

Harriet Tubman Gardens Apt. Corp. v H.T. Dev. Corp.
2019 NY Slip Op 32022(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 652532/2014
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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HARRIET TUBMAN GARDENS APARTMENT
CORPORATION,

Plaintiff,

-against-

Index No. 652532/2014
Motion Sequences 001
and 002

H.T. DEVELOPMENT CORPORATION, BLUESTONE
ORGANIZATION, AND YORK RESTORATION
CORPORATION,

Defendants.

-----X
BLUESTONE ORGANIZATION, INC.,

Third-Party Plaintiff,

-against-

JOB OPPORTUNITIES FOR WOMEN, INC.,
LINDEN CONSTRUCTION CORP.,
OLDCASTLE PRECAST INC. a/k/a OLDCASTLE
PRECAST EAST INC., N. WEXLER, P.E., INC.,
ARTHUR KAHANE ARCHITECT, P.C., CAR-WIN
CONSTRUCTION, INC., B&N ROOFING & SHEET
METAL, INC., KINGS COUNTY WATERPROOFING
CORP. and JOHN ELLIS AND ASSOCIATES
ARCHITECTS,

Third-Party Defendants.

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HON. TANYA R. KENNEDY, J.S.C.:

Third-party defendant Arthur Kahane Architect, P.C. (“Kahane”) moves, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the third-party action of defendant/third-party plaintiff Bluestone Organization, Inc. (“Bluestone”) and all cross-claims asserted against it. Bluestone moves for summary judgment, pursuant to CPLR 3212, to dismiss the complaint and all cross-claims and counterclaims as asserted against it.

BACKGROUND

Plaintiff Harriet Tubman Gardens Apartment Corporation (“Plaintiff”) is a New York corporation and owner of the residential cooperative apartment building located at 2235 Frederick Douglas Boulevard, New York, New York, which consists of seventy-three (73) units (“the Building”) (Winikow Affidavit, Exhibit A, complaint, ¶¶ 2-3).

Plaintiff alleges that defendant H.T. Development Corporation (“H.T.”) was the Sponsor for the Offering Plan for the Building and that Bluestone was the successor in interest to H.T. (*id.*, ¶¶ 7-8). Plaintiff also alleges that Bluestone and H.T., as Sponsor, made certain representations in the Offering Plan, including, but not limited to “promptly correct any defects in the construction of the Building and the units therein” (*id.*, ¶16c).

However, the Offering Plan identified H.T. as the Sponsor of the Plan, which was comprised of five (5) principles: “Steven Bluestone, Thomas Potvin, Ira Lichtiger and Sara B. Herbstman, ‘all members of the Bluestone family’” (Lichtiger Affidavit, Exhibit H, Offering Plan, Part IC, page 147). The Offering Plan also identified, *inter alia*, third-party defendant John Ellis & Associates (“John Ellis”) as the architect and third-party defendant Banta Homes Corp. (“Banta”) “as the contractor the Sponsor engaged to construct the project in the Offering Plan” (*id.*, pp. 148-149).

By October 29, 2013, construction of the Building was complete, and all residential units were sold (Winikow Affidavit, Exhibit A, complaint, ¶12). According to plaintiff, the Building was subject to, among other things, “leakage issues due to faulty exterior construction, insufficient heating . . . water ponding in the rear courtyard, roof leakage, and exterior bricks and mortar falling from the [B]uilding” (*id.*, ¶20). Plaintiff also maintains that Bluestone and H.T. hired Kahane and defendant York Restoration Corporation (“York”) “to probe the areas of leakage and to make repairs” (*id.*, ¶24).

Banta hired Kahane on or about March 26, 2007 to “prepare plans and specifications for the remedial work pursuant to . . . findings without conducting additional probes” (Kahane Affidavit, Exhibit 3, Banta/Kahane Agreement). Kahane was the architect and York was the contractor (*id.*, Exhibit 4, August 3, 2008 letter). The Banta/Kahane Agreement also indicated that “these drawings and specifications will identify areas (relayed to us) that are experiencing water infiltration and will provide in detail the method(s) for their repair” (*id.*, Exhibit 3, Banta/Kahane Agreement). Further, the Banta/Kahane Agreement provided, *inter alia*, that “[c]lient agrees that the service provided by Kahane will be rendered without any warranty, express or implied” (*id.*). The Banta/Kahane Agreement did not require Kahane to indemnify Bluestone or to procure insurance for Bluestone or any other entity (*id.*).

