

Fortuna Pheasant Close LLC v Midtown Restorations, LLC

2020 NY Slip Op 30986(U)

April 19, 2020

Supreme Court, New York County

Docket Number: 154958/2014

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE
Justice

PART 15

Fortuna Pheasant Close LLC

INDEX NO. 154958/2014
MOTION DATE _____
MOTION SEQ. NO. 5,6,7,8, and 9

v.

Midtown Restorations, LLC & Tambour USA LLC

The following papers, numbered _ to _ were read on this motion to/for _____ **PAPERS**
NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

CROSS-MOTION: YES NO

Melissa A. Crane, JSC

The court consolidates motions 5,6,7,8, and 9 for disposition.

The main plaintiff, Fortuna Pheasant Close LLC (Fortuna), commenced this action in 2014, against Tambour USA, LLC. (Tambour) and Midtown Restorations LLC (Midtown). The main lawsuit involves primarily allegations that Tambour and Midtown breached their contractual obligations and warranties to Fortuna when they provided and installed waterproofing material on Fortuna’s property at 90 Pheasant Close Road East in Southampton (the Southampton Property). After the time to implead had passed, Tambour and Midtown initiated a rash of third-party actions against basically any business that had anything to do with construction at the Southampton Property.

The deadline to implead in this case was October 2017. On October 23, 2018, plaintiff filed the Note of Issue and Certificate of Readiness. On December 21, 2018, Tambour commenced a third third-party action against Crown Waterproofing, James McDonough Jr., McDonough & Conroy Architects, P.C., Marcello Pozzi, Mllo Inc., Araiys Design, L.A., P.C., Tedeschi USA, LLC, and CMM Sitework, Inc., and Top Remodeling, Inc.

Most of these parties move to dismiss the third-party action. In motion 6, CMM SITEWORK, INC, (CMM), moves to dismiss the claims against it. Plaintiff hired CMM to demolish an existing building, pool and driveway on the Southampton Property. Plaintiff has not

sued CMM. In motion 7, McDonough & Conroy, P.C. and James McDonough, whom plaintiff hired for architectural services and did not sue, moves to dismiss the third-party claims Tambour and Midtown have asserted against it.

In motion 8, Marcello Pozzi and MLLO, Inc (collectively “Pozzi defendants” move to dismiss the third-party claims. The Pozzi defendants provided design and architectural services to plaintiff. However, plaintiff has not sued the Pozzi Defendants directly.

In motion 9, Araiys Design L.A., P.C. (“Araiys”), moves to dismiss the third-party claims against it. Araiys provided plans to plaintiff for the grounds and tennis court. Plaintiff has not sued Araiys directly.

The court grants motion sequence numbers 6-9 to dismiss. First, because plaintiff has sued Tambour and Midtown for Tambour and Midtown’s own actions, there is no vicarious liability that would support a claim for common law indemnification. *Structure Tone, Inc v Universal Services Group, Ltd et al.*, 87 AD3d 909, 911[1st Dep’t 2011]). Nor is there a contract that would support a claim for contractual indemnification. Accordingly, the court dismisses all third-party claims for indemnification.

Nor can Tambour or Midtown sue these third parties for contribution. The right to contribution derives from CPLR 1401:

Two 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 a judgment has been rendered against the person from whom contribution is sought.

Contribution is not available for damages for economic loss, such as when the main plaintiff sues for breach of contract (see *Galvin Bros., Inc. v Town of Babylon*, 91 AD3d 715, 715-16 [2d Dep’t 2012][motion to dismiss contribution claim pursuant to CPLR 3211(a)(7) was proper where plaintiff sought to recover only for economic loss]; *Richards Plumbing and Heating Co., Inc. v Washington Group, International*, 59 AD3d 311, 312 [1st Dep’t 2009] [affirming motion to dismiss third party complaint against architect for failure to perform work properly where main plaintiff only claimed breach of contract]).

