SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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ROGER EHRENBERG AND CARIN LEVINE EHRENBERG,

Plaintiff,

- against -

LMA GROUP INC.,

Defendant.

Index No. 157861/2016

DECISION and ORDER

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LMA GROUP INC.,

Third-Party Plaintiff,

- against -

MANUEL ZEITLIN ARCHITECTS, ADVANCED PROFESSIONAL ENGINEERING, P.C., MARK BIXLER and BRUCE MERDJAN,

Third-Party Defendants.

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Debra A. James, J.:

In this action, third-party defendants, Bruce Merdjan and his employer Advanced Professional Engineering, P.C. (together, APE), and Mark Bixler and his employer Manuel Zeitlin Architects (together, MZA), move for an order, pursuant to CPLR 3211(a), to dismiss the third-party complaint against them, or, pursuant to CPLR 3211 (c), for summary judgment. Defendant and third-party plaintiff, LMA Group Inc. (LMA), oppose the motion.

CONCLUSION

The motion of third-party defendant APE and MZA to dismiss pursuant to CPLR 3211(a)(5) shall be granted.

BACKGROUND

This action arises in connection with a prior action, Ehrenberg v Regier (Sup Ct, NY County, Index No. 111964/07) (prior action).

The plaintiffs at bar, Roger Ehrenberg and Carin Levine Ehrenberg, are the same in such prior action. They commenced the prior action seeking compensation from Hilda Regier, the defendant in the prior action, for expenses that they incurred in repairing a shared party wall between their adjoining residences. In such prior action, Regier impleaded LMA, MZA, and APE by way of a third-party complaint.

Plaintiffs and Regier own properties on West 22nd Street. The party wall is plaintiffs' western wall and Regier's eastern wall. Regier has owned and lived in her house since 1977. Plaintiffs purchased their house in 2005, and at that time it was a three-unit building. Plaintiffs hired LMA as the general contractor; Mark Bixler of MZA as the architect; and Bruce Merdjan of APE as the professional engineer to convert their house into a single-family home.

Before the work in plaintiffs' house started, MZA, APE, and LMA discovered that the party wall in plaintiffs' basement was

bulging outward. The investigation revealed that the bulge was next to the section of the party wall where Regier's south chimney was located, and that the flue pipe in the south chimney was perforated and deteriorated. Plaintiffs' party wall next to the south chimney was in a crumbling state and the bricks could be removed by hand. In his role as engineer, Merdjan concluded that gas escaping from the flue had eroded the brick of the party wall. MZA and APE drafted plans to repair the party wall and for the renovations, and LMA performed the work.

Plaintiffs moved into their house in late 2008 when the renovation was complete. Plaintiffs then commenced the prior action, alleging that Regier's failure to maintain the party wall and the chimneys caused them to expend money repairing their side of the party wall.

Regier counterclaimed for negligence, for compensatory and punitive damages, and for an injunction compelling plaintiffs to repair and restore the structural integrity of the party wall, to remove a steel beam, and to repair her ceiling, walls and other damages arising from the injury to her section of the party wall. Regier also filed a third-party complaint against LMA, MZA, and APE, alleging that they had a duty to perform their work without damaging the shared party wall, and that their work caused damage to the shared party wall. Regier's third-party complaint asserted causes of action against such defendants only for

indemnification and contribution of any damages recovered against her by plaintiffs, but she asserted no claim of damages to her own home.

In the prior action, plaintiffs, Regier, LMA, MZA, and APE moved for summary judgment.

In a decision and order dated July 23, 2015, the court granted summary judgment in favor of MZA and APE, dismissing Regier's third-party complaint against them.

In a decision and order dated September 29, 2015, the court granted summary judgment in favor of LMA, dismissing Regier's third-party complaint against it.

In a decision and order dated December 17, 2014, the court granted summary judgment in favor of Regier, dismissing the complaint against her, and denied plaintiffs' motion for summary judgment dismissing Regier's counterclaim.

Thus, the only cause of action remaining in the prior action is Regier's counterclaim against plaintiffs for trespass and damage to her section of the party wall.

Plaintiffs then commenced this action asserting indemnification and contribution claims against LMA, based on Regier's counterclaim allegations against plaintiffs in the prior action. LMA then served a third-party complaint on third-party defendants MZA and APE, also asserting indemnification and contribution claims based on the same counterclaim allegations by

Regier in the prior action. Specifically, LMA claims that any negligence or otherwise culpable conduct relating to repair of the party wall, as well as any resulting damage to Regier's residence for which she may be entitled to recovery from plaintiffs, would have resulted in whole or in part from the negligence or otherwise culpable conduct of third party-defendants MZA and APE, in preparing the design drawings, specifications and protocol for the repair of the party wall.

MZA and APE move for an order dismissing the third-party complaint on the grounds that 1) the claims are now barred by res judicata and collateral estoppel; 2) LMA has no indemnification claim against MZA or APE, because it never contracted with MZA or APE; and 3) MZA and APE are not liable for the bulge in the party wall, which existed before they became involved with the project, and neither of them controlled the construction work.

DISCUSSION

The standard of review on a motion to dismiss pursuant to CPLR 3211 is well established. The court must assume the truth of the allegations in the pleading and "resolve all inferences which reasonably flow therefrom in favor of the pleader." (Sanders v Winship, 57 NY2d 391, 394 [1982].) In assessing a complaint, the court must "determine simply whether the facts alleged fit within any cognizable legal theory." (Morone v Morone, 50 NY2d 481, 484 [1980].) "[T]he allegations of a

complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment." (Arrington v New York Times Co., 55 NY2d 433, 442 [1982] cert denied 459 US 1146 [1983].) If the facts stated are sufficient to support any cognizable legal theory, the motion to dismiss should be denied. (Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 318 [1995].)

