

**Board of Mgrs. of 147 Waverly Place Condominium v
KMG Waverly, LLC**

2016 NY Slip Op 31579(U)

August 17, 2016

Supreme Court, New York County

Docket Number: 159329/2013

Judge: Jeffrey K. Oing

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x
THE BOARD OF MANAGERS OF 147 WAVERLY
PLACE CONDOMINIUM,

Plaintiff,

-against-

KMG WAVERLY, LLC, KMGW, LLC, MARATHON
WAVERLY, LLC, MARATHON REAL ESTATE
OPPORTUNITY FUND, LLC, BURT MILLER,
ERIC GRANOWSKY, STAN KLEGER, RON
BERNSTEIN, BSK ARCHITECTS, LLP,
JOAN KREVLIN, GEORGE J. KULIK, P.E.,
P.C. and GEORGE J. KULIK,

Defendants.

Index No.: 159329/2013

Mtn Sq. Nos. 005, 006
007 & 008

DECISION AND ORDER

-----x
KMG WAVERLY, LLC, KMGW, LLC, MARATHON
WAVERLY, LLC, MARATHON REAL ESTATE
OPPORTUNITY FUND, LLC, BURT MILLER,
ERIC GRANOWSKY, STANLEY KLEGER, and
RON BERNSTEIN,

Defendant/
Third-Party
Plaintiffs,

-against-

WAVERLY CC, LLC, STANISLAW SLUTSKY,
P.E., FORUM ENGINEERING, P.C.,
ROBERT SILMAN ASSOCIATES STRUCTURAL
ENGINEERS, D.P.C., KULIK & ASSOCIATES,
LLC, GEORGE J. KULIK, P.E., P.C.,
LAWRENCE EXTERIOR RESTORATION CORP.,
VANGUARD CONSTRUCTION & DEVELOPMENT
COMPANY, INC., and BSK ARCHITECTS,
LLP,

Third-Party Defendants.

-----x
JEFFREY OING, J.:

Mtn Seq. No. 005

Third-party defendant Robert Silman Associates Structural Engineers, D.P.C. ("Silman Associates") moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint as against it for failure to state a cause of action.

Mtn Seq. No. 006

Third-party defendants Kulik & Associates, LLC and George J. Kulik, P.E., P.C. (together, "Kulik") move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss all causes of action against them based upon documentary evidence and for failure to state a cause of action.

Mtn Seq. No. 007

Third-party defendant Stanislav Slutsky, P.E., incorrectly sued as Stanislav Slutsky, P.E. ("Slutsky"), moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint as against it for failure to state a cause of action.

Mtn Seq. No. 008

Third-party defendant Forum Engineering, P.C. ("Forum") moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint and all cross claims against it for failure to state a cause of action.

Lawrence Exterior Restoration Corp. ("Lawrence Exterior") cross-moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint against it for failure to state a cause of

action. It joins in the arguments of the other third-party defendants.

Motion sequence numbers 005, 006, 007 and 008 are consolidated for disposition.

FACTS

This action arises out of the gut renovation of a Manhattan building located at 147 Waverly Place. Defendants, KMG Waverly, LLC, and its affiliates, KMGW, LLC, Marathon Waverly, LLC, Marathon Real Estate Opportunity Fund, LLC, Burt Miller, Eric Granowsky, Stan Kleger and Ron Bernstein, who are the sponsors (together, the "Sponsor Defendants"), converted the building to condominium units in 2007. The condominium board of managers (the "Board") seeks recovery for alleged defects due to improper workmanship and/or design. The main action asserts claims against the Sponsor Defendants for breach of contract, fraud in the inducement, and fraudulent conveyance, and against the individual Sponsor Defendants for breach of fiduciary duty. The direct claims against defendants BKSK Architects, LLP and Kulik were previously dismissed or withdrawn.

The Sponsor Defendants commenced a third-party action for contribution and indemnity based upon their position that, with respect to any contractual responsibility that they owed to plaintiffs, they wholly delegated such responsibility to the third-party defendants.

The alleged problems with the building include recurrent leaks throughout the building due to alleged substandard methods and materials in constructing the roofing system, exterior facade and windows. The leaks have allegedly caused extensive damage to the building, including mold growth and buckling floors. Plaintiffs also complain of inoperable windows, excessive noise and odor transmission between units, inadequate heating and cooling, missing fire-stopping, exposed junction boxes and faulty fire stair doors. The Board maintains that Sponsor Defendants knew about the problems with the building, but misrepresented to potential buyers that the building was exactly as advertised.

The third-party complaint seeks recovery from the third-party defendants for any damages for which the Sponsor Defendants are held liable under the first cause of action of the complaint for breach of contract.

