

253 E. 62nd St. v Moluka Enters. LLC.

2018 NY Slip Op 31042(U)

May 29, 2018

Supreme Court, New York County

Docket Number: 651477/2010

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE

PART 12

Justice

-----X
253 EAST 62ND STREET,

Plaintiff,

- v -

INDEX NO. 651477/2010

MOTION DATE _____

MOTION SEQ. NO. 24, 25, 26

DECISION AND ORDER

MOLUKA ENTERPRISES LLC., DEMO PLUS INC.,
DOUGLAS ELLIMAN PROP. MGMT., YOLANDA
QUEEN, BELLMARC PROP. MGMT SERVS., INC.,
LIORA ELGHANAYAN and JOHN
ELGHANAYAN,

Defendants.
-----X

By notice of motion, third-party defendants/fourth third-party defendants Berzak Berzak/SDG Architects PC and SDG Engineering, PC (collectively, Berzak/SDG) move pursuant to CPLR 3212 for orders: (1) granting them summary dismissal of fourth third-party plaintiff Moluka Enterprises, LLC's claims and any cross claims against them, and (2) granting them judgment on their contractual indemnification claims against co-defendant P&J Renovations, Inc. (motion sequence 24). Moluka and P&J oppose the motion.

By notice of motion, second third-party defendant/third third-party plaintiff Perciballi Container Service Inc. moves pursuant to CPLR 3212 for an order summarily dismissing all

claims asserted against it by P&J and any cross claims (motion sequence 25). P&J opposes the motion, while Berzak/SDG oppose the dismissal of their cross claim against Perciballi.

By notice of motion, P&J moves for an order granting it judgment as to its indemnification claims and dismissing any cross claims against it (motion sequence 26).

Perciballi and Berzak/SDG oppose the motion.

The motions are consolidated for disposition.

I. PERTINENT FACTUAL BACKGROUND

This action arises from damage to plaintiff's building at 1177 Second Avenue in Manhattan that allegedly resulted from demolition work performed on the adjacent vacant building located at 1179 Second Avenue, owned by defendant Moluka Enterprises, LLC (Moluka).

A. Contracts and proposals between the parties

1. Moluka and P&J

By Abbreviated Form of Agreement Between Owner and Contractor, Moluka hired P&J as the contractor for the demolition project at 1179 Second Avenue, with the project's "architect" listed as Berzak and SDG. The contractor agreed to execute the contract work fully, the scope of which includes, but is not limited to, the provision of all labor, materials, equipment, tools, sidewalk bridge, scaffolding, and full-time onsite supervision required to demolish a five-story building. Pursuant to article 9 of the contract:

9.1. The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.7. The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the work under a contract with the Contractors.

9.8. The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals.

9.12. To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

9.12.2. The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

(NYSCEF 544).

Article 10 of the agreement governs the architect's role:

10.1. The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (2) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2. The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work . . .

10.3. The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraphs 9.1 and 16.1. The Architect will not

be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

...
10.4. Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

...
10.6. The Architect will have authority to reject Work which does not conform to the Contract Documents.

...
10.7. The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract documents.

(*Id.*).

Article 16 obligates the contractor to protect persons and property:

16.1. The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protections to prevent damage, injury or loss to:

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein; and
- .3 other property at the site or adjacent thereto.

... The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Paragraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

(*Id.*).

The agreement is signed only by Moluka and P&J. (*Id.*).

In its proposal to Moluka, dated November 15, 2008, P&J offers to supply all labor, material, equipment, waste-hauling service, and insurance to perform the following:

Supply and install plywood fence at front and rear of building; also provide sidewalk bridge and scaffolding with netting at front of building. Provide all labor, equipment and trucking to demo 5 story masonry and wood structure, including fire escape, interior finishes, interior walls, staircases, roof slab, interior floor slabs, exterior walls down to foundation wall crack basement slab; back fill basement with small masonry and brick leaving sidewalk grade.

(NYSCEF 489).

Between June 15 and July 9, 2009, P&J submitted invoices to Moluka, reflecting the work done to date. By invoice dated July 9, 2009, P&J issued Moluka a final invoice for the completion of the job. (*Id.*).

