

253 E. 62nd St., LLC v Moluka Enters., LLC
2016 NY Slip Op 31186(U)
June 24, 2016
Supreme Court, New York County
Docket Number: 651477/2010
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
253 EAST 62nd STREET, LLC,

Plaintiff,

- against -

MOLUKA ENTERPRISES, LLC, DEMO PLUS INC.,
YOLANDA QUEEN, DOUGLAS ELLIMAN PROP.
MGMT., BELLMARC PROP. MGMT. SERVS., INC.,
LIORA ELGHANAYAN and JOHN ELGHANAYAN,

Defendants.

-----X
DOUGLAS ELLIMAN PROPERTY MANAGEMENT s/h/a
DOUGLAS ELLIMAN PROP. MGMT., YOLANDA
QUEEN and BELLMARC PROPERTY MANAGEMENT
SERVICES, INC. s/h/a BELLMARC PROP. MGMT.
SERVS., INC.,

Third-Party Plaintiffs,

-against-

P&J RENOVATIONS, INC., BERZAK ASSOCIATES
ARCHITECTS P.C. and SDG ENGINEERING, PC,

Third-Party Defendants.

-----X
P&J RENOVATIONS, INC.,

Second Third-Party Plaintiff,

-against-

PERCIBALLI CONTAINER SERVICE, INC.,

Second Third-Party Defendant.
-----X

Index No. 651477/2010

Mot. seq. no. 19

DECISION AND ORDER

-----X
PERCIBALLI CONTAINER SERVICE, INC.,

Third Third Party-Plaintiff,

-against-

DEMO DELUXE, INC. and MICHAEL SARNELLI,

Third Third-Party Defendants.

-----X
MOLUKA ENTERPRISES, LLC,

Fourth Third-Party Plaintiff,

-against-

P&J RENOVATIONS, INC., BERZAK ASSOCIATES
ARCHITECTS P.C. and SDG ENGINEERING, P.C.,

Fourth Third-Party Defendants.

-----X
BARBARA JAFFE, J.:

For Moluka:
James Yoo, Esq.
Hardin Kundla *et al.*
110 William St.
New York, NY 10038
212-571-0111

For Berzak/SDG:
Lina C. Rossillo, Esq.
Morris Duffy Alonso & Faley
2 Rector St., 22nd Fl.
New York, NY 10006
212-766-1888

By notice of motion, third-party defendants/fourth third-party defendants Berzak Associates Architects PC and SDG Engineering, PC (collectively, movants) move pursuant to CPLR 3211(a)(7) for an order dismissing the fourth third-party complaint and all cross claims against them. Defendant/fourth third-party plaintiff, Moluka Enterprises, LLC opposes.

In the fourth third-party complaint, Moluka asserts common law indemnification and contribution claims against movants. (NYSCEF 368). As plaintiff seeks in the main action

against Moluka economic damages arising from negligence rather than breach of contract, Moluka's contribution claim against movants is not barred as a matter of law. (See *Sound Refrigeration and Air Conditioning, Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349 [2d Dept 2011] [contribution claim not necessarily barred as plaintiff sought damages for negligence as well as breach of contract]; *Castle Vil. Owners Corp. v Greater New York Mut. Ins. Co.*, 58 AD3d 178 [1st Dept 2008] [contribution claim not barred as plaintiff alleged that engineering firm's negligence led to collapse of retaining wall and plaintiff sought traditional tort damages from firm]; *Tower Bldg. Restoration, Inc. v 20 E. 9th St. Apt. Corp.*, 295 AD2d 229 [1st Dept 2002] [as third-party plaintiff asserted tort claim against movant, contribution claim remained viable]; compare *Bd. of Mgrs. of A Bldg. Condominium v 13th & 14th St. Realty LLC*, 137 AD3d 505 [1st Dept 2016] [contribution claim barred where plaintiff sought to recover only economic losses resulting from breach of contract]).

As the parties dispute the existence, nature, and extent of movants' roles and responsibilities related to the demolition project at issue, and as it has not yet been determined whether movants' actions or inactions contributed or caused the injury asserted by plaintiff, movants have not established entitlement to dismissal of the contribution claim. (See *Guadalupi v Morelli*, 127 AD3d 1016 [2d Dept 2015] [dismissal of contribution claim denied as defendants raised triable issue as to whether third-party defendants negligently performed repairs and thereby created hazardous condition]; *Navarreto v 995 Westchester Ave. LLC*, 35 AD3d 267 [1st Dept 2006] [triable issue remained as to whether negligence by third-party defendant was substantial factor in causing plaintiff's harm]).

Movants have also failed to demonstrate that Moluka's common law indemnification

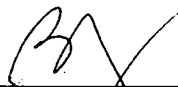
claim against them should be dismissed as liability for the accident has not yet been determined. (See *Dautaj v Alliance Elev. Co.*, 110 AD3d 839 [2d Dept 2013] [summary dismissal of cross claim for common law indemnification would have been premature as there had not yet been finding as to any party's liability for accident]; *Brockman v Cipirani Wall St.*, 96 AD3d 576 [1st Dept 2012] [same]).

And, as the parties dispute whether movants and Moluka were in privity of contract or the functional equivalent thereof, movants are not entitled to dismissal of the claims against them on the ground that there was no privity. (*Key Intern. Mfg., Inc. v Morse/Diesel, Inc.*, 142 AD2d 448 [2d Dept 1988] [factual issues remained as to whether privity existed between parties] cf. *Richards Plumbing & Heating Co., Inc. v Washington Group Intern., Inc.*, 59 AD3d 311 [1st Dept 2009] [although construction manager alleged entitlement to indemnity as its relationship with architect so close as to approach that of privity, liability would only be imposed if manager's claims sounded in negligent misrepresentation or similar torts]).

Accordingly, it is hereby

ORDERED, that third-party defendants/fourth third-party defendants Berzak Associates Architects P.C. and SDG Engineering, P.C.'s motion to dismiss the fourth third-party complaint and all cross claims against them is denied.

ENTER:



Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: June 24, 2016
New York, New York