Board of Mgrs. of the A Bldg. Condominium v 13th & 14th Street Realty, LLC
2014 NY Slip Op 33121(U)
December 1, 2014
Supreme Court, New York County
Docket Number: 100061/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM,

Index No. 100061/11

Plaintiff,

Motion seq. no. 016

-against-

DECISION & ORDER

13th & 14th STREET REALTY, LLC, *et al.*,

Defendants.

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By notice of motion, defendant Hudson Meridian Construction Group, LLC, s/h/a Hudson Meridian Construction Group, moves pursuant to CPLR 3212 for an order granting it partial summary judgment on liability on its claims for contractual defense and indemnification against defendants Crystal Window and Door Systems, Ltd., and third-party defendants Demar Plumbing Corp., Restor Technologies, Inc., AGIR Electric, Ltd., d/b/a Pinnacle Electric

Corporation, Marmaro Group LLC, and Bay Restoration Corp. (hereinafter, the Subcontractors). Bay Restoration, Demar Plumbing, Crystal Window, Pinnacle Electric, Marmaro Group, and Restor Technologies oppose.

By notice of cross motion, Restor Technologies moves for an order dismissing the third party claims and cross claims against it. Hudson Meridian, Crystal Curtain, and Bay Restoration oppose.

I. BACKGROUND

This action arises from the construction of a condominium, which plaintiffs allege is riddled with water leaks and as-yet undiscovered and latent building defects, and was not constructed in compliance with the condominium's offering plan, applicable codes and regulations, and industry standards. In the complaint, plaintiffs allege that Hudson Meridian was in charge of construction of the condominium, and they assert two causes of action against it, breach of contract and common law negligence, both relating to the allegedly defective and non-conforming construction. Plaintiffs also assert various claims against Crystal Window, but not against Demar Plumbing, Restor Technologies, Pinnacle Electric, Marmaro Group, and Bay Restoration, all of which were subcontractors for the construction. (NYSCEF 549).

Crystal Window was hired by Hudson Meridian to furnish and install complete windows, curtain wall systems, terrace doors, metal panels, terracotta baguettes, and a glass parapet. Demar Plumbing was hired to install complete plumbing, including the delivery and installation of all bathtubs, showers, faucets, and trim in the apartments. Restor Technologies agreed to furnish and install waterproof membranes and vapor barriers "below slab on grade" and along the condominium's foundation walls. Pinnacle Electric was hired to furnish complete electrical

work for the condominium. Marmaro Group agreed to furnish complete ceramic tile and stone work for the condominium. Bay Restoration was hired to install the roofing at the condominium. (NYSCEF 549).

Section 19.1 of the contract between Hudson Meridian and Crystal Window provides, as pertinent here:

> To the fullest extent permitted by law, Subcontractor will defend, indemnify and save Contractor . . . harmless from and against any and all claims, liens, judgments, damages, losses and expenses, including reasonable attorneys' fees and legal costs, arising in whole or in part and in any manner from the act, failure to act, omission, negligence, breach or default by Subcontractor and/or its officers, directors, agents, employees, sub-subcontractors and suppliers in connection with the performance of this Subcontract.

The identical clause appears in Hudson Meridian's contracts with all of the Subcontractors in issuse here, and Hudson Meridian asserts claims for contractual indemnification against all of them in either the main action or the third-party action. (*Id.*).

By affidavit dated October 8, 2013, Hudson Meridian's president William Cote denies that Hudson Meriden directly performed any construction work on the condominium. Rather, he states that all of the work was performed by the Subcontractors, and thus contends that any defect in or damage to the condominium was necessarily caused by the Subcontractor's acts or omissions. (NYSCEF 548).

II. HUDSON MERIDIAN'S MOTION

A. Contentions

Hudson Meridian argues that the indemnity provisions in the subcontracts require the Subcontractors to pay past and present attorney fees and costs, and to defend it in this action, as there need not be a finding of liability against the Subcontractors to trigger the duty to defend.

Rather, all that is needed is plaintiffs' allegation that the Subcontractors may be held liable. It also contends that as all of the work on the condominium was performed by the Subcontractors and not by Hudson Meridian, the Subcontractors must indemnify it as any damages must have been caused by them. (NYSCEF 569).