2. P&J and Perciballi

On October 29, 2008, Perciballi, on the letterhead of "Perciballi Container Service Inc.," submitted its proposal to P&J for the demolition project, offering to supply all permits, labor, materials, equipment, waste-hauling services, and insurance for the same work reflected in P&J's proposal to Moluka. Attached to the proposal is a Subcontract Agreement Rider (Contractor/Subcontractor), which provides, as pertinent here,

[Perciballi] shall defend and indemnify and hold harmless [P&J], all entities the contractor is required to indemnify and hold harmless, [Moluka], and other persons and entities related to them, from all liability for any and all property or economic damage, including all attorney fees, disbursements, and related costs, arising out of or resulting from the work covered by the contract, to the extent such work was performed by or contracted through the subcontractor or by anyone for whose acts the subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the indemnified parties.

Perciballi also agrees to procure and maintain certain insurance, and ensure that any sub-contractors engaged by the subcontractor comply with the insurance indemnification provision of the contract. The agreement was signed by P&J and Perciballi on January 21, 2009.

(NYSCEF 490).

3. Perciballi and Demo Deluxe/Plus

On November 13, 2008, Demo Deluxe, Inc., submitted a proposal to Perciballi for the demolition work set forth in P&J's proposal to Moluka. (NYSCEF 491).

On or about June 16, 2009, Demo Plus, Inc. obtained from the Department of Buildings (DOB) a work permit for the demolition, with Demo Plus's owner listed as the superintendent of construction. (NYSCEF 492).

B. Pertinent deposition and expert testimony

1. Moluka

On October 29, 2013, Moluka's principal, Liore Elghanayan, appeared for an examination at trial (EBT), and denied any recollection of having hired Berzak, or knowledge about SDG or what services Berzak performed at 1179 Second Avenue. (NYSCEF 464).

On October 30, 2013, Yolanda Queen, of Douglas Elliman Property Management, formerly known as Bellmarc Property Management Services, Moluka's management company, testified that after Moluka received a notice from the City of New York requiring the demolition of the building, it advised Berzak to start preparing documentation for the demolition, even though there was no contract between Berzak and Moluka or Bellmarc/Douglas Elliman. By email, Moluka instructed Berzak to prepare specifications to submit to the DOB for approval to demolish the building. Berzak recommended P&J as the contractor to perform the demolition, and Berzak submitted invoices from P&J to Queen for approval and payment from Moluka to P&J. Queen believed that it was Berzak's and P&J's job to obtain necessary permits, DOB documents, and filings to proceed with the demolition. She described her communications with Berzak as relating to

the necessary forms that needed to be signed and filed. The contractor that was hired to perform the work. The payment schedule was provided. And then as the demolition

started, then [Berzak] would send progress reports expressing that we're at this point; therefore the contractors should be paid this amount as per the scheduled payments. And checks would be cut. They would be sent to [Berzak] directly and [Berzak] would provide them to the contractor.

(NYSCEF 543, at 93-94).

2. Berzak

Berzak's president and owner, Michael Berzak, testified at an EBT on November 12, 2013, that based on his long history with Moluka's owners, he was hired for the demolition project to serve as Moluka's agent, essentially as an expeditor, helping to hire consultants which contracted directly with Moluka, recommending the contractor and structural engineer for the shoring plans, submitting the contractor's payment requests to Moluka after approving the payments and verifying that the required work was performed, and communicating with Moluka about the "aesthetics" of the work. Berzak did not visit the work site once construction began, and it denied that the scope of its work under the P&J contract is accurate as to its duties, as it had no authority to fire anyone and filed no documents under its architectural seal. Berzak also denied having worked as an architect on the project or having reviewed SDG's architectural drawings. Rather, it prepared forms for the DOB, with which it filed them after they were executed by SDG and Moluka. (NYSCEF 465). There was no contract between Berzak and Moluka; it was paid by Moluka on an hourly basis upon its submission of invoices to Bellmarc/Douglas Elliman.

3. SDG

On March 28, 2014, SDG's owner testified at an EBT that SDG was hired by Berzak to provide structural engineering services for the demolition project, and that given their long-standing relationship, no written contract was created. Given the DOB's interest in the "highly visible" demolition project, it asked that SDG not only provide engineering services, but monitor

the demolition and report on it, for which SDG was paid separately by the DOB. SDG inspected the site before the demolition to ensure that there were no danger zones for workers and that shoring was not needed, and drafted structural drawings, dated June 9, 2009, which were signed and sealed documents filed along with a permit application, as required by the DOB. The drawings were not demolition drawings.