DISCUSSION

Mtn Seq. No. 005

Silman Associates is a structural engineering firm. It was hired by the architect on the project at the building to perform structural engineering services, which, it claims, are unrelated to the alleged defects complained of in the complaint. Given that the project was completed in 2007, Silman Associates argues that the statute of limitations for professional malpractice expired long before the main action was commenced in 2013. This

argument is unavailing. The Sponsor Defendants seek common-law indemnification and contribution, which do not accrue until the party seeking such recovery is found liable (McDermott v City of New York, 50 NY2d 211, 217 [1980][indemnification]; Bay Ridge Air Rights, Inc. v State of New York, 44 NY2d 49, 56 [1978] [contribution]). As such, the statute of limitations has not elapsed.

Implied indemnity permits a party who is vicariously liable, due solely to the negligence of another, to shift the liability to the actual wrongdoer. However, a party who actually participated to some extent in the wrongdoing cannot shift the burden (Trustees of Columbia Univ. v Mitchell/Giurgola Assoc., 109 AD2d 449, 453 [1st Dept 1985]). "Thus, to be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought" (17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am., 259 AD2d 75, 80 [1st Dept 1999]).

The Sponsor Defendants argue that to the extent that the Board seeks damages for the building's allegedly substandard condition third-party defendants are responsible for that condition because the Sponsor Defendants delegated responsibility to design and construct the building to third-party defendants. The Sponsor Defendants further claim that because the damage was

Index No.: 159329/2013
Mtn Sq. Nos. 005, 006, 007 & 008

Page 6 of 12

not only based on money needed to repair the defects, but on damage to other parts of the building that resulted from those defects they allege more than mere economic loss.

Silman Associates points out that its contract was with the architect, BKSK Architects, LLP, not with the Sponsor Defendants. Therefore, the Sponsor Defendants did not delegate any responsibility to Silman Associates for the design of any portion of the building. Further, the Sponsor Defendants did not delegate their full and exclusive responsibility to anyone. They were allegedly aware of the defects and failed to remedy them despite their obligation to make sure the work was performed properly and that the materials were in accordance with the purchase agreement. They also allegedly concealed the defects from potential buyers and misrepresented the condition of the building thereby breaching their contractual obligation under the offering plan and purchase agreement.

Here, the Sponsor Defendants are seeking indemnification for breach of contract. There is no basis to support a claim for indemnity in the context of a breach of contract action, however, given that the Sponsor Defendants allegedly breached the contract, and are, therefore, at least partially responsible for the harm (Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc., 59 AD3d 311, 312 [1st Dept 2009]).

Additionally, in the main complaint of the Board alleges that the

Sponsor Defendants themselves misrepresented the condition of the building despite knowing that actual conditions. That is an allegation of specific wrongdoing by the Sponsor Defendants, which precludes implied indemnification (Id.). Under these circumstances, the claim for indemnification is dismissed as against Silman Associates.

Accordingly, that branch of Silman Associates' motion to dismiss the common-law indemnification claim is granted, and it is dismissed against Silman Associates.

The Sponsor Defendants also seek contribution. However, contribution is not available where the liability upon which it is based derives solely from a contractual obligation (CPLR 1401; Lehr Assoc. Consulting Engrs., LLP v Daikin AC (Ams.) Inc., 133 AD3d 533, 533-34 [1st Dept 2015]). Rather, there must be some sort of tort liability as a predicate to a claim for contribution (17 Vista Fee Assoc., 259 AD2d at 81, supra), which is absent here. Consequently, the claim for contribution is also dismissed.

Accordingly, that branch of Silman Associates' motion to dismiss the common-law contribution claim is granted, and it is dismissed against Silman Associates.

Mtn Seq. No. 006

Kulik moves for dismissal based upon the fact that Kulik had no nexus to the work allegedly performed at the building. George

Index No.: 159329/2013
Mtn Sq. Nos. 005, 006, 007 & 008

Page 8 of 12

Kulik states that he was retained to perform an inspection of the building's facade in 2004, which was completed in February 2005. This inspection was before commencement of the gut renovation. He did not inspect the premises after the renovations. The Board withdrew its complaint as against Kulik.

In opposition, the Sponsor Defendants do not address Kulik's specific contentions. Rather, they address all the motions as a whole. Neither the complaint, nor the third-party complaint, specify any conduct on the part of Kulik that resulted in the damages alleged. Having failed to dispute Kulik's factual assertions, the Sponsor Defendants have in effect conceded them.

Accordingly, Kulik's motion to dismiss the third-party complaint against it is granted, and it is dismissed against it.

