixed rent was \$72,000, but pursuant to the Lease, “[o]n September 1, 2012, the fixed rent shall be adjusted to an amount equal to six (6%) percent of the ‘appraised value’ of the land . . . [and if] the parties cannot agree upon the ‘appraised value,’ the [Lease] requires that the parties submit the issue to arbitration” (hereinafter referred to as the “Rent Escalation Provision”). Thereafter, defendant Saft, an attorney at Wolf, prepared a sublease for the Property between Ali Baba and plaintiff, which the parties executed in or about April of 2007 (the “Sublease”). It is undisputed that the Sublease does not incorporate the Rent Escalation Provision.

In September of 2012, plaintiff and the landlord could not agree on the “appraised value” of the Property and they submitted the issue to arbitration. Wolf represented plaintiff in this arbitration. On October 24, 2012, the arbitrators determined that the fair market value of the Property as of September 1, 2012, was \$6,325,000. Thus, plaintiff’s base rent for the Property increased from \$6,000 per month to \$31,625 per month. Pursuant to the Sublease, the base rent plaintiff was to receive from Ali Baba for the period of September, 2012 through April 20, 2013, was \$22,605.84 per month.

Plaintiff then commenced this action against Wolf and the third-party plaintiffs for professional and legal negligence and misfeasance, breach of contract and breach of fiduciary duty. This court, in a prior decision, dismissed plaintiff’s claims against Wolf for malpractice, breach of contract and breach of fiduciary duty on the ground that they are barred by the statute of limitations. Third-party plaintiffs then brought a third party action against Wolf for indemnification and contribution although they have voluntarily withdrew their indemnification claims.

The cause of action for contribution is insufficient as a matter of law because the damages sought in the underlying action are purely monetary. 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. The law is clear that where “the underlying claim seeks purely economic damages, a claim for common-law contribution is not available.” *Children’s Corner Learning Center v. A Miranda Contracting Corp.*, 64 A.D.3d 318, 323 (1st Dept 2009). *See also*

Beck v. Studio Kenji, Ltd., 90 A.D. 3d 462, 463 (1st Dept 2011). This is the case even where the plaintiff is also asserting a claim for professional malpractice in addition to a breach of contract claim. *Children's Learning Center*, 64 A.D.3d at 324. The reason for this is “because 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.* If the damages sought are economic only, that is if plaintiff is only seeking to be returned to as good a position as it would have been if there had been no breach, then there is no valid claim for contribution. *Id.*

In the present case, third-party plaintiffs do not have any viable claim for contribution against Wolf as the only damages being sought in the underlying action are economic damages. The damages that plaintiff is seeking in the underlying action are the same for both its professional negligence/malpractice claims, its breach of contract claims and its breach of fiduciary duty claims—it is seeking to recover for rent it is being required to pay based on escalations of rent in its ground lease that it is unable to recover from its subtenant because the lack of any provision in the sublease allowing the plaintiff to recover these escalations from the subtenant. It is not relevant to this analysis whether the claim being asserted in the underlying complaint is for negligence or breach of contract. The relevant inquiry is the measure of damages being sought. Since there is no question that the only damages being sought are economic—that plaintiff is attempting to be returned to as good a position as it would have been if the rent escalation clause was contained in the sublease, the contribution claim must be dismissed.

Based on the foregoing, the court need not reach the other arguments being made by Wolf as to why the contribution claim should be dismissed. However, the court finds that there is no

basis for sanctioning third-party plaintiffs for asserting their claims for contribution and indemnification.

The motion to dismiss the third-party complaint against Wolf is granted and the third-party complaint is dismissed. The request for sanctions is denied. This constitutes the decision, order and judgment of the court in the third-party action.

Dated: 6/23/14

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.