The existing masonry wall of plaintiff's building at 1179 Second Avenue was not removed, but was "reinforced by the demolition," absent the weight of two buildings. SDG had no supervisory role during the demolition or control over the contractors' work. Rather, it inspected the work to ensure that it was safely performed, and was not responsible for the structural stability of either building. SDG reported to Berzak on the project's progress. (NYSCEF 466).

4. P&J

P&J's president and owner testified at an EBT on November 6, 2013, that P&J specializes in interior commercial construction. He never visited the worksite, never spoke to Berzak about any of P&J's safety precautions, testing, or inspections to be done on site, never communicated with SDG, and did not know of SDG or its role at the project. (NYSCEF 469).

According to P&J's owner, P&J hired Perciballi Container Service to perform the demolition. He did not know and was not told that Perciballi was going to hire a subcontractor to perform it, and did not know about the subcontractor's existence until the lawsuit was commenced. P&J's only involvement in the demolition was to hire Perciballi and pay it. (NYSCEF 486).

5. Perciballi

On March 28, 2014, the owner and president of Perciballi Container Service and Perciballi Industries, testified that Container Service performs waste removal and provides and removes dumpsters, and that the only equipment it owns are trucks and dumpsters. Although the business of Perciballi Industries is demolition and excavation, the demolition of 1179 Second Avenue was performed by Demo Plus while Container Service performed the waste removal and did no demolition. Industries was incorporated after the demolition was completed and it then performed demolitions of other neighboring buildings not in issue here.

Before the demolition of 1179 Second Avenue, Perciballi brought the owner of Demo Deluxe to the site and they walked around its perimeter, after which Demo Deluxe submitted a proposal to P&J for the demolition, which was accepted. At the instance of P&J's owner, Perciballi's proposal to P&J provides that Perciballi would perform the demolition, notwithstanding the knowledge that Demo Deluxe would be doing the demolition. According to Perciballi, P&J's owner did not want to deal directly with Demo Deluxe. The arrangement was that P&J would pay Perciballi who would then pay Demo Deluxe. Perciballi did no demolition work at that time, and visited the site approximately five times to supply the dumpsters. Nor did it supervise Demo Deluxe's demolition work, and never spoke to Berzak about any issues related to the project. (NYSCEF 468).

6. Demo Plus/Deluxe

The owner of Demo Plus and Demo Deluxe testified at an EBT on October 29, 2013, that the scope of its work for the project was to acquire necessary permits and gradually demolish the building from the fifth floor to the basement. Demo Plus was the contracting party; Demo Deluxe performed the work. Demo Plus was hired by Perciballi and Demo Deluxe's work was

supervised by the DOB and its inspector, John McNerney, who “watched from the beginning to [the] end of the demolition.” Other than McNerney’s, there were no other site inspections. SDG’s president was the onsite engineer, and he inspected Demo Deluxe’s work and sent records to the DOB. Demo Deluxe’s owner and foreman were responsible for making decisions regarding the demolition. The owner did not recall ever speaking to SDG about anything related to the party wall, or ever speaking to Berzak. No one from any company other than Demo Deluxe worked on the demolition. (NYSCEF 467).

7. Expert affidavit

By affidavit dated March 1, 2017, Martin J. Fradua, a licensed professional engineer, states that based on a reasonable degree of engineering certainty, SDG’s structural shoring drawings satisfied applicable building code requirements and the standards for the engineering profession at that time, and that the purpose of the shoring was to make the floors safe for workers. The work permit was obtained by Demo Plus; SDG had no duty to supervise, direct, or control Demo Plus’s work or that of any contractors or subcontractors, nor was SDG responsible for the means or methods used to demolish the building. Likewise, Berzak had no duty or responsibility for the work, nor did it provide architectural or engineering professional services for the project by filing drawings and records prepared by others. Berzak’s official seal and signature appear nowhere on the filings and the project did not require its technical review or approval. (NYSCEF 470).

II. PERTINENT PROCEDURAL BACKGROUND

A. First third-party complaint

As pertinent here, Moluka sues Berzak/SDG for common-law and contractual indemnification, contribution, and breach of contract for their failure to procure insurance.