By August 3, 2008, Kahane completed its work at the Building and issued a letter to Banta indicating that Kahane completed its work at the Building and that there were “no further reports of water leaks into the Building” (Kahane Affidavit, Exhibit 4, August 3, 2008 letter). However, Plaintiff alleges that the work Bluestone, H.T. and York performed from September 2007 through August 2008 “to identify and repair façade work” was “improperly done and caus[ed] leaks [throughout] the apartments” (Winikow Affidavit, Exhibit A, complaint, ¶28).

On or about August 15, 2014, Plaintiff commenced this action against H.T., Bluestone and York, asserting claims for breach of contract (two against H.T. and Bluestone and one against York as a third-party beneficiary); breach of express warranty (one against H.T. and Bluestone and one against York); and breach of implied warranty (against York) (*id.*, ¶¶55-107).

Bluestone commenced a third-party action on April 26, 2017 against third-party defendants Kahane, John Ellis, Job Opportunities for Women, Inc., Linden Construction Corp., Oldcastle Precast Inc. a/k/a Oldcastle Precast East Inc. (“Oldcastle”), N. Wexler, P.E., Inc (“Wexler”), Car-Win Construction, Inc., B & N Roofing & Sheet Metal, Inc., and Kings County Waterproofing Corp. (“Kings County”) for common-law indemnity, contribution, contractual indemnity, breach of agreement to procure insurance, breach of contract, and breach of warranty (Winikow Affidavit, Exhibit C, third-party complaint, ¶¶ 16-45).

On or about July 19, 2017, Oldcastle filed an answer and asserted cross-claims against all of the named third-party defendants for apportionment, contribution and indemnification (*id.*, Exhibit D). Thereafter, on or about July 21, 2017, Wexler filed an answer and asserted cross-claims for contribution, indemnification, contractual indemnification, and breach of contract for failure to procure insurance (*id.*, Exhibit E). On or about December 22, 2017, Kings County filed an answer and asserted cross-claims (which was not annexed to the moving papers) against all named third-party defendants, and a counterclaim against Bluestone for contribution and indemnification (NYSCEF No. 95). The remaining third-party defendants have yet to appear.

Kahane now moves, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the third-party action and all cross-claims asserted against it. Bluestone also moves for summary judgment, pursuant to CPLR 3212, to dismiss the complaint and all cross-claims and counterclaims as asserted against it.

ARGUMENTS

Motion by Kahane to Dismiss Third-Party Complaint and all Cross-Claims

Kahane argues that Bluestone is not entitled to common-law indemnification because Plaintiff sued Bluestone for its own wrongdoing and has not alleged that Kahane is liable for any of Plaintiff's claimed damages. Kahane maintains that Bluestone was sued for its own wrongdoing and that there are no allegations that Bluestone is vicariously liable for Kahane's actions. Kahane also maintains that all the defendants were sued for their own conduct and not for Kahane's conduct. Kahane additionally argues that Bluestone is not entitled to seek contribution from Kahane because Plaintiff seeks recovery of economic loss and not for personal injury, injury to property or wrongful death.

With respect to the claims for contractual indemnification and failure to procure insurance, Kahane argues that it is entitled to dismissal because there is no contractual relationship between Bluestone and Kahane. Kahane also argues that its agreement with Banta did not require Kahane to indemnify Bluestone or to procure insurance for Bluestone or any other entity. Kahane additionally argues, *inter alia*, that an architect is not subject to a claim for breach of warranty. Moreover, Kahane maintains that the breach of contract claim against it accrued when Kahane completed its work in 2008 and is time-barred because it is subject to a three-year statute of limitations. As for the cross-claims asserted against it, Kahane argues that these claims should be dismissed for the same reasons regarding dismissal of the third-party complaint.