Tambour tries to characterize the main plaintiff’s claims as sounding in tort, because plaintiff alludes to negligence in the complaint. “In determining whether an action lies on contract or in tort, courts consider the nature of the damages sought by the plaintiff in the main action” *Rothberg v Phil’s Main Roofing, LLC*, 2017 WL 1162904 at *8 [SDNY March 24, 2017]; see also, *Trump Vill. Section 3., Inc. v NY State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dep’t 2003] [“where a plaintiff’s direct claims against a codefendant seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable;”]; see also *Structure Tone, Inc v Universal Services Group, Ltd et al.*, 87 AD3d 909, 911[1st Dep’t 2011] [dismissal of contribution claim appropriate “because despite USG’s attempts at casting its claims in tort, the claims are based on alleged breaches of an express contract”]).

Here, the fact section of the main plaintiff's amended complaint talks only of contractual obligations. At no point does the amended complaint allege any facts constituting negligence. Thus, to the extent the complaint addresses negligence or professional malpractice at all, it is bare bones and conclusory. Moreover, the measure of damages plaintiff seeks is exactly the same for each claim as it is for the breach of contract claim. It is, therefore, clear that plaintiff is suing under a breach of contract theory for economic loss. Accordingly, contribution is unavailable to defendants Tambour and Midtown. Consequently, the court grants motions 6-9, seeking dismissal of the third-party complaint against these movants. By virtue of this decision, any counterclaims and cross claims are dismissed as well.

Motion 5 and Tedeschi USA, LLC's (Tedeschi) cross motion differ from motions 6-9 in that they do not ask for dismissal pursuant to the economic loss rule. Rather, in motion 5, Crown Waterproofing, Inc., (Crown Waterproofing) moves to dismiss because it claims prejudice from being impleaded five years after this action commenced, while Tedeschi cross moves under the same reasoning. Alternatively, movants request severance.

The court denies that part of the motion to dismiss, but grants that part of the motion to sever. On June 28, 2017, this court set an impleader deadline of October 26, 2017. The order stated: "No Further extensions, FINAL" (See EDOC 73). The note of issue was filed in October 2018. Despite the order, and the note of issue, it was not until December 20, 2018 that Tambour initially filed its third-third party complaint.

Tambour blames its failure to join additional parties earlier on plaintiff's failure to provide discovery. However, neither Tambour nor Midtown reached out to the court, as instructed, if problems arose.

Despite the delay, the court will sever the action against Crown Waterproofing and Tedeschi. Although Crown Waterproofing complains that the delay has prejudiced it, because employees have moved on and documents have been destroyed, Tambour is entitled to explore this assertion before the court dismisses the case. Moreover, experience has shown that documents are often never truly gone. Crown Waterproofing and Tedeschi have leave to renew this motion, upon the close of discovery and after conferencing the motion with the court.

To the extent Tambour claims that severance will prejudice it, considering that Crown Waterproofing and Tedeschi's activities at the Southampton Property are different from Tambour's and Midtown's, the cases are not so intertwined that they absolutely need to be tried together. For example, it would appear that these entities were not present at the same time. Considering the course that Tambour has charted in this litigation, and the prejudice that would result to plaintiff in delaying a trial in a case it brought it 2014, severance is the wiser course rather than vacating the note of issue.

Accordingly, it is

ORDERED THAT the court denies that part of motion seq. 5 to dismiss, but grants that part of motion 5 to sever; and it is further

ORDERED THAT plaintiff shall serve a new caption on the county clerk and trial support via e filing; and it is further

ORDERED THAT the court grants the motion (seq. 6) of CMM SITEWORK, INC. to dismiss all claims against it; and it is further

ORDERED THAT the court grants the motion (seq. 7) of McDonough & Conroy, P.C. and James McDonough, to dismiss all claims against it; and it is further

ORDERED THAT the court grants the motion (seq. 8) of Marcello Pozzi and MLLO, Inc to dismiss all claims against it; and it is further

ORDERED THAT the court grants the motion (seq. 9) of Araiys Design L.A., P.C. moves to dismiss all claims against it; and it is further

ORDERED THAT the remaining claims are severed and shall continue; and it is further

ORDERED THAT the clerk is directed to enter judgment accordingly.

Dated: April 19, 2020
New York, NY



JSC