Bay Restoration argues that Hudson Meridian's motion is premature as it has not yet been determined that Hudson Meridian is free from its own negligence, and as Cote's denial is conclusory and no depositions have been taken of Hudson Meridian employees. It alleges that documents produced in discovery, including Hudson Meridian's contract with the condominium owner, reflect that it had substantial responsibilities related to the construction work, including supervision and inspection of the work, and that it had numerous employees at the site during construction. And absent any evidence demonstrating that it was negligent, Bay Restoration claims that its duty to indemnify has not yet been triggered, observing that plaintiffs neither sued it nor allege that Bay Restoration's acts or omissions caused them damages. It also denies that it has a duty to defend Hudson Meridian based solely on the allegations set forth in plaintiffs' complaint. (NYSCEF 617).

Demar Plumbing, Crystal Window, Pinnacle Electric, Restor Technologies, and Marmaro also argue that the motion is premature, and that Hudson Meridian has not shown its entitlement to indemnification without demonstrating that they may be held liable, nor can they show it. (NYSCEF 643, 649, 652, 660).

B. Analysis

1. Duty to indemnify

The contractual clause in issue here applies to any claims "arising in whole or in part and

in any manner from the act, failure to act, omission, negligence, breach or default by [the subcontractors] in connection with the performance of [the subcontracts]." Thus, a finding of negligence against a subcontractor is not a condition precedent to the duty. (*See Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019 [2d Dept 2011] [contract required subcontractor to indemnify for claims arising out of or resulting from performance of agreement and caused by subcontractor's acts or omissions; indemnification not conditioned on finding of fault or that acts or omissions be negligent or wrongful, whether acts or omissions were negligent irrelevant to subcontractor's duty to indemnify]).

The claim must, however, arise from the Subcontractor's acts or omissions and be connected to its performance of the subcontract. Here, plaintiffs do not allege that their damages arose from the acts or omissions of the Subcontractors in connection with the performance of the subcontracts. While they allege, for example, that the roof was defective, they do not assert that the defect resulted from Bay Restoration's acts or omissions or breach or negligence, nor does Hudson Meridian offer any such evidence. Cote's allegation that only the Subcontractors performed work at the condominium does not establish that plaintiffs' damages arose from the acts or omission of the Subcontractors. (*See Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007 [2d Dept 2011] [provision obligated defendant to indemnify for claims arising out of its acts or omissions; as it had not been determined whether injuries arose out of defendant's acts or omissions, summary judgment premature]).

In *Simone*, by contrast, the movant established, *prima facie*, that the action arose from the subcontractor's performance of the contract and the acts or omissions of persons directly and indirectly employed by the subcontractor. (90 AD3d at 1019). And in *Pope v Supreme-K.R.W.*

Constr. Corp., while the indemnity provision did not require a finding of negligence, it also did not require that the claims arise from the indemnitor's acts or omissions but rather only from work performed pursuant to the contract. (261 AD2d 523 [2d Dept 1999]). Similarly, in *Keena v Gucci Shops*, it was undisputed that the plaintiffs' injuries arose out of the subcontractors' work. (300 AD2d 82 [1st Dept 2002]), as it was in *Velez v Tishman Foley Partners*, 245 AD2d 155 [1st Dept 1997]).

Moreover, Cote's conclusory denial of liability is insufficient to establish, *prima facie*, that Hudson Meridian was not negligent. (*See Mikelatos v Theofilaktidis*, 105 AD3d 822 [2d Dept 2013] [party seeking contractual indemnification must prove itself free of negligence, as to extent its negligence contributed to accident, it cannot be indemnified; *Miranda v Norstar Bldg. Corp.*, 79 AD3d 42 [3d Dept 2010] [unless proposed indemnitee is found free of active negligence, conditional summary judgment for contractual indemnification premature]; *Neighborhood Partnership Hous. Dev. Fund v Blakel Constr. Corp.*, 34 AD3d 303 [1st Dept 2006] [indemnification provisions enforceable as there was no evidence of active negligence by proposed indemnitees]; *cf Bermejo v New York City Health and Hosps. Corp.*, 119 AD3d 500 [2d Dept 2014] [clause required indemnification for claims arising out of act or omission in connection with performance of agreement; in absence of evidence that indemnitee was itself negligent, summary judgment on claim for contractual indemnification should have been granted]).