Bluestone has not set forth any opposition regarding the dismissal of its claims for contractual indemnification, breach of contract, failure to procure insurance and breach of warranty. However, Bluestone opposes dismissal of its claim for common-law indemnity and for contribution. With respect to the claim for common-law indemnity, Bluestone argues, among

other things, that the project documents and correspondence demonstrate that Kahane directed and performed the investigative work for the remedial repairs at the Building (White Affirmation, Exhibits E, F, G). Regarding the claim for contribution, Bluestone maintains that Plaintiff seeks recovery for both property damage and economic loss.

York submitted papers which, *inter alia*, incorporated Bluestone's arguments in opposition to the motion. Kings County also submitted opposition which, among other things, maintained that dismissal is premature due to outstanding discovery. Wexler also submitted opposition papers, which incorporated the arguments of York and Kings County.

In reply, Kahane reiterated its arguments in support of dismissal and maintained, *inter alia*, that it did not provide any services in connection with the Offering Plan, or with the initial design or construction of the Building. Further, Kahane argued, among other things, that the project documents and correspondence which Bluestone relies upon fail to demonstrate that Kahane performed any investigative work. Rather, Kahane maintains that the documents and correspondence establish that Kahane performed the scope of its construction administration duties as required under the contract with Banta.

Motion by Bluestone for Summary Judgment to Dismiss Complaint, Cross-Claims and Counterclaims

Bluestone argues that it is entitled to summary judgment dismissing the complaint and all cross-claims and counterclaims asserted against it because no contractual relationship existed between Bluestone and any of the parties in this action. Bluestone also maintains that it was not the Sponsor for the Apartments and that it never entered into a Purchase Agreement with the individual owners or any contract with any entity regarding work at the Building.

Plaintiff argues in opposition that factual issues exist as to whether Bluestone is the successor to or alter ego of H.T. to warrant piercing the corporate veil and that discovery is needed

to resolve such issues. York also submitted papers setting forth the same arguments opposing Kahane's motion to dismiss.

In reply, Bluestone argues, *inter alia*, that plaintiff has not set forth any allegations to warrant piercing the corporate veil and that the claim for needed discovery will not remedy this deficiency.

DISCUSSION

Motion by Kahane to Dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to establish that the documentary evidence conclusively refutes the party's claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]). The movant must demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

When evaluating Kahane's motion to dismiss pursuant to CPLR 3211(a)(7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

"In the classic indemnification case, the one entitled to indemnity from another had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party" (*D'Ambrosio v City of New York*, 55 NY2d 454, 461 [1982]; *see also, Trustees of Columbia Univ v Mitchell /Giurgola Assoc.*, 109 AD2d 449, 452 [1st Dept 1985]). The party seeking indemnification "must show that it may not be held responsible in any degree" (*Rosado v Proctor & Schwartz*, 66 NY2d 21, 25 [1985]).

Further, [s]ince the predicate of common-law indemnity is vicarious liability on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*Trustees of Columbia Univ v Mitchell /Giurgola Assoc., supra* at 452).

Plaintiff has not alleged that Kahane engaged in any wrongdoing, but rather alleges that Bluestone is responsible for the damages Plaintiff sustained. Kahane correctly contends that Bluestone was sued for its own wrongdoing and that there are no allegations that Bluestone is vicariously liable for Kahane’s actions. Kahane also correctly contends that all the defendants were sued for their own conduct and not for Kahane’s conduct.

As Kahane correctly contends, Kahane did not provide any services in connection with the Offering Plan, or with the initial design or construction of the Building. Moreover, the project documents and correspondence do not establish that Kahane performed any investigative work. Kahane also correctly contends that the documents and correspondence establish that Kahane performed the scope of its construction administration duties as required under the contract with Banta. Therefore, Bluestone is not entitled to common-law indemnification from Kahane since Bluestone is an alleged wrongdoer (*see Rosado v Proctor & Schwartz, supra* at 25; *Trustees of Columbia Univ v Mitchell /Giurgola Asso., supra* at 452). As such, the cause of action for common-law indemnification is dismissed pursuant to CPLR 3211(a)(7).

