

**Cobblestone Foods, LLC. v Branded Concept Dev.,
Inc.**

2018 NY Slip Op 34586(U)

July 2, 2018

Supreme Court, Kings County

Docket Number: Index No. 515724/16

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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COBBLESTONE FOODS, LLC.,

Plaintiff,

Decision and order

- against -

Index No. 515724/16

BRANDED CONCEPT DEVELOPMENT, INC.,
PROSERVE ENVIRONMENTAL AND TREE
HOUSE DESIGN, LTD.,

Defendants,

July 2, 2018

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BRANDED CONCEPT DEVELOPMENT, INC.,
Third-Party Plaintiff,

- against -

SHALAT ARCHITECTS, P.C., WESBUILT
CONSTRUCTION MANAGERS, LLC.,
FISKAA, LLC., AND FISKAA ENGINEERING LLP,
Third-Party Defendants,

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PRESENT: HON. LEON RUCHELSMAN

2018 JUL -6 AM 7:18
KINGS COUNTY CLERK
FILED

The third party defendants Fiskaa LLC and Fiska Engineering LLP and Shalat Architects, P.C. have moved seeking summary judgement to dismiss the third party complaint. Defendant/third party plaintiff Branded Concept Development Inc., has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

This lawsuit was commenced by the plaintiff, an entity involved in catering and food services. It contracted with various entities, included Branded, Shalat and Fiskaa to provide renovation and construction at 220 Atlantic Avenue in Kings County. Specifically, Branded was hired as the construction manager and Fiskaa was hired to provide engineering design

services and Shalat was hired to provide architectural services. On September 7, 2016 the plaintiff sued Branded and ProServe Environmental, an asbestos removal company. The plaintiff subsequently filed an amended complaint adding a third entity, Tree House Design Ltd., the designer hired for the project. The complaint alleged breach of contract for failing to complete the work in a timely manner, negligence, negligent representation and unjust enrichment. On July 27, 2017 Branded instituted a third party action against Fiskaa, Shalat and others. Specifically, concerning Fiskaa and Shalat the third party complaint seeks contribution, contractual and common law indemnification and breach of contract. Fiskaa and Shalat have now filed motions seeking summary judgement.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

CPLR §1401 states that where two or more persons (or entities) are subject to liability for the same "personal injury, injury to property or wrongful death" they may claim contribution

among them (id). Thus, contribution is only available where tort liability is sought in the underlying case (Board of Education of Hudson City School District v. Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 523 NYS2d 475 [1987]). Thus, contribution is unavailable where damages sought are exclusively for breach of contract (Ruby Land Development Ltd. v. Toussie, 4 AD3d 518, 771 NYS2d 701 [2d Dept., 2004]). Therefore, an examination of the plaintiff's complaint is necessary. The Amended Complaint contains ten causes of action. The third cause of action alleges professional negligence against Branded. The fifth cause of action alleges gross negligence against Branded (and Proserve). The sixth cause of action alleges negligent representation against Branded. However, the mere recitation of a tort, negligence in this case, does not automatically mean the claims sought are not economic. In Structure Tone Inc., v. Universal Services Group Ltd., 87 AD3d 909, 929 NYS2d 242 [2d Dept., 2011] the court held that attempts by a plaintiff to cast various claims as tort claims would not allow contribution when in reality the claims were really all based upon breach of contract. The court explained that claims for contribution only "apply to damages for personal injury, injury to property or wrongful death" and that mere economic loss resulting from a breach of contract is not an 'injury to property' (id). Thus, in considering whether an action is really a tort or a breach of

contract claim, the focus must be upon the nature of damages sought by the plaintiff in the main action (see, Trump Village Section 3 Inc., v. New York State Housing Finance Agency, 307 AD2d 891, 764 NYS2d 17 [1st Dept., 2003]; Board of Managers of Hudson Condominium v. 195 Hudson Street Associates LLC, 37 AD3d 312, 831 NYS2d 132 [1st Dept., 2007])). A re-examination of the complaint reveals that all three negligence actions essentially seek damages for breach of contract and do not allege any injury contemplated by CPLR §1401. Although the Amended Complaint alleges that Branded owed Cobblestone a special duty "independent from its contractual obligations and duties under the Agreement" (amended Complaint, ¶68) the damages sought are for the same claims that comprise the breach of contract claims. Branded argues that "any tortious act constitutes an 'injury to property' within the meaning of the statute" (see, Memorandum of Law in Opposition, page 7). Branded cites to Masterwear Corp., v. Bernard, 3 AD3d 305, 771 NYS2d 72 [1st Dept., 2004]], however, that case did not discuss whether overlapping claims of tort and breach of contract are distinct claims for purposes of contribution. Rather, the case merely held that the torts of conversion, fraud and breach of a fiduciary duty can satisfy the 'injury' requirement of CPLR §1401.

Therefore, contribution is not proper and consequently the motions seeking to dismiss that claim is granted.

Turning to the other causes of action it is well settled that common law or implied indemnification permits a party who has been required to pay to recover from the wrongdoer (Schottland v. Brown Harris Stevens Brooklyn LLC, 137 AD3d 997, 27 NYS3d 634 [2d Dept., 2016]). Fiskaa and Shalat argue that Branded cannot be entitled to indemnification because "Branded actually performed the construction work on the project that allegedly caused Plaintiff Cobblestone's economic damages. Consequently, as an alleged active tortfeasor, Branded cannot maintain any indemnification claim against Fiskaa as a matter of law" (see, Fiskaa's Memorandum of Law in Support of Motion for Summary Judgement, page 9 and Shalat's Memorandum of Law in Support of Motion for Summary Judgement, page 11). Thus, for Branded to be entitled to indemnification Branded must establish that it was not negligent and that Fiskaa and/or Shalat was negligent (Perri v. Gilbert Johnson Enterprises Ltd., 14 AD3d 681, 790 NYS2d 25 [2d Dept., 2005]). There have been no determinations concerning any negligence by Branded or any other party. In addition, there has been no discovery at all. Therefore, it is premature to conclude that Branded will not be entitled to any indemnification since it has not been established whether Branded committed any negligence (Benedetto v. Carrera Realty Corp., 32 AD3d 874, 822 NYS2d 542 [2d Dept., 2006]). This does not in any way contradict the Court's concurrent decision

dismissing Wesbuilt from the third party litigation. The issue concerning Branded and Wesbuilt was whether their duties overlapped and the court concluded they did not. However, there is no dispute that Branded, Fiskaa and Shalat were all working simultaneously, therefore, questions of the respective negligence of either party or all the parties and whether indemnification is proper must await discovery and possibly a trial.


Consequently, the motion seeking summary judgement dismissing the common law indemnification claims are denied without prejudice at this time.

There has been no evidence presented that any contract existed between Branded and Fiskaa or Shalat. Therefore, the causes of action seeking contractual indemnification and breach of contract are dismissed.


So ordered.

ENTER:

DATED: July 2, 2018
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC


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FILED