

**Chatham Towers, Inc. v Castle Restoration &
Constr., Inc.**

2017 NY Slip Op 30908(U)

May 1, 2017

Supreme Court, New York County

Docket Number: 651561/2013

Judge: Cynthia S. Kern

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NYSCEF DOC. NO. 365

RECEIVED NYSCEF: 05/04/2017

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 asserted cross-claims against Kemper for contractual indemnification and contractual indemnification, failure to procure insurance and common law indemnification and contribution. Kemper has brought the present motion for summary judgment to dismiss the cross-claims of Castle. Castle has not opposed that portion of Kemper’s motion to dismiss the claims for contractual indemnification, contractual contribution and failure to procure insurance and those cross-claims are dismissed. As will be explained below, the remainder of the cross-claims are also dismissed.

In prior decisions in this action, the court dismissed the third-party claims of Castle against various third-party defendants for common law indemnification and common law contribution. For the same reasons that the court previously dismissed the claims Castle asserted against the third-party defendants for contribution, the cross-claims against Kemper for contribution are also dismissed. As this court previously

held, the claims 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, Castle does not have a viable claim for contribution against Kemper 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 cross-claim 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 cross-claim against Kemper for common law indemnification is dismissed for the same exact reasons that the court dismissed the common law indemnification claims against the third-party defendants. 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).

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In the instant case, Castle cannot maintain an indemnity claim against Kemper as there is no valid claim asserted against Castle 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 vicariously liable for any services rendered by Kemper. As such, Castle is being charged with liability for its own alleged wrongdoing and not merely vicariously for any actions taken by Kemper.

Based on the foregoing, the motion for summary judgment dismissing the cross-claims asserted by Castle against Kemper is granted in its entirety and these cross-claims are dismissed. The foregoing constitutes the decision, order and judgment of the court.

DATE:

5/1/17

CK

KERN, CYNTHIA S., JSC

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