CPLR 1401 provides that:

“[t]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or judgment has been brought or judgment has been rendered against the persons from whom contribution is sought.”

Plaintiff does not seek recovery for property damage, personal injury or wrongful death. Rather, Plaintiff asserts claims against Bluestone for breach of contract, breach of implied warranty, and breach of express warranty, for which Bluestone seeks contribution from Kahane. Specifically, Plaintiff seeks recovery of “the cost of labor and materials to repair, correct, replace and otherwise remediate the defective construction of the [B]uilding and individual [apartments/[u]nits]” (Winikow Affidavit, Exhibit A, ¶¶1, 66, 75, 83, 90).

However, the Court of Appeals ruled that “purely economic loss does not constitute injury to property within the meaning of New York’s contribution statute . . .” (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71NY21, 26 [1987] [internal quotation marks and citation omitted]). The Court of Appeals has further ruled that in construction cases, “the appropriate measure of damages is the cost to repair the defects, or, if the defects are not remediable, the difference in value between a properly constructed structure and that which was in fact built” (*Brushton-Moira Cent. School Dist. v Thomas Assoc.*, 91 NY2d 256, 262).

Contribution is unavailable where one party “is seeking the benefit of its contractual bargain, namely the cost of completing the defective repairs . . .” (*Trump Vil. Section 3. v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dept 2003] [internal quotation marks and omitted]; see also *Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341, 343-344 [1st Dept 1997]).

Here, Plaintiff seeks to recover “the cost of labor and materials to repair, correct, replace and otherwise remediate the defective construction of the building and individual [apartments/[u]nits]” (*id.*, ¶¶, 66, 75, 83, 90). It is apparent that recovery is being sought for economic loss, which precludes a claim for contribution under CPLR 1401. Moreover,

contribution is unavailable since Plaintiff failed to allege that Kahane engaged in any wrongdoing. "A contribution claim may be interposed when one or more parties are alleged to be liable for damages" (*Comi v Breslin & Breslin*, 257 AD2d 754, 756 [3d Dept 1999]). Therefore, the claim and cross-claims for contribution are dismissed pursuant to CPLR 3211(a)(7).

It is well established that "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]).

Here, no contractual relationship exists between Bluestone and Kahane. The contract between Kahane and Banta did not require Kahane to provide contractual indemnity to any party or to name Bluestone an as additional insured on any general liability insurance policy. Additionally, Bluestone failed to identify the existence of any contract that Kahane allegedly breached (*see 757 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004]). Therefore, this claim is dismissed pursuant to CPLR 3211(a)(1) and(a)(7).

Similarly, the claim for breach of the agreement to procure insurance is also dismissed pursuant to CPLR 3211(a)(7) in the absence of a contractual relationship between Bluestone and Kahane.

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). However, there is no contractual relationship between Kahane and Bluestone. Therefore, the cause of action for breach of contract

is dismissed pursuant to CPLR 3211(a)(7). Since this Court dismissed the breach of contract claim, the branch of the motion to dismiss the breach of contract claim as time-barred pursuant to CPLR 3211(a)(5) is denied as moot. Further, “[n]o warranty attaches in the performance of a service. . .” (*Rochester Fund Muns. v Amsterdam Mun. Leasing Corp.*, 296 AD2d 785, 787 [3d Dept 2002]). Therefore, the cause of action for breach of warranty is dismissed.

The cross-claims which the answering third-party defendants assert against Kahane are dismissed for the same reasons regarding dismissal of the third-party complaint.

Bluestone’s Motion for Summary Judgment

“The proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . .” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

“Generally, a party alleging a breach of contract must demonstrate the existence of a contract reflecting the terms and conditions of their purported agreement” (*Mandarin Trading Ltd v Wildenstein*, 16 NY3d 173, 182-183 [2011] [internal citations and quotations omitted]; *see also Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]).

Bluestone has demonstrated its prima facie entitlement to summary judgment by establishing that no contractual relationship existed between Plaintiff and Bluestone. Plaintiff alleges that Bluestone was the Sponsor of the Apartments and is liable for breach of contract based upon its breach of Offering Plan (Winikow Affidavit, Exhibit A, complaint, ¶¶10-17). However, the Offering Plan identifies H.T. as the Sponsor of the Apartments (*id.*, Exhibit H, Offering Plan,

p. 147). Although Plaintiff also alleges that Bluestone breached the terms and conditions of the Purchase Agreements with the individual owners (*id.*, Exhibit A, complaint, ¶8), the Offering Plan identifies H.T. as the Sponsor and the individual owner as the Purchaser (*id.*, Exhibit I, Purchase Agreement, pp. 151, 165). Plaintiff has not presented any evidence establishing that Bluestone was a party to the Offering Plan; that Bluestone entered into any Purchase Agreement with the individual owners; or that Bluestone entered into any contract with Plaintiff or any other entity regarding the Apartments. Moreover, Plaintiff has not demonstrated that Bluestone is the successor in interest to H.T.

A party seeking to pierce the corporate veil must establish that “(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

Here, Plaintiff does not assert any cause of action to pierce the corporate veil. In fact, “there is no evidence of self-dealing, commingling of funds, lack of corporate formalities or other veil-piercing indicia” (*Hartej Corp. v Pepsico Trading Co.*, 255 AD2d 233, 233 [1st Dept 1998], which is required to invoke such doctrine (*see also Sound Communications, Inc. v Rock and Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011]; *Prichard v 164 Ludlow Corp.*, 49 AD3d 408, 409 [1st Dept 2011])).

Contrary to Plaintiff’s contention, no factual issues exist with respect to whether Bluestone is the successor to or alter ego of H.T. to warrant piercing the corporate veil. Also without merit is plaintiff’s claim that discovery is needed to resolve the factual issue regarding whether to pierce the corporate veil since the complaint is devoid of any allegations regarding Bluestone’s complete dominion and control over H.T. (*Prichard v 164 Ludlow Corp.*, *supra* at 409) [“[t]he cause of

action for breach of contract was properly dismissed for failure to allege sufficient facts to justify piercing the corporate veil. Moreover, further discovery will not cure the defects. Only in conclusory terms have plaintiffs alleged how defendants-respondents controlled the corporation with respect to its failure to pay under the buy-out agreement ...”]). Therefore, summary judgment is granted to Bluestone dismissing the complaint and all cross-claims and counterclaims asserted against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion of third-party defendant Arthur Kahane Architect, P.C. to dismiss the complaint and all cross-claims is granted (motion sequence 001) and the third-party complaint and all cross-claims as asserted against third-party defendant Arthur Kahane Architect, P.C. are dismissed, with costs and disbursements as taxed by Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of defendant/third-party plaintiff Bluestone Organization, Inc. for summary judgment dismissing the complaint, and all cross-claims and counterclaims as asserted against Bluestone Organization, Inc. is granted, and the complaint and all cross-claims as asserted against said defendant/third-party plaintiff are dismissed, with costs and disbursements as taxed by Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

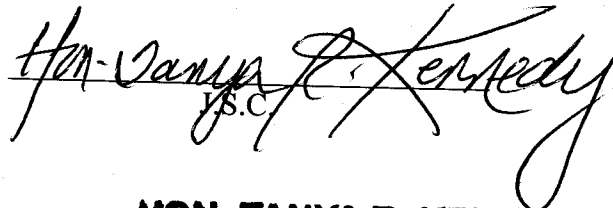
ORDERED that the action is severed and continued against the remaining defendants and third-party defendants, and it is further

ORDERED that the remaining parties are to appear before the Court for a status conference on August 7, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 3, 2019

ENTER:

A handwritten signature in black ink that reads "Hon. Tanya R. Kennedy". The signature is written in a cursive style and includes the initials "J.S.C." written in smaller letters below the main name.

HON. TANYA R. KENNEDY