(NYSCEF 456). In their answer, Berzak/SDG assert a cross claim against P&J for common-law indemnification. (NYSCEF 456). In its answer, P&J asserts cross claims against Berzak/SDG for common-law and contractual indemnification, contribution, and breach of contract for their failure to procure insurance. (NYSCEF 458).

B. Second third-party complaint

In or around January 16, 2013, P&J commenced a second third-party action against Perciballi, and in February 2014, it served an amended complaint, in which it asserts causes of action for common-law and contractual indemnification, contribution, and breach of contract for its failure to procure insurance. (NYSCEF 459, 571). In the amended complaint, P&J contends, as pertinent here, that Perciballi negligently performed work at the premises, including work involving carting and trucking, and that it negligently placed carting and trucking equipment on the premises, thereby damaging the adjacent building while performing its work, including negligently hauling, moving and removing carts, trucks, and equipment. (NYSCEF 571). Perciballi answered and, as pertinent here, asserts cross claims against Moluka, Berzak/SDG, and P&J for contribution and indemnification. (NYSCEF 460).

C. Third third-party complaint

Perciballi then commenced a third-party action against third third-party defendants Demo Deluxe, Inc., and Michael Sarnelli for common-law and contractual indemnification, contribution, and breach of contract for their failure to procure insurance. (NYSCEF 461).

D. Fourth third-party complaint

On or about June 3, 2015, Moluka commenced a fourth third-party action against P&J, Berzak, and SDG, asserting the following claims: (1) common-law indemnification against all defendants; (2) contribution against all defendants; and (3) contractual indemnification against

P&J. (NYSCEF 471). Moluka alleges that Berzak had a duty to “hire, oversee, supervise and monitor competent consultants, engineers, contractors, and subcontractors to insure (sic) that the demolition work was performed in a safe, competent, and workmanlike manner, and to insure (sic) that the demolition work did not cause damage to adjoining properties,” and that SDG had a duty to oversee, supervise, and monitor the demolition, and to provide competent engineering services related thereto, including consultation with contractors and subcontractors to ensure that the work caused no damage. (*Id.*).

Berzak/SDG thereafter asserted cross claims against P&J for common-law and contractual indemnification and contribution. (NYSCEF 472).

E. Prior summary judgment decisions

By decision and order dated December 24, 2015 (motion sequence 18), summary judgment was granted in favor of defendants Douglas Elliman, Queen, and Bellmarc, and the complaint was dismissed as against them. Bellmarc was also granted summary judgment on its cross claim for attorney fees against Moluka, and its motion for summary judgment on its third-party claims against P&J for contractual indemnity and attorney fees was denied as moot as to the indemnity claim and denied as premature on the claim for fees. (NYSCEF 387).

By decision and order dated June 24, 2016, Berzak/SDG’s motion (sequence number 19) to dismiss the fourth third-party claim and all cross claims against them was denied, given the disputed issues of fact raised. (NYSCEF 415).

III. BERZAK/SDG'S MOTION

A. Dismissal of Moluka's claims

1. Contentions

Berzak asserts that absent a duty to supervise, direct or control the work site, it breached no duty to Moluka, nor was it otherwise negligent. It not only denies having had any contractual relationship with Moluka, but asserts that it acted solely as an expeditor, not as an architect, and that its sole task was to prepare forms for filing with the DOB. It observes that it never went to the project site and thus could not have inspected or supervised the work, and that instead the P&J contract requires that P&J perform those tasks. Moreover, according to their expert, in filing drawings and records with the DOB, Berzak performed no professional architectural or engineering services as borne out by the filings which bear no such indicia.

SDG also denies responsibility for overseeing, supervising, and monitoring the contractor's means and methods, as its role was limited to inspecting the work for the DOB and designing shoring drawings for the demolition, which were thereafter implemented by Demo Plus. SDG relies on an affidavit from an expert engineer who opines that SDG performed its tasks in a reasonable and safe manner, and in compliance with New York City building codes. (NYSCEF 450).