Mtn Seq. No. 007

Slutsky seeks to dismiss the third-party action as against it for essentially the same reasons as Silman Associates. Slutsky contends that the Board alleges that the Sponsor Defendants were active wrongdoers, and the claims against them have nothing to do with the services that Slutsky provided. As discussed, supra, the Sponsor Defendants are alleged to have participated in wrongdoing by concealing information from the buyers, despite knowing of defects, thereby breaching their obligations under the offering plan and purchase agreement. Having participated to some degree in the wrongdoing, indemnity

is not available to them (Trustees of Columbia Univ. v Mitchell/Giurgola Assoc., 109 AD2d at 453, supra). Further, Sponsor Defendants demonstrate by their own exhibit that Slutsky was not responsible for the areas of the building that allegedly caused damage. As demonstrated by Slutsky's contract (Opposition to Motion, Ex. D), Slutsky was retained to provide mechanical and electrical consulting engineering services for the project. It was not involved with the building's roofing system, exterior facade or windows, which are the source of the damages regarding which the Board seeks recovery. Therefore, there is no viable common-law indemnity claim against it. With respect to the claim for contribution, Slutsky maintains that there is no claim for tortious personal injury, property damage or wrongful death, upon which it could be held liable, and, as such, contribution, pursuant to CPLR 1401, is not available. Under these circumstances, neither the indemnity claim nor the claim for contribution can survive (17 Vista Fee Assoc., 259 AD2d at 81, supra).

Accordingly, Slutsky's motion to dismiss the third-party complaint against it is granted, and it is dismissed as against it.

Mtn Seq. No. 008

Forum moves to dismiss the third-party complaint and all cross claims against it.¹ Forum was a sub-consultant to Slutsky

on the project. It raises essentially the same arguments as Slutsky and Silman Associates. For the reasons discussed, supra, Forum's motion to dismiss the third-party complaint against it is granted, and it is dismissed against it.

Cross Motion

Lawrence Exterior cross-moves to dismiss the third-party action as against it. It adopts the moving papers of the other third-party defendants rather than submitting additional papers. The Sponsor Defendants maintain that they had a direct contractual relationship with Lawrence Exterior, and that by that contract they delegated any contractual responsibility that they owed to the Board to Lawrence Exterior.

Were the Board's breach of contract cause of action against the Sponsor Defendants limited to the defects in the manner in which the work was performed, it would be conceivable that Sponsor Defendants would have a viable claim. The Board, however, clearly alleges that the Sponsor Defendants were actively involved in wrongdoing by misrepresenting the condition of the building despite their knowledge of the true condition. Thus, the Sponsor Defendants were the alleged wrongdoers and cannot have the benefit of common-law indemnity against Lawrence Exterior (17 Vista Fee Assoc., 259 AD2d at 80, supra; Trustees of Columbia Univ. v Mitchell/Giurgola Assoc., 109 AD2d at 453, supra).

Index No.: 159329/2013
Mtn Sq. Nos. 005, 006, 007 & 008

Page 11 of 12

The claim for contribution must also be dismissed. Unlike the cases cited by the Sponsor Defendants, this action does not rest on a tort claim, as is required to recover contribution (Cf. Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp., 84 AD3d 1349 [2d Dept 2011]; Village of Palmyra v Hub Langie Paving, Inc., 81 AD3d 1352 [4th Dept 2011]).

Accordingly, Lawrence Exterior's cross motion to dismiss the third-party complaint against it is granted, and it is dismissed as against it.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of third-party defendant Robert Silman Associates Structural Engineers, D.P.C. (mtn seq. no. 005) is granted, and the third-party complaint is dismissed as against said defendant; and it is further

ORDERED that the motion of third-party defendants Kulik and Associates, LLC and George J. Kulik, P.E., P.C. (mtn seq. no. 006) is granted, and the third-party complaint is dismissed as against said defendants; and it is further

ORDERED that the motion of third-party defendant Stanislav Slutsky, P.E. incorrectly sued herein as Stanislav Slutsky, P.E. (mtn seq. no. 007) is granted, and the third-party complaint is dismissed as against said defendant; and it is further

ORDERED that the motion of third-party defendant Forum Engineering, P.C. (mtn seq. no. 008) is granted, and the third-

Index No.: 159329/2013
Mtn Sq. Nos. 005, 006, 007 & 008

Page 12 of 12

party complaint is dismissed as against said defendant; and it is further


ORDERED that the cross motion of third-party defendant Lawrence Exterior Restoration Corp. is granted, and the third-party complaint is dismissed as against said defendant; and it is further

ORDERED that the third-party action is severed and continued against the remaining third-party defendants; and it is further

ORDERED that counsel are directed to appear in Part 48 for a status conference on September 22, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/17/16


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.