

County of Saratoga v Delaware Eng'g, D.P.C.

2019 NY Slip Op 34149(U)

June 24, 2019

Supreme Court, Saratoga County

Docket Number: 2015-2969

Judge: Ann C. Crowell

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

 **ORIGINAL**
COUNTY OF SARATOGA

COUNTY OF SARATOGA and SARATOGA
COUNTY SEWER DISTRICT NO. 1,

Plaintiffs,

-against-

DECISION and ORDER
RJI #45-1-2018-1120
Index # 2015-2969

DELAWARE ENGINEERING, D.P.C., FORMERLY
KNOWN AS DELAWARE ENGINEERING, P.C.,
NORTH COUNTRY ENGINEERING, P.C., JETT
INDUSTRIES, INC., and TRAVELERS CASUALTY
AND SURETY COMPANY OF AMERICA,

Defendants.

APPEARANCES:

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ANN C. CROWELL, J.

SARATOGA COUNTY
CLERK'S OFFICE
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FILED

The defendants, Jett Industries, Inc. ("Jett Industries") and Travelers Casualty and Surety Company of America ("Travelers") move to dismiss the cross-claims of defendant Delaware Engineering, D.P.C., formerly known as Delaware Engineering, P.C. ("Delaware Engineering") for contribution and indemnification pursuant to CPLR §§ 3211(a)(1) and (7).

Defendant Delaware Engineering opposes the requested relief and cross-moves for leave to serve an amended answer pursuant to CPLR § 3025(b).

Delaware's contention that Jett Industries' motion is untimely has been considered and rejected. A motion to dismiss pursuant to CPLR § 3211(a)(7) may be made "at any subsequent time." *CPLR § 3211(e)*. A party cannot waive a defense founded upon a release that did not exist at the time issue was joined. *George Strokes Electrical and Plumbing, Inc. v Dye*, 240 AD2d 919 [3d Dept. 1997]; *CPLR §§ 3211(a)(1); (e)*.

On April 9, 2018, the County of Saratoga and Saratoga County Sewer District No. 1 ("plaintiffs") executed, in pertinent part, the following "Limited General Release:"

" COUNTY OF SARATOGA AND SARATOGA COUNTY SEWER DISTRICT NO. 1, hereinafter referred to as RELEASOR, in consideration of the sum of TEN DOLLARS (\$10.00), and other good and valuable considerations, the receipt of which is hereby acknowledged from JETT INDUSTRIES, INC. referred to as RELEASEE, hereby releases RELEASEE, RELEASEE'S heirs, executors, administrators, successors and assigns, as well as RELEASEE'S sureties, including Travelers Casualty and Surety Company of America ("Travelers"), from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEE and/or its sureties, including Travelers, that the RELEASOR, RELEASOR'S successors and assigns ever had, now have or hereafter can, shall or may have, for, upon or by any matter, cause or thing whatsoever from the beginning of the world to the day of the date of the RELEASE relating only to a construction contract identified as Saratoga County Sewer District No. 1 - Wastewater Treatment Plant Expansion Project - Contract #1 General Construction dated July 18, 2008 between Releasor and Releasee (the Contract), except as limited herein."

" MEANING MORE PARTICULARLY, this release applies only to claims brought by Releasor against Releasee and/or Travelers in the litigation in the Supreme Court, State of New York, County of Saratoga, *County of Saratoga and Saratoga County Sewer District No. 1 v. Delaware Engineering, D.P.C. Formerly Known as Delaware Engineering, P.C., North Country Engineering, P.C., Jett Industries, Inc. and Travelers Casualty and Surety Company of America*, Index No. 2015-2969 (the "Action"). Other than claims brought by Releasor against Releasee and/or Travelers in the Action, which are hereby released, Releasor expressly reserves without limitation all warranty claims arising under the Contract, including warranty claims with respect to work related to the

Contract performed by Releasee in 2017; claims for indemnification or contribution arising from claims brought by third parties for personal injury or property damage, and claims relating to obligations to indemnify Releasor contained in the Contract.”

In considering a motion to dismiss for failure to state a cause of action, the question is whether a party has a cause of action, not whether he has stated one. *Torok v Moore’s Flatwork & Foundations, LLC*, 106 AD3d 1421 [3d Dept. 2013]. The complaint must be afforded a liberal construction, the facts plead are presumed to be true and a party is to be accorded every favorable inference. *Rodriguez v Jacoby & Meyers, LLP*, 126 AD3d 1183 [3d Dept. 2015]; *Esposito-Hilder v SFX Broadcasting, Inc.*, 236 AD2d 186 [3d Dept. 1997]. Every favorable inference should be accorded Delaware Engineering with respect to its cross-claims against defendant Jett Industries. Delaware Engineering’s Answer asserts cross-claims against Jett Industries and Travelers sounding in contribution, contractual indemnification and/or common law indemnification.

