

New York Schs. Ins. Reciprocal v Sony NY Mgt. & Constr. Corp.

2017 NY Slip Op 32889(U)

September 6, 2017

Supreme Court, Suffolk County

Docket Number: 600277-16

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 600277-16**

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

NEW YORK SCHOOLS INSURANCE
RECIPROCAL a/s/o ISLIP UNION FREE
SCHOOL DISTRICT,

Plaintiff,

-against-

SONY NY MANAGEMENT &
CONSTRUCTION CORP. and UNITECH
SERVICES GROUP,

Defendants.

UNITECH SERVICES GROUP, INC s/h/a
UNITECH SERVICES GROUP,

Third-Party Plaintiff,

-against-

NIKO K CONSTRUCTION CORP.,
NIKOLAOS KOUTSOGIANNIS and PARK
EAST CONSTRUCTION CORP.,

Third-Party Defendants.

_____ X

MOTION DATE: 12-16-16; 3-29-17
SUBMITTED: 3-30-17
MOTION NO.: 001-MG
003-MG

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Upon the following filed documents numbered 14-84 read on this motion to dismiss the third-party complaint and motion to dismiss cross claims ; Notice of Motion and supporting papers 14-25, 28, 29; 53-66 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 31-39; 68 ; Replying Affidavits and supporting papers 69-78; 79-84 ; it is,

ORDERED that the motions (001, 003) by third-party defendant Park East Construction Corp. are hereby consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by third-party defendant Park East Construction Corp. for an order dismissing the third-party complaint is granted; and it is further

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ORDERED that the motion (003) by third-party defendant Park East Construction Corp. for an order dismissing the cross claims by third-party defendants Niko K. Construction Corp. and Nikolaos Koutsogiannis is granted; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on November 8, 2017 at 10:30 a.m., in Part 44, 210 Center Drive, Riverhead, New York.

In an action captioned *NY Schools Insurance Reciprocal a/s/o Islip Union Free School District v Sony NY Management and Construction Corp. and Unitech Services Group*, Index No. 16/600277 (“the Main Action”), plaintiff seeks damages for the alleged failure of defendants to properly protect an open area of the roof of Islip High School during a rain storm on July 30, 2015. Defendant Sony NY Management and Construction Corp. (“Sony”) was retained with third-party defendants Niko K. Construction Corp. and Nikolaos Koutsogiannis (the “Niko defendants”) to perform roof demolition and replacement. Defendant/third-party plaintiff Unitech Services Group (“Unitech”) was retained by Sony to perform limited asbestos abatement on the roof of the subject premises. Non-party Park East Construction Corp. (“Park”) was the construction manager. The action was commenced on January 7, 2016.

The record reveals a contract between Islip Union Free School District (“Islip”) and Park, which provides in Article 7, Miscellaneous Provisions:

13. Nothing herein shall be deemed to create a contractual relationship between the Construction Manager and any other party to the Project, including but not limited to the Architect, Contractors, subcontractors, or material suppliers on the Project. This Agreement is intended solely for the benefit of Owner and Construction Manager and is not intended for the use or benefit of any other party. Nothing contained in this Agreement is intended to make any person or entity who is not a signatory to this Agreement a third party beneficiary of any right created by this Agreement or by operation of law.

In addition, the contract provides in Article 9, Insurance, the following:

4. To the fullest extent permitted by law, the Construction Manager shall indemnify and hold harmless the Owner, and its board, officers and employees from and against all claims, damages, losses and expenses resulting in bodily injury and/or property damage, including, but not limited to, attorneys’ fees to the extent arising out of or resulting from the negligence of Construction Manager, or any

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subcontractor/consultant of Construction Manager, excluding any claims, damages, losses and expenses arising from and limited to the extent of the Owner's own negligence.

5. To the fullest extent permitted by law, all Contractors hired to perform work to be completed as an extension of this Agreement will hereby assume and agree to indemnify, defend and hold harmless the Construction Manager, the Owner, its partners and/or subsidiaries, the Architect, and [other indemnities (sic)] *** from and against any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements relating to any death, personal injury or property damage, including the loss of use thereof, brought or assumed against any of the indemnities (sic) by any person or firm, arising out of or in connection with or as a consequence of performance of the Work of the Contractor, as well as any additional work, extra work or add-on work whether caused in whole or in part by the Contractor or any person or entity employed, either directly or indirectly, by the Contractor, including any subcontractors thereof and their employees.

