

**Board of Mgrs. of the 20 Henry St. Condomintum v  
CJUF III 20 Henry Prop., LLC**

2017 NY Slip Op 32279(U)

October 26, 2017

Supreme Court, Kings County

Docket Number: 500289/16

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26<sup>th</sup> day of October, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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BOARD OF MANAGERS OF THE 20 HENRY STREET  
CONDOMINIUM, on Behalf of the Individual Unit  
Owners,  
Plaintiffs,

- against -

CJUF III 20 HENRY PROPERTY, LLC,  
K. ROBERT TURNER, JANINE GETLER,  
MARCUS NEUPERT, and DANIEL MILLMAN,

Defendants.

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CJUF III 20 HENRY PROPERTY, LLC,  
K. ROBERT TURNER, JANINE GETLER,  
MARCUS NEUPERT, and DANIEL MILLMAN,

Third-Party Plaintiffs,

- against -

LEVIATHAN CONSTRUCTION MANAGEMENT SERVICES,  
MERRITT ENGINEERING CONSULTANT P.C.,  
B&A RESTORATION CONTRACTORS, INC.,  
E.A.S. PLUMBING, INC.,  
STAT FIRE SUPPRESSION, INC.,  
DUNWAY SERVICES CORP.,  
EASTERN WATERPROOFING & RESTORATION CO., INC.,  
GARDINER & THEOBOLD INC.,  
HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,  
JANSONS ASSOCIATES, INC.,  
C.F.C. CONTRACTING CORP.,  
CNM CONSTRUCTION CORP., and  
LAWRENCE FINKELSTEIN AND ASSOCIATES, INC.,

Third-Party Defendants.

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**DECISION AND ORDER**

Index No. 500289/16

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF Docket No.:

Amended Notice of Motion, Affirmation, Affidavit, and Exhibits Annexed _____	<u>79-85, 130-136</u>
Affirmations in Opposition and Exhibits Annexed _____	<u>112-113, 114-117</u>
Reply Affirmation and Exhibits Annexed _____	<u>138-141</u>

The plaintiff, the Board of Managers of the 20 Henry Street Condominium (the plaintiff) representing individual unit owners, commenced this action to recover damages arising from (1) the allegedly deficient construction of one of its two buildings, (2) the allegedly deficient renovation of its other building, and (3) the allegedly deficient construction and renovation of the individual units in both buildings (collectively, the property). The current defendants are CJUF III 20 Henry Property, LLC, the sponsor of the condominium development (the sponsor), and its three formerly designated representatives on the board of managers (collectively, the former board members).<sup>1</sup>

The sponsor and the former board members (collectively, the third-party plaintiffs) commenced a third-party action against, among others, Gardiner & Theobald Inc. (G&T), which performed construction consulting services at the property. Several of G&T's codefendants in the third-party action (collectively, the third-party codefendants)<sup>2</sup> have interposed answers, asserting cross claims against G&T, among others. The third-party plaintiffs' claims and the third-party codefendants' cross claims against G&T sound in

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<sup>1</sup> By stipulation, dated August 4, 2017 (NYSCEF #167), the defendant K. Robert Turner, a principal of the sponsor, was dismissed with prejudice from the underlying action.

<sup>2</sup> The third-party codefendants are B&A Restoration Contractors, Inc., C.F.C. Contracting Corp., E.A.S. Plumbing, Inc., Hudson Meridian Construction Group, LLC, Jansons Associates, Inc., Merritt Engineering Consultant P.C., and Stat Fire Suppression, Inc.

contractual indemnity, breach of contract to obtain insurance, contribution, and common-law indemnity. G&T now moves, pre-answer, to dismiss the third-party plaintiffs' claims and the third-party codefendants' cross claims insofar as asserted against it, pursuant to CPLR 3211 (a) (1), (3), (5), and (7).

G&T's motion is resolved, as follows:

1. *Third-Party Plaintiffs' Claims and Third-Party Codefendants' Cross Claims for Contractual Indemnity.* G&T's contract with the sponsor, which was agreed to and accepted on May 16, 2011 (the G&T contract), does not contain any mention of indemnity and, therefore, any contractual indemnity claim by any party must fail. The branch of G&T's motion for the dismissal of the third-party plaintiffs' claims and the third-party codefendants' cross claims against it for contractual indemnity is granted, and such claims and cross claims are dismissed pursuant to CPLR 3211 (a) (1) and (7) (*see Board of Managers of 125 North 10th Condominium v 125 North 10, LLC*, 45 Misc 3d 1215[A], 2014 NY Slip Op 51593[U], \*9 [Sup Ct, Kings County 2014], *affd* 150 AD3d 1063 [2d Dept 2017]).

2. *Third-Party Plaintiffs' Claims and Third-Party Codefendants' Cross Claims for Breach of Contract to Obtain Insurance.* The G&T contract does not require that G&T obtain an insurance policy naming any of the third-party plaintiffs and/or any of the third-party codefendants as additional insureds. Therefore, the branch of G&T's motion for the dismissal of the third-party plaintiffs' claims and third-party codefendants' cross claims against it for breach of contract to obtain insurance is granted, and such claims and cross claims are dismissed pursuant to CPLR 3211 (a) (1) and (7).

3. *Third-Party Plaintiffs' Claims and Third-Party Codefendants' Cross Claims for Contribution and Common-Law Indemnity.* There can be no claim or cross claim for contribution where, as here, the underlying claim is purely for economic loss as a result of a breach of contract (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 24 [1987]; *Board of Managers of A Bldg. Condominium v 13th & 14th Street Realty LLC*, 137 AD3d 505, 506 [1st Dept 2016]). With respect to the sponsor's common-law indemnity claim against G&T, the sponsor's liability to the plaintiff is not purely vicarious because, under the G&T contract, it did not delegate exclusive responsibility to G&T, but rather maintained a degree of responsibility for "the information, designs, specifications, plans, design drawings and instructions" of the property (Standard Terms and Conditions § 2.4) (*see Board of Managers of 125 North 10th Condominium v 125 North 10, LLC*, 150 AD3d 1063, 1064-1065 [2d Dept 2017]). In other words, the fault for the defective construction/renovation of the property is allegedly shared by the sponsor and G&T, among others (*see Residential Bd. of Mgrs. of 310 W. 52nd St. Condo. v El-Ad 52 LLC*, 140 AD3d 536, 537-538 [1st Dept 2016]). The former board members' claims and the third-party defendants' cross claims for common-law indemnity against G&T fail as a matter of law, considering the allegations of actual wrongdoing by the former board members and the third-party defendants, respectively (*see Residential Bd. of Mgrs. of 310 W. 52nd St. Condo.*, 140 AD3d at 537-538).

*Conclusion*

Based on the foregoing and after oral argument, it is

ORDERED that the branch of G&T's motion to dismiss the third-party plaintiffs' claims and the third-party codefendants' cross claims against it is granted pursuant to CPLR 3211 (a) (1) and (7), and such claims and cross claims are dismissed without costs and disbursements, and the remainder of G&T's motion which is pursuant to CPLR 3211 (a) (3) and (5) is denied as academic; and it is further

ORDERED that the third-party plaintiffs' claims and the third-party codefendants' cross claims against G&T are severed and dismissed, and the third-party action is continued against the remaining third-party defendants; and it is further

ORDERED that G&T's counsel shall electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of said service with the County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL