

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

2018 NY Slip Op 34587(U)

January 22, 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,

January 22, 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

The third party defendant Wesbuilt Construction Managers LLC has moved seeking 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 to provide renovation and construction at 220 Atlantic Avenue in Kings County. On September 7, 2016 the plaintiff sued Branded, the project manager of the construction project and ProServe Environmental, an asbestos removal company. The plaintiff subsequently filed an amended complaint adding a

third entity, Tree House Design Ltd., the architect 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 Wesbuilt and others. Specifically, concerning Wesbuilt the third party complaint seeks contribution, contractual and common law indemnification and breach of contract. Wesbuilt has now filed the instant motion to dismiss the third party complaint on the grounds there is no merit to any of the causes of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-

discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

According to the Amended Complaint, the plaintiff and Branded entered into a contract on March 14, 2014. Wesbuilt entered into a letter of engagement with the plaintiff on October 5, 2015 and subsequently a contract with the plaintiff on November 19, 2015, nineteen and twenty months after the contract with Branded. Thus, Branded's third party complaint alleges, without admitting the truth thereof, that due to Branded's "failure to adhere to their duties in overseeing the means, manner and methods of the renovation, and their negligent design and build-out of an existing building located at 220 Atlantic Avenue, Brooklyn, New York, the completion and opening of Plaintiff's new catering facility at that location (the 'Cobblestone Project'), was delayed by eleven months" (see, Third Party Complaint, ¶ 19). Indeed, the Amended Complaint alleges that Branded's breach of contract "created substantial delays at the project" (see, Amended Complaint, ¶54) and that the actions of Branded "caused the project to be delayed no less than Ten Months beyond the original time frame contemplated by the parties (see, Amended Complaint, ¶60). Thus, the Third Party Complaint contains four causes of action. The first is contribution and alleges that if the plaintiff recovers judgement against Branded then Wesbuilt (and the other third party defendants) will be liable to Branded

for their share of the responsibility in procuring that judgement. The second and third causes of action seek common law and contractual indemnification, alleging that Branded should be indemnified for any judgement plaintiff obtains against Branded. The last cause of action is for breach of contract alleging Wesbuilt did not maintain insurance on behalf of Branded as mandated by its contract with the plaintiff.

The critical question then that must be addressed is whether any of the claims against Branded could likewise implicate Wesbuilt.

Branded argues that "the Management Agreement between Branded and Plaintiff never provided for a specific completion date of the Cobblestone Project" (see, Memorandum of Law in Opposition, page 10). However, the Amended Complaint, which will be deemed true for purposes of a motion to dismiss (even though not the complaint sought to be dismissed) states that "Branded represented to Cobblestone that the project would be completed on or prior to October 15, 2015" (see, Amended Complaint, ¶15). It is true that the Management Agreement does not provide a completion date, however, it does provide for total fees in the amount of \$108,000 to be paid in ten monthly installments of \$8,800 including a down payment of \$8,000 for a total of \$96,000. The Agreement further provides that the remaining \$12,000 will be paid at the time of a punchlist meeting and upon

completion of the punchlist. Thus, while no specific end date is provided a reasonable understanding of the contract reveals it should have been completed on or about March 2015 and surely by October of 2015. Thus, the delay precipitated by the stop work order of December 13, 2014 cannot possibly accrue to Wesbuilt who did not begin its presence on the project until approximately ten months later in October 2015. Moreover, any claims against Branded for its recommendation of ProServe likewise do not implicate Wesbuilt at all. Thus, the eighth, ninth and tenth causes of action of the Amended Complaint do not concern Branded and do not comprise Branded's Third Party Complaint. The second, third, fourth, fifth, sixth and seventh causes of action also fail to implicate Wesbuilt since they concern allegations that predate Wesbuilt's involvement or concern ProServe in a manner in which Wesbuilt cannot be responsible.

Specifically, the second cause of action of the Amended Complaint concerns a delay of at least ten months due to Branded's "failures and/or omissions" and that a delay of two months in operating the business ensued because the lease had expired (see, Amended Complaint, ¶ 60,61). Thus, clearly, the delays contemplated in Count Two only concern Branded. Count Three of the Amended Complaint alleges professional negligence based upon a special duty owed by Branded. Thus, no claims for indemnification or contribution are possible based upon such

special relationship. It is well settled that contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person (Godoy v. Abamaster of Miami Inc., 302 AD2d 57, 754 NYS2d 301 [2d Dept., 2003]). It is further well settled that to establish a claim for indemnification Branded must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that Wesbuilt was guilty of some negligence that contributed to the causation of the accident (Perri v. Gilbert Johnson Enterprises Ltd., 14 AD3d 681, 790 NYS2d 25 [2d Dept., 2005]). Although there has been no 'accident' in this case, clearly Branded cannot establish any of the above mentioned criteria sufficient to establish such third party claims against Wesbuilt. The fourth and fifth counts of the Amended Complaint alleges negligence and gross negligence concerning Branded's failure to deal with the Stop Work Order. As noted, those claims, if true, pre-date Wesbuilt's involvement and cannot form the basis for any claims against Wesbuilt. The sixth cause of action alleges negligent misrepresentation on the part of Branded by recommending ProServe. Again, that allegation cannot devolve upon Wesbuilt.

The remaining cause of action of the Amended Complaint, Count One, alleges breach of contract on the part of Branded in

failing to satisfy its obligations under the Management Agreement. The Count consists of numerous allegations and does not provide any time frame by which Wesbuilt's participation can be gauged. However, even if the Amended Complaint can be read to include periods of time when Wesbuilt was involved, no contribution or indemnification is available to Branded. Section 3.18.1 of the contract between Wesbuilt and the plaintiff states that Wesbuilt shall indemnify the various parties "provided that such claim damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property" (id). Thus, pursuant to the contract indemnification is only available for a specific, non-economic injury. Branded argues the damages of the Amended Complaint are unspecified and could relate to injury or property (see, Memorandum in Opposition, page 14). While the damages of the Amended Complaint are unspecified, they are all exclusively economic, thereby providing another basis upon which all the claims of the Third Party Complaint concerning indemnification and contribution must fail.

Therefore, the motion seeking to dismiss the first three causes of action of the amended complaint is granted.

Concerning the motion seeking to dismiss the cause of action for the failure to obtain insurance on behalf of Branded, Wesbuilt has provided sufficient evidence that indeed, Wesbuilt's

insurance policy covered Branded as an additional insured. Specifically, Wesbuilt's insurance policy provides coverage to all entities that Wesbuilt had an obligation including Branded. Thus, the motion seeking to dismiss that cause of action is granted. Therefore, the motion seeking to dismiss the Third Party Complaint is granted.

So ordered.

ENTER:

DATED: January 22, 2018
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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KINGS COUNTY CLERK
FILED