Here, third party plaintiff MVA relies upon CPLR 3211 (a) (5), which states "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."

MZA and APE initially argue, pursuant to CPLR 3211 (a) (5), that LMA's claims are barred by res judicata and collateral estoppel, because the court previously determined in the prior action that the damages claimed by Regier were not created by MZA or APE, and neither MZA or APE committed negligence in performing their design duties. In opposition, LMA contends that neither res judicata nor collateral estoppel bars its claims, because the adjudication of the potential liability of LMA, MZA and APE in the prior action was limited to Regier's claims for indemnity for her potential liability to plaintiffs.

O'Brien v City of Syracuse (54 NY2d 353 [1981]) sets forth the transactional approach to res judicata analysis. Under this analysis, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based on different theories or seeking a different remedy. (See id.) Res judicata applies only when the same parties have litigated successive actions against each other. (See City of New York v Welsbach Elec. Corp., 9 NY3d 124, 128 [2007] [finding that res judicata did not apply even though the original action was dismissed as against Welsbach, where the "City made no claim against Welsbach in the [original] action"].)

Here, plaintiffs did not file any claims against MZA and APE in the prior action, nor did LMA file any claims against MZA and APE in the prior action. Therefore, because no claims were brought by either plaintiffs or LMA against MZA and APE, res judicata does not bar LMA's third-party action against MZA and APE.

Collateral estoppel "applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." (City of New York, 9 NY3d at 128) [internal citations and quotation marks omitted].)

In the prior action, this court dismissed Regier's indemnity and contribution claims against LMA, MZA and APE for property damage claimed by plaintiffs. There was no claim for indemnity and contribution against LMA, MZA, or APE in the prior action for alleged property damage to Regier's residence from the renovation. In fact, as to LMA, the court found that, "to the extent that [Regier] seeks to recover damages to her own property resulting from the negligence of [LMA], [LMA] has established its twelfth affirmative defense that such claims are barred by the applicable statute of limitations." Therefore, the issue of the potential liability of MZA and APE for indemnity and contribution to plaintiffs and/or LMA, arising from the alleged property damage to Regier's residence, was not "raised, necessarily decided and material in the first action". Nor did LMA have "a full and fair opportunity to litigate the issue in" the prior action. (City of New York, 9 NY3d at 128.)

MZA and APE also argue that LMA has no indemnification claim against MZA or APE, because it never contracted with MZA or APE. This court considers that the true nature of MZA and APE's motion on this score is pursuant to CPLR 3211(a)(5), "the pleading fails to state a cause of action".

MZA and APE assert that indemnification and contribution are only available for a property damages matter, but that this is not such a matter, as "purely economic loss resulting from

breach of contract does not constitute 'injury to property' within the meaning of . . .CPLR § 1401." (Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 26 [1987].) MZA and APE note that Regier's counterclaim alleges that the actions of LMA, MZA and APE increased the costs to repair the party wall, for which plaintiffs seek reimbursement from Regier. They argue that those costs are not property damage for purposes of CPLR § 1401, and as plaintiffs engaged MZA and APE to design plans for the party wall, only plaintiffs have a right to bring claims against them for alleged additional costs to repair the wall.

In opposition, LMA maintains that this action seeks indemnity and/or contribution for damages that might be recoverable by Regier, based on her allegations that renovations to the shared party wall damaged her residence. "[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 Univ. v Tishman Constr. Corp. of New York, 240 AD2d 341, 343 [1st Dept 1997].)

Contrary to LMA's argument, a review of the complaint at bar shows that the measure of damages that plaintiffs seek are for breach of contract. Specifically, the first and second causes of action of the complaint are for LMA's alleged breach of its contract with plaintiffs, including failure to procure insurance

thereunder. Thus, LMA third party claims against MZA and APE with respect to such causes of action do not lie, since plaintiffs' claims seek the benefit of its contract bargain with LMA, and as such, APE and MVA, which have no privity of contract with LMA, may not be held liable to LMA in contribution or indemnification with respect to such loss. (Tishman, supra; see also Board of Educ of Hudson School Dist v Sargent, Webster, Crenshaw & Foley, 71 NY2d 21, 29-30 [1987]).

Likewise, the third party complaint fails to state a cause of action for common law indemnity against MZA and APE as, with respect to such third party defendants, the third party complaint does not allege that either owed any duty to it, but only that MZA and APE's owed contractual obligations to plaintiffs to prepare the design drawings and specifications and administer the contract. (Hudson School Dist, supra). Unlike plaintiffs' allegations against LMA in the third cause of action of the complaint at bar, the third party complaint does not allege any facts wherein LMA claims it "was unfairly required to discharge a duty that should have been discharged by [MZA or APE]" (Hudson School Dist supra).

ORDER

Accordingly, it is hereby

ORDERED that the motion to dismiss by third-party defendants MZA and APE is granted, and the third party complaint is

dismissed in its entirety against the third party defendants, with costs and disbursements to such third party defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such third party defendants; and it is further

ORDERED that the first party action herein is severed and continued; and it is further

ORDERED that the caption is amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

ORDERED third-party defendants are directed to serve an answer to the third-party complaint within 20 days after service of a copy of the order with notice of entry.

This is the decision and order of the court.

Dated: February 6, 2018

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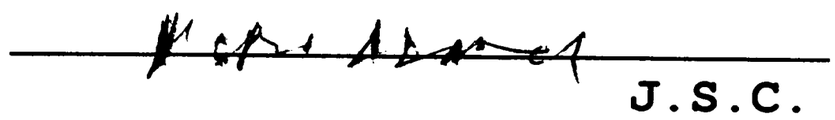

J.S.C.