The instant third-party action was commenced on August 11, 2016. Defendant/third-party plaintiff Unitech seeks damages for contractual indemnification, breach of contract, common law indemnification, and contribution from the third-party defendants. Unitech alleges that Park was responsible for the entire project including, among other things, verifying that the subject premises was protected from "weather" and all "adversities," coordinating the trades, and ensuring that adequate equipment and personnel were in place. The third-party complaint alleges that Park did not foresee the rain storm and did not adequately prepare for it. After the incident, Park allegedly falsely claimed that Unitech advanced too quickly with its asbestos removal work and also claimed that Sony left the roof exposed on July 29, 2105 against Park's advice and admonitions. It is also alleged that Unitech personnel were off the site by 1:30 p.m. on July 29, 2016 and were not present the next day when the rain storm occurred. At the request of Park, Sony and the Niko defendants were directed to cover the roof with tarps as quickly as possible. There were not enough tarps to cover the exposed roof and not enough personnel to deploy the tarps and water damage was observed inside the high school building.

Park now moves in separate motions to dismiss the third-party complaint and to dismiss the cross claims of the Niko defendants pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

In determining a CPLR 3211 (a) (7) motion to dismiss, "the court must afford the

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pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff [here Third-party Plaintiff] the benefit of every possible favorable inference” (**AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.**, 5 NY3d 582, 591; quoting, **Leon v Martinez**, 84 NY2d 83, 87). Moreover, “whether a [third-party] plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” **AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.**, *supra*, quoting, **EBC I, Inc. v Goldman Sachs & Co.**, 5 NY3d 11, 19).

Turning to the first cause of action in the third party action which seeks contractual indemnification from Park, the third-party complaint alleges that “third-party defendants agreed in writing to indemnify parties to the fullest extent permitted by law for, among other things, property damage that occurred during the course of the performance with their work to be performed at the subject premises.” Affording the pleadings a liberal construction, accepting the allegations of the third-party complaint as true and providing third-party plaintiff the benefit of every possible favorable inference, third-party plaintiff has failed to state a cause of action.

“The best evidence of whether contracting parties intended their contract to benefit third parties remains the language of the contract itself” (**Nepco Forged Products, Inc. v Consolidated Edison Co.**, 99 AD2d 508; see also, **Mendel v Henry Phipps Plaza W., Inc.**, 16 AD3d 112, 113). Therefore, “when a contract expressly negates enforcement by third parties, that provision is controlling” (**Treeline Garden City Plaza, LLC v Berkley-Arm, Inc.**, 12 Misc 3d 1182[A]), quoting, **Morse/Diesel, Inc. v Trinity Industries, Inc.**, 859 F2d 242, 249; see also, **Board of Managers of the Alexandria Condominium v Broadway/72nd Assocs.**, 285 AD2d 422, 424-5). Here, the contract between the school district and Park, in Article 7, Paragraph 13, contains determinative language expressly negating any intent to create or confer third-party beneficiary rights. Accordingly, Unitech’s claim that it is a third-party beneficiary under the subject agreements is lacking in merit (See **Aymes v Gateway Demolition Inc.**, 30 AD3d 196).

The court now turns to that branch of the motion to dismiss Unitech’s second cause of action for breach of contract against Park. The third-party complaint alleges that pursuant to a Contractual Agreement, third-party defendants were required to obtain and maintain liability insurance coverage for plaintiff and/or third-party plaintiff at the work site and failed to do so. In addition, third-party plaintiff alleges that the third-party defendants have refused to defend and indemnify plaintiff and/or third-party plaintiff under the insurance policies obtained. Affording the pleadings a liberal construction, accepting the allegations of the third-party complaint as true and providing third-party plaintiff the benefit of every possible favorable inference, third-party plaintiff has failed to state a cause of action.

To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff’s performance under the contract; (3) the defendant’s breach of the contract; and (4) damages as a result of the breach (See **JP Morgan Chase v J.H. Elec., of N.Y., Inc.**, 69 AD3d 802). “It is well settled that a subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity” (**Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club, Inc.**, 156 AD2d 550, 551). In the present case, Park’s motion to dismiss Unitech’s cause of action for breach of contract

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against Park is granted as Unitech has not alleged facts showing the existence of a contract between Park and Unitech. In addition, a review of the subject contract reveals that Park was obligated to obtain insurance and hold Islip harmless, and the Contractors were obligated to obtain insurance which would hold Islip and Park harmless in cases of property damage or injury caused by the Contractors or any of their subcontractors. There is no provision which required Park to obtain insurance that would hold harmless a Contractor or subcontractor such as Unitech. Therefore, the second cause of action is dismissed.