Berzak/SDG also deny having violated the building codes, which plaintiff alleges were violated by Moluka, and observes that Moluka never asserted a claim against them for those violations. They thus claim that absent a duty owed to Moluka or a breach of that duty, they cannot be held liable for contribution or indemnification. Berzak/SDG also maintain that a common-law contribution claim may not be based solely on economic damages, as are alleged

here and, absent a contract between Moluka and Berzak and SDG, Moluka may not recover economic damages from them. (*Id.*).

Moluka asserts that its principal believed that Berzak would perform its duties as a professional architect in a competent manner and that there are triable issues as to whether Berzak had a duty to hire, oversee, supervise, and monitor workers, and ensure that the demolition cause no damage to the adjoining property. It relies on testimony from various party witnesses which, it alleges, reflect that Berzak monitored and supervised the project, including the project's means and methods, and that SDG designed the demolition project and supervised its implementation. Moluka asserts that if there was any damage, it must have been caused by Berzak/SDG's negligence, and that absent a finding as to the cause of the damage, triable issues of fact remain. Moluka also contends that the prohibition against economic loss does not bar recovery for property damage. (NYSCEF 541).

In reply, Berzak/SDG reiterate their previous arguments, and observe that Moluka offered no expert testimony to rebut their expert's opinion that they were not negligent. (NYSCEF 566).

2. Contribution

A third-party plaintiff seeking contribution from a third-party defendant must show that the defendant owed it a duty of reasonable care independent of its contractual obligations, if any, or that a duty was owed to the plaintiff as an injured party and that a breach of that duty caused injury. (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694 [2d Dept 2016]).

It is undisputed that Demo Deluxe alone performed the demolition, and the testimony of its owner establishes that the only person or entity supervising the demolition was a DOB inspector. It is also undisputed that the Demo Deluxe never spoke to Berzak about the

demolition, and that SDG inspected its work in order to submit reports on the demolition to the DOB. Moreover, the agreement between Moluka and P&J confers on P&J alone the responsibility for the demolition and the supervision and control of the work and its means and methods.

Berzak/SDG thus demonstrate that they owed no duty to plaintiff or P&J and were not negligent as they neither performed the work at issue, nor supervised, controlled, oversaw, or monitored the means and methods of the work, and therefore may not be held liable for contribution. (*See Diaz v 313-315 W. 125th St.*, 138 AD3d 599 [1st Dept 2016] [contribution claim against general contractor should have been dismissed as it showed lack of actual fault by proof that it did not provide construction work, materials, equipment, or supervision at worksite]; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014] [dismissing contribution cross-claim by property owner and general contractor against architect as architect owed no duty to other defendants or plaintiffs]; *see also Famous Formaggio Pizzeria, LLC v Procida Constr. Corp.*, 59 Misc 3d 661 [Sup Ct, Bronx County 2018] [property owner failed to establish that contractor overseeing work on neighboring property actually performed work which allegedly caused property damages, and thus did not establish claim for common-law negligence]).

Instead, Berzak monitored the progress of the project and acted as a liaison for paying the contractors for their work, while SDG inspected the project for safety issues and reported its findings to the DOB, which do not constitute supervision and control sufficient to impose liability on it. (*See Kenny v Turner Constr. Co.*, 155 AD3d 479 [1st Dept 2017] [design architect and structural engineer did not owe duty of care to plaintiff based on their obligation, if any, to inspect progress of work for owner]; *Martinez v 342 Prop. LLC*, 89 AD3d 468 [1st Dept 2011] [contribution and common-law indemnity claims based on safety consultant's alleged negligence

should have been dismissed, as consultant provided advice on safety matters and at most had authority to stop unsafe work, and thus lacked necessary control over conduct of work on project]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225 [1st Dept 2006] [while on-site safety manager responsible for workers' safety, duty to supervise and enforce general safety standards insufficient to establish supervision and control], *affd* 7 NY3d 805 [no triable issue as to whether safety manager controlled activity bringing about injury to enable it to avoid or correct unsafe condition]).

While Moluka relies on Queen's testimony that Berzak was the architect for the demolition and oversaw it (NYSCEF 543, at 89-90), her statement was made in response to the question as to whether Berzak was involved in the "demolitions of the other vacant Moluka buildings," not the one at issue here. None of the other statements from other witnesses relied on by Moluka references or reflects any actions by Berzak/SDG to perform the work or supervise, oversee, control, or monitor the work or control the means and methods of it.