2. Duty to defend

A contractor's duty to defend is no broader than its duty to indemnify. (*Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp.*, 78 AD3d 613 [1st Dept 2010]; *Bryde vs*

CVS Pharmacy, 61 AD3d 907 [2d Dept 2009]). As Hudson Meridian has not established that it is entitled to indemnification (*see infra*, II.B.1), it has also not demonstrated that the Subcontractors' duty to defend has been triggered. (*See Inner City Redevelopment Corp.*, 78 AD3d at 613 [as defendant was not insurer and contract limited indemnitee to losses caused in whole or party by defendant's negligence, order requiring defendant to defend or indemnify was premature absent showing that defendant negligent]; *Bryde*, 61 AD3d at 908 [premature for court to grant motion for summary judgment on contractual indemnification claim that sought provision of defense as contractor is not insurer and its duty to defend not broader than duty to indemnify, which duty had yet to be established]; *see also JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575 [1st Dept 2012] [motion denied as premature as duty to defend was not broader than duty to indemnify and indemnification clause did not apply to mere assertion of claims, regardless of outcome]).

The Court in *Auto. Ins. Co. of Hartford v Cook* addressed an insurer's duty to defend and thus, the decision is inapposite. (7 NY3d 131 [2006]).

III. RESTOR TECHNOLOGIES' MOTION

A. Contentions

Restor Technologies asserts that as part of the Brownfield Cleanup Program (BCP), a governmental program which provides an environmental easement to sites remediated thereunder, it was hired by Hudson Meridian to install a waterproofing membrane and vapor barrier below the condominium basement. It alleges that it began to install the barrier in February 2006 and completed it in May 2006, that between May and August 2006, it did no work and had no representatives at the site, that in August 2006, at Hudson Meridian's request, it

returned to the site to repair a portion of the waterproofing that had been damaged by the work of another trade, and that between August 2006 and September 2007 it did no work at the site. (NYSCEF 626). Relying on testing and inspections conducted on the barrier until 2010 as part of the BCP, Restor Technologies argues that the barrier was installed and working properly and that, therefore, neither plaintiffs nor Hudson Meridian can prove that any defects in the barrier arose from any negligence on its part. (*Id.*).

It also relies on prior litigation to support its claim that Hudson Meridian is barred or estopped from bringing claims against it. In 2010, Atlantic Specialty Insurance Company commenced a subrogation action on behalf of the condominium against defendants 13th and 14th Street Realty and Hudson Meridian, among others, arising out of property damage claims relating to alleged construction defects at the condominium, including the waterproofing and barrier. In that action, Hudson Meridian brought a third-party action against several defendants, including Restor Technologies, seeking, in part, contractual indemnification, defense, and insurance coverage. The parties thereafter agreed to discontinue the action with prejudice against all parties. (NYSCEF 626).

Hudson Meridian contends that triable issues remain as to Restor Technologies' negligence, that its reliance on the reports of the BCP inspections and testing is insufficient and without probative value, that statements in the reports constitute inadmissible hearsay, and that summary dismissal is premature as neither Restor Technologies nor any other parties have been deposed. It also denies that its claims against Restor Technologies are barred or estopped as the claims in the two actions differ, and the subrogation action was not litigated but discontinued. (NYSCEF 738, 1004).

Crystal Curtain and Bay Restoration argue that the motion is premature absent discovery and because the cause of the alleged water problems has yet to be determined. (NYSCEF 731; 734).

B. Analysis

That there were no indications in the inspection or testing reports of problems with Restor Technologies' work does not preclude a finding that problems arose thereafter, nor is it shown that the reports or statements made therein are admissible.

A matter resolved by a stipulation of discontinuance does not estop a future action. (*M.V.B. Collision, Inc. v Rovt*, 101 AD3d 830 [2d Dept 2012]; *Singleton Mgt. v Compere*, 243 AD2d 213 [1st Dept 1998]). And here, given the differing allegations, Hudson Meridian's claims against Restor Technologies are not barred.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Hudson Meridian Construction Group, LLC s/h/a Hudson Meridian Construction Group's motion is denied; and it is hereby

ORDERED, that third party defendant Restor Technologies, Inc.'s motion is denied.

ENTER:

Barbara Jaffe, JSC

DATED: December 1, 2014
New York, New York