Turning to the branch of the motion to dismiss the third cause of action which seeks common law indemnification, the third-party complaint alleges that the third-party defendants supervised, directed and controlled the work at the subject premises and were in complete control of the means, methods and procedures under the Agreement. Therefore, if the plaintiff sustained property damage, said damage was caused and brought about solely by the primary and active negligence *** of third-party defendants, which supervised, caused and/or permitted conditions to exist at the subject premises that caused or contributed to the damage alleged by plaintiff. Affording the pleadings a liberal construction, accepting the allegations of the third-party complaint as true and providing third-party plaintiff the benefit of every possible favorable inference, third-party plaintiff has failed to state a cause of action.

Common-law indemnification allows a non-culpable party who has been compelled to make a payment to shift the entire burden of loss to the liable party and obtain full reimbursement (**Arch Ins. Co. v Harleysville Worcester Ins. Co.**, US Dist Ct, SDNY, July 7, 2014, Cote, J. [2014 WL 3377124] at *7, *citing Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 691). Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer (**McCarthy v Turner Constr., Inc.**, 17 NY3d 369, 375). The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee (**Trustees of Columbia Univ. v Mitchell/Giurgola Associates**, 109 AD2d 449, 453; see also **Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.**, 59 AD3d 311, 312 [holding that a claim for common-law indemnification was properly dismissed where there were only claims for breach of contract, not vicarious liability]). Thus, there is no common-law indemnification claim when, as here, the plaintiff in the Main Action seeks recovery from the defendant/third-party plaintiff because of the latter's alleged wrongdoing, i.e., breach of contract, and does not seek to hold the third-party defendant vicariously liable for any negligence by the defendant/third-party plaintiff (**Chatham Towers, Inc. v Castle Restoration & Constr., Inc.**, 151 AD3d 419; **Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.**, 252 AD2d 951, 952). Accordingly, the second and third cause of action for common-law indemnification are dismissed.

Turning to the branch of the motion to dismiss the fourth cause of action which seeks contribution from Park, the third-party complaint alleges "that if the plaintiff was caused to sustain damages at the time and place set forth in plaintiff's complaint, said damages were caused by the negligence, recklessness, acts or omissions and/or breaches of duty and/or warranty and/or strict liability of the third-party defendants. If the third-party plaintiff is found liable for any of the damages set forth in the plaintiff's complaint, then the relative responsibility of the

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third-party defendants must be apportioned, and as such the third-party defendants will be liable over and jointly and severally liable to the third party plaintiff for the full amount of any verdict or judgment that the plaintiff may recover against the third-party plaintiff ***.” Affording the pleadings a liberal construction, accepting the allegations of the third-party complaint as true and providing third-party plaintiff the benefit of every possible favorable inference, third-party plaintiff has failed to state a cause of action.

Purely economic loss resulting from a breach of contract does not constitute “injury to property” within the meaning of New York’s contribution statute (see NY CPLR 1401; **Board of Education v Sargent, Webster, Crenshaw & Folley**, 71 NY2d 21). To permit apportionment of liability, pursuant to CPLR 1401, arising solely from breach of contract would not only be at odds with the statute’s legislative history, but also do violence to settled principles of contract law which limit a contracting party’s liability to those damages which are reasonably foreseeable at the time the contract is formed (*Id.*). Some form of tort liability is a prerequisite to application of CPLR 1401 (**Galvin Bros., Inc. v Town of Babylon, N.Y.**, 91 AD3d 715), which is not alleged here. Therefore, that branch of the motion which seeks to dismiss the fourth cause of action for contribution is granted.

Turning to Park’s motion to dismiss the Niko defendants’ cross claims asserting contribution and common law indemnification, the court finds that, like Unitech, the Niko defendants are not entitled to contribution or common law indemnification for the reasons stated above. Accordingly, Park’s motion to dismiss the cross claims by the Niko defendants is granted.

In sum, Park’s motions to dismiss the third-party action and the Niko defendants’ cross claims are granted in their entirety.

Dated: September 6, 2017



J.S.C.

ELIZABETH H. EMERSON