In 2007, plaintiffs entered into a professional services agreement with Delaware to develop and prepare design plans, specifications and contract documents to expand the Saratoga County Waste Water Treatment Plant’s capacity to 50 million gallons per day. On or about July 19, 2008, plaintiffs entered into a contract with Jett Industries in the sum of \$37,949,000.00 to construct the expansion designed by Delaware. Delaware contracted with plaintiffs for additional services during the construction, including providing a qualified field representative for inspections of critical phases of the construction. Plaintiffs’ first, second and fourth causes of action against Delaware sound in architectural and engineering malpractice with respect to the design of influent main sewage pumps and piping, identified as Pump Nos. 2 and 5 and the design of inground concrete aeration tanks, identified as Nos. 5, 6, 7 and 8. Plaintiffs’ third cause of action asserts that Delaware failed to inspect a large concrete aeration

tank identified as Tank No. 7 and discover certain plugs which were improperly left in the tank by Jett Industries. Plaintiffs' third cause of action is styled as negligence and professional malpractice, but also asserts that Delaware failed to fulfill its contractual duties, responsibilities and obligations. The third cause of action seeks the recovery of "all costs, fines, damages, expenses associated with the repair and remediation of the SCWWTP tanks, including all consequential and incidental damages, reasonable attorneys' fees, Court costs and disbursements." Plaintiffs' sixth cause of action against Delaware and Jett Industries sounds in unjust enrichment. Plaintiffs' fifth cause of action against Jett Industries only sounds in breach of contract.

Delaware's Answer and proposed Amended Answer assert a contribution cross-claim against Jett Industries. However, "it is well settled that a defendant may not seek contribution from other defendants where the alleged 'tort' is essentially a breach of contract." *Westbank Contracting, Inc. v Rondout Valley Central School Dist.*, 46 AD3d 1187, 1190 [3d Dept. 2007] (citations omitted). The "determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought." *Id* (citations omitted). Plaintiffs' third cause of action against Delaware seeks the recovery of "all costs, fines, damages, expenses associated with the repair and remediation of the SCWWTP tanks, including all consequential and incidental damages, reasonable attorneys' fees, Court costs and disbursements." All of the damages sought with respect to the third cause of action are for economic loss where a contribution claim is inapplicable. Plaintiffs have not asserted any legal duty against Delaware, with respect to the plugs left in tank No. 7, independent of Delaware's contractual obligations to inspect the work and discover the plugs improperly left in place by Jett Industries. *Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw &*

Folley, 71 NY2d 21 [1987]. Delaware's cross-claim for contribution against Jett Industries is dismissed. The dismissal of Delaware's contribution claim based upon the contractual basis of liability being asserted against it renders the arguments regarding the release and General Obligations Law § 15-108 moot.

Delaware's cross-claim for common law indemnification is similarly dismissed. The liability of Delaware, if any, for not finding the plugs left in by Jett Industries is not vicarious, but arises from Delaware's alleged failure to perform its contractual inspection obligations. *Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 199-200 [3d Dept. 1989], lv. den. 75 NY2d 702 [1989].

An indemnity agreement which purports to hold an indemnitee harmless for its own negligence is void as against public policy. *General Obligations Law § 5-322.1; O'Brien v Key Bank*, 223 AD2d 830 [3d Dept. 1996]; *see also, Lue v Finkelstein & Partners, LLP*, 94 AD3d 1386 [3d Dept. 2012]. Jett Industries contends that Delaware's negligent performance of its contract (Delaware's failure to find the plugs left in the tank by Jett Industries during its required inspections of the work performed) renders the contractual indemnification provisions against Jett Industries unenforceable. Plaintiffs' claims alleging Delaware's failure to properly perform its contractual inspection obligations sound in breach of contract only, not negligence. *Torok v Moore's Flatwork & Foundations, LLC*, 106 AD3d 1421 [3d Dept. 2013]. Therefore, any failure to properly inspect the tanks cannot bar Delaware's contractual indemnification claim against Jett Industries. To the extent that plaintiffs contend that Delaware negligently designed the tanks where Jett Industries improperly left plugs installed, any finding of such negligence must await a jury's determination. Jett Industries's motion to dismiss Delaware's cross-claim for contractual indemnification is denied. The plaintiffs and Jett Industries

“Limited General Release” does not preclude Delaware’s cross-claim for contractual indemnification.

Delaware’s motion to amend its Answer to amplify its cross- claims for contribution and common law indemnification is denied. Delaware’s motion to amend its Answer to amplify its cross-claim for contractual indemnification is granted. Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to the attorney for the defendant Delaware for filing and entry. The underlying papers will be filed by the Court.

Dated: June 24, 2019
Ballston Spa, New York


ANN C. CROWELL, J.S.C.

cc: Mark Seiden, Esq.

Papers Received and Considered:

Notice of Motion, dated April 12, 2019

Affirmation of Clifford G. Tsan, Esq., dated April 12, 2019, with Exhibits A-4

Memorandum of Law, dated April 12, 2019

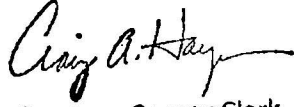
Notice of Cross Motion, dated May 10, 2019

Affirmation of Matthew D. Gumaer, Esq., dated May 10, 2019, with Exhibits 1-2

Memorandum of Law, dated May 10, 2019

Affirmation of Joel M. Howard, III, Esq., dated May 7, 2019, with Exhibit A

Reply Memorandum of Law, dated May 23, 2019

ENTERED
Craig A. Hayner

Saratoga County Clerk

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