Although now academic, as plaintiff's claims against Moluka arise from negligence, and not breach of contract, that plaintiff seeks to recover only for economic loss does not bar Moluka's contribution claim against Berzak/SDG, as such a claim is barred only when the economic loss allegedly arises from a breach of contract, rather than negligence. (*See Eisman v Vil. of E. Hills*, 149 AD3d 806 [2d Dept 2017] [court properly declined to dismiss contribution claim as allegations against defendant sounded in tort, rather than breach of contract]; *Wing Wong Realty Corp. v Flintlock Constr. Svces., LLC*, 95 AD3d 709 [1st Dept 2012] [contribution claim properly asserted as property damage claim was based on theories of negligence and statutory liability, not just breach of contract]; *Sound Refrigeration and Air Conditioning, Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349 [2d Dept 2011] [contribution claim not

barred by economic loss doctrine as plaintiff asserted claim for damages for injury to property based on negligent performance of work]; *Castle Vil. Owners Corp. v Greater New York Mut. Ins. Co.*, 58 AD3d 178 [1st Dept 2008] [contribution claim not precluded as design professional may be subject to tort liability regardless of contractual duties, and plaintiff sought tort damages, not just contract damages]).

3. Common-law indemnity

To prevail on a claim for common-law indemnification, a party must prove not only that it was not negligent, but that the proposed indemnitor was responsible for negligence that contributed to the accident or, absent negligence, that it had authority to direct, supervise, and control work giving rise to the injury. (*Shaughnessy v Huntington Hosp. Assoc.*, 147 AD3d 994 [2d Dept 2017]).

Liability for indemnification may only be imposed against parties that exercise actual supervision and control over injury-producing work. (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]). Thus, even if a party has the contractual authority to direct and supervise work, if the party never exercises that authority but instead subcontracts its contractual duties to an entity that actually directs and supervises the work, then the party with contractual authority may not be held liable for common-law indemnification. (*Id.*).

Here, absent evidence that Berzak/SDG directed and supervised the demolition work and in light of the evidence that others supervised and controlled it, Berzak/SDG may not be held liable for common-law indemnity. (*McCarthy*, 17 NY3d at 378 [defendant not required to indemnify owners as it did not actually supervise and control work at issue, but rather contracted injury-producing work to subcontractor]; *Gjeka v Iron Horse Transport, Inc.*, 151 AD3d 463 [1st Dept 2017] [common-law indemnity claim properly dismissed as owner's representative merely

oversaw progress and safety of work, which does not rise to level of supervisory control])). There is also no evidence, expert or otherwise, that Berzak/SDG was actively at fault in causing plaintiff's damages. (*See 87 Chambers, LLC*, 122 AD3d at 542 [common-law indemnity claims should have been dismissed as architect not actively at fault in causing damage to plaintiff's building and it did not exercise supervision and control over injury-producing work])).

B. Summary judgment against P&J

Berzak/SDG contends that the agreement between Moluka and P&J obligates P&J to indemnify them and hold them harmless and that the obligation was triggered as plaintiff's damages are alleged to have been caused by P&J's work for Moluka. They apparently abandon their cross claims for common law indemnification and contribution. (NYSCEF 450).

In opposition, P&J argues that having denied privity of contract between them and Moluka, Berzak/SDG are estopped from arguing that it is contractually obligated to indemnify them. And, having also denied that Berzak was the architect for the project, it is likewise estopped from asserting that it is covered as the "architect" by the indemnity provision in the P&J contract. P&J also denies that SDG is Moluka's "agent," and in any event, its owner did not read the agreement before signing it and was not familiar with it. Thus, P&J maintains that it did not clearly and purposely intend to indemnify Berzak/SDG. It also observes that absent a finding that it was negligent, and as it performed no work on the project, there has been no determination that Berzak/SDG was not negligent. (NYSCEF 562).

In reply, Berzak/SDG contends that to the extent that it is found that Berzak and SDG were the architect and agent on the project, they are covered by the indemnification provision. (NYSCEF 566).

As Berzak/SDG establish that they did not operate as Moluka's architect and agent on the demolition project, they are estopped from arguing to the contrary in support of their claim for contractual indemnity. (See e.g., *Matter of Hartsdale Fire Dist. v Eastland Constr., Inc.*, 65 AD3d 1345 [2d Dept 2009], *lv denied* 14 NY3d 701 [2010] [party estopped from inequitably adopting position directly contrary to or inconsistent with earlier position in same proceeding]).

