Chatham Towers, Inc. v Castle Restoration & Constr., Inc.
2017 NY Slip Op 30603(U)
March 23, 2017
Supreme Court, New York County
Docket Number: 651561/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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CHATHAM TOWERS, INC.,

Plaintiff,

DECISION/ORDER
Index No. 651561/2013

-against-

CASTLE RESTORATION & CONSTRUCTION, INC., KEMPER SYSTEM AMERICA, INC., ABC CORP., XYZ, CORP.,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Chatham Towers Inc. ("Chatham Towers") commenced the present action against defendants Castle Restoration & Construction, Inc. ("Castle") and Kemper System America ("Kemper"). Plaintiff had hired Castle and Kemper to restore the plaza decks at Chatham Towers. After discovering leaks in the deck, plaintiff commenced an action for monetary damages against the contractor and waterproofing manufacturer Castle and Kemper, asserting claims for breach of contract and breach of warranty. Castle then brought a third party action against various defendants, including third party defendant Thomas Balsley Associates Landscape Architecture, PLLC, Athwal Engineering, P.C. and Athwal & Associates' Inc. (the "Moving Defendants").

Third party Moving Defendants have now brought the present motion to dismiss the third party complaint against them for failure to state a cause of action and to dismiss any cross-claims asserted against them. As will be explained more fully below, the motion is granted in its entirety.

Castle has asserted seven causes of action against the Moving Defendants for contribution, indemnification, breach of contract and breach of implied warranty. In a prior decision in this action, the court dismissed the third party claims of Castle against third party defendant Howard L. Zimmerman, Architect ("Zimmerman") for contribution, common law indemnification and breach of an implied

warranty. Zimmerman withdrew that portion of its motion to dismiss the contractual claims asserted against it. Subsequently, the court issued a decision dismissing the third party claims of Castle against third party defendant Gace Consulting Engineers, D.P. C. ("Gace") for contribution, common law indemnification breach of an implied warranty and breach of contract.

Moving Defendants served Chatham with a notice to admit where they requested that Castle admit that it did not enter into a written or oral contract with Moving Defendants in connection with the construction project. Castle admitted that it did not enter into any written agreement with Moving Defendants concerning the project and declined to respond to the question as to whether there were any oral agreements between Moving Defendants and Chatham.

For the same reasons that the court previously dismissed the claims Castle asserted against Zimmerman and Gace for contribution, the claims against Moving Defendants for contribution are also dismissed. As this court previously held, the claims and cross-claims against Gace and Zimmerman for contribution are 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. *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987). 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). "[T]he determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought." *Rockefeller University v. Tishman Construction Corp.*, 240 A.D.2d 341 (1st Dept 1997). If the damages sought are to be placed in as good a position as one would have been but for the acts being sued upon, then the claim is for economic damages. *Children's Learning Center*, 64 A.D.3d at 324.

In the present case, neither third-party plaintiff Castle or any other party has a viable claim for contribution against Moving Defendants or Gace or Zimmerman as the only damages being sought in the

underlying action are economic damages. The damages that plaintiff Chatham is seeking in the underlying action are to be placed in the same position it would have been in if the warranty had been complied with—to have Castle and Kemper repair or replace the components of the plaza deck that it deems defective. 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 contract had been performed and the warranty had been complied with, the contribution claim and cross-claims must be dismissed.

There is no basis for the argument by Castle that plaintiff Chatham is seeking to recover in tort for property damage, as a result of which the economic loss doctrine does not apply. Initially, three of Chatham's causes of action against Castle are for breach of contract and breach of warranty and one cause of action is for a declaratory judgment. Thus, there is no tort claim being asserted by plaintiff against Castle. Even if a tort claim had been asserted, this would not change the analysis of the court as the only recovery being sought in the underlying action is for economic loss.

There is also no basis for the claim by Castle that the action by plaintiff is for property damage rather than economic loss because the plaintiff is seeking to recover for damage to the garage roof which was not part of the original work that defendant Castle contracted to perform. The plaintiff alleges in the verified complaint that the contract between Castle and Chatham provides that during the guarantee period, Castle "shall be responsible for all costs incurred in making the defective work good, both for labor and materials, and for all resulting injuries and damages to the building and to equipment." Thus, the recovery for damage to the roof as a result of the alleged leaks is expressly provided for in the contract between Castle and Chatham.

Moreover, the claims against Moving Defendants for common law indemnification are dismissed for the same exact reasons that the court dismissed the common law indemnification claims against Gace and Zimmerman. A claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear

responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999). As the First Department has stated, "[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." *SSDW Company*, 151 A.D.2d at 296 (quoting *Trustees of Columbia Univ.*, 109 A.D.2d at 453).

In the instant case, Castle and Kempner cannot maintain indemnity claims against Moving Defendants as there is no valid claim asserted against Castle or Kempner based on vicarious liability. The plaintiff in the first party action, Chatham, asserts claims against Castle based on its failure to honor the express warranty of the contract between Chatham and Castle. The plaintiff is not seeking to hold Castle or Kemper vicariously liable for any services rendered by Moving Defendants. As such, Castle is being charged with liability for its own alleged wrongdoing and not merely vicariously for any actions taken by Moving Defendants.

The court will next address Moving Defendants' motion to dismiss Castle's claim for breach of an implied warranty. There "is no cause of action for breach of warranty where the defendant has only provided a service." *Gutarts v. Fox*, 104 A.D.3d 457, 459 (1st Dept 2013). Since no party in this litigation, including Castle, has ever alleged that Moving Defendants provided goods, as opposed to services, in connection with the restoration project, there is no viable claim against the Moving Defendants for breach of an implied warranty.

Finally, the motion to dismiss the causes of action for breach of contract in the third party complaint against the Moving Defendants for contractual indemnification and contractual contribution and for failure to procure insurance on the ground that there is no contract between Castle and the Moving Defendants is granted as Castle has admitted in its response to the notice to admit that Castle did not enter into a written contract with the Moving Defendants in connection with the construction project at 170 and 180 Park Row and did not deny that there were no oral agreements between the parties. Moreover, the former president of Castle testified in his deposition that he did not recall whether Castle have ever entered into any contract with the Moving Defendants. Since there is no written contract between Castle and the Moving Defendants which provides for indemnification or an obligation to procure insurance, there is no viable claim for contractual indemnification, contractual contribution or for failure to procure insurance.

Based on the foregoing, the motion to dismiss is granted to the extent that the claims and cross-claims against the Moving Defendants are dismissed in their entirety. The foregoing constitutes the decision and order of the court.

DATE : 3/23/17

CK

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.