IV. PERCIBALLI'S MOTION

A. Dismissal of P&J's claims against Perciballi

1. Contentions

Perciballi argues that it may not be held liable for negligence, absent any duty owed to P&J, and given the undisputed facts that the only party that performed the demolition was Demo Deluxe, that Demo Plus was an independent contractor hired by Perciballi, and that Demo Plus/Deluxe obtained all permits in its name, controlled the manner and methods of the demolition, and performed the actual work. Perciballi's sole function at the worksite, it maintains, was waste removal or carting, and it observes that P&J, in its second third-party complaint against it, alleges that its work at the project was limited to carting and trucking, and there is no allegation in any of the pleadings in this matter that its trucking and carting activities caused plaintiff's damages. Given Demo Plus's status as an independent contractor, Perciballi claims that it cannot be held vicariously liable for its negligence, and that absent evidence that it was negligent, it is not contractually required to indemnify P&J. (NYSCEF 476).

P&J denies that Perciballi performed no demolition work, relying on testimony that it was involved with the project from the beginning, that it brought in Demo Plus and inspected the site before the demolition began, that it prepared its contract with P&J, that its owner visited the site five times, that it communicated with Demo Deluxe to ensure that the work progressed, and

that it was paid by P&J for the work. P&J also contends that Perciballi's denial of having performed the demolition work in issue is controverted by its demolition of the neighboring buildings. (NYSCEF 561).

Regardless of whether Perciballi or a subcontractor performed the demolition, P&J argues, it is required by their agreement to indemnify P&J for any property and economic damages arising out of or related to the demolition. That Demo Plus was an independent contractor employed by Perciballi is irrelevant, it maintains, and observes that there is no evidence that P&J was negligent, while Perciballi may be held liable for negligence based on its inspection and monitoring of the status of Demo Deluxe's work. It is also undisputed, according to P&J, that Perciballi failed to obtain the contractually-required insurance for the demolition, and has thus admitted to being liable for failing to procure insurance. (*Id.*).

In reply, Perciballi denies that there is evidence that it performed the demolition or that it supervised the means and methods of Demo Deluxe's work, or that it agreed to indemnify P&J for the demolition. It advised P&J that it would perform no demolition work and thus there was no meeting of the minds on contractual indemnity, thereby invalidating the agreement. P&J's claim for common-law indemnification has no merit, Perciballi asserts, as there is no evidence that it supervised and controlled the work, and its owner was present at the site solely for the removal of its containers. It also argues that there was no meeting of the minds on its obligation to obtain insurance, as it believed that the insurance obtained by Demo Plus, naming Perciballi as an additional insured, was sufficient. (NYSCEF 569).

While Perciballi submits a "supplemental affirmation in lieu of oral argument" in support of its motion (NYSCEF 573), and contends that I permitted it to do so at a September 13, 2017

hearing on the instant motions, there is no indication that a hearing was held on September 13th and nothing in writing reflects that permission was given.

2. Contractual indemnification

As the parties' agreement requires Perciballi to defend and indemnify P&J from all liability "arising out of or resulting from the work covered by the contract, to the extent such work was performed by or contracted through the subcontractor or by anyone for whose acts the subcontractor may be held liable," that Perciballi did not perform the demolition is irrelevant, having contracted with Demo Plus/Deluxe to perform it. Consequently, Perciballi does not establish that it may not be held liable for contractual indemnification. The same holds true for its claim that there was no meeting of the minds. P&J denied that it knew or was told that Perciballi would not be doing the demolition or that Perciballi had subcontracted with Demo Plus to do it. Thus, Perciballi demonstrates at most a unilateral mistake on its end, which is insufficient to invalidate the agreement. (*See e.g., Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644 [1989] [absent allegations of fraud, claim of unilateral mistake does not invalidate contract]; *Desiderato v N & A Taxi, Inc.*, 190 AD2d 250 [1st Dept 1993] [for rescission of contract, party must show that despite exercise of ordinary care it had no knowledge of mistake]).

3. Common-law indemnification

For the same reasons set forth above (III.A.3.), in dismissing Moluka's common-law indemnity claims against Berzak/SDG, and absent any evidence that Perciballi caused plaintiff's damages, the common-law indemnification claim has no merit. That Perciballi visited the site and inspected Demo Deluxe's work to ensure compliance with its agreement and to assess its progress in order to pay it, is insufficient. (*See e.g., Pita v Roosevelt Union Free School Dist.*, 156 AD3d 833 [2d Dept 2017] [no common-law indemnity found where defendants were not

negligent in connection with accident and had no authority to direct, supervise, or control work leading to injury]; *Hastedt v Bovis Lend Lease Holdings, Inc.*, 152 AD3d 1159 [4th Dept 2017] [court properly denied claim for common-law indemnification against contractor absent evidence that it was negligent or exercised supervision or control over injury-producing work]; 87 *Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014] [common-law indemnity claims should have been dismissed as architect not actively at fault in causing damage to plaintiff's building and exercised no supervision and control over injury-producing work]; see also *Ortiz-Cruz v Evers*, 150 AD3d 622 [1st Dept 2017] [judgment on cross-claim against contractor for common-law indemnification properly denied as, while owner hired contractor to perform repairs and contractor subcontracted work to other contractor, evidence did not establish that contractor directed or controlled work]).

4. Failure to procure insurance

It is undisputed that Perciballi did not obtain the insurance required by its agreement with P&J, and it cannot rely on the insurance obtained by Demo Plus as satisfying its duty to obtain its own insurance.

B. Dismissal of cross claims

While Berzak/SDG assert a cross claim against Perciballi for contractual indemnification based on the contract between Moluka and P&J, it has been determined that Berzak/SDG are not entitled to contractual indemnity under that agreement. (*See supra*, III.B.).

V. P&J'S MOTION

A. Summary judgment against Perciballi

1. Contractual indemnification

As it has been determined that the parties' agreement requires Perciballi to indemnify P&J for Demo Deluxe's work (*supra*, IV.A.2.), and to indemnify it from any liability or claimed liability arising out of or resulting from the work covered by the agreement, and as plaintiff alleges that its damages arose from the demolition at issue in the agreement, P&J establishes that it is entitled to be contractually indemnified by Perciballi.

2. Common-law indemnification

P&J is not entitled to common-law indemnification given the prior determination. (*Supra*, IV.A.3).

3. Failure to procure insurance

Given the determination that Perciballi failed to procure the required insurance (*supra*, IV.A.4), P&J prevails on this claim.

B. Dismissal of Perciballi's cross claims against P&J

Perciballi submits no opposition to dismissal of its cross claims against P&J.

C. Dismissal of Berzak/SDG's cross claims against P&J

It has been determined that Berzak/SDG is not entitled to contractual indemnification from P&J based on its contract with Moluka (*supra*, III.B.), and that P&J cannot be held liable for common-law indemnification (*id.*). Berzak/SDG does not oppose dismissal of its contribution and failure to procure insurance cross claims.

VI. CONCLUSION

Accordingly, it is hereby

Ordered, that the motion by Berzak Berzak/SDG Architects, P.C. and SDG Engineering, P.C. (sequence 24) for summary judgment is granted to the extent of dismissing the fourth third-party complaint in its entirety, and the fourth third-party complaint is hereby severed and dismissed, and denied as to their cross claim against defendant P&J Renovations, Inc. for contractual indemnification; it is further

Ordered, that the motion by Perciballi Container Services, Inc. for summary judgment in its favor on the second third-party complaint (sequence 25) is granted to the extent of dismissing the common-law indemnification claim and cross-claims and the contractual indemnification cross claim asserted by Berzak Berzak/SDG Architects, P.C. and SDG Engineering, P.C., and is otherwise denied; and it is further

ORDERED, that the motion by P&J Renovations, Inc. for summary judgment in its favor on its third-party claims against Perciballi Container Service, Inc. is granted to the extent of: (1) granting judgment on its claims for contractual indemnification and failure to procure insurance, and (2) dismissing the cross claims asserted against it by Berzak Berzak/SDG Architects, P.C. and SDG Engineering, P.C., and denied as to its claim for common-law indemnification against Perciballi, and P&J is directed to e-file a proposed order and judgment.

5/29/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE