

**Michael Anthony Contr. Corp. v Queens N.Y. Realty
LLC**

2020 NY Slip Op 35792(U)

January 28, 2020

Supreme Court, Nassau County

Docket Number: Index No. 604986/2014

Judge: Jerome C. Murphy

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publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

MICHAEL ANTHONY CONTRACTING CORP.,

Plaintiff,

- against -

**QUEENS N.Y. REALTY LLC, MIDRE CONTRACTING
CORP., ACTION STORE FRONTS INC., ROMAN IRON
WORKS INC., MAX HOROWITZ & SON INC.,
PRIME LIGHT ELECTRICAL CONSTRUCTION
MAINTENANCE INC., and SURETEC INSURANCE
COMPANY,**

Defendants

**QUEENS N.Y. REALTY LLC, on behalf of itself and as
subrogee of all other persons similarly situated as trust
fund beneficiaries of Lien Law Trusts of third-party
defendant Michael Anthony Contracting Corp., and
Benjamin Mason, M.D.,**

Third-Party Plaintiffs,

- against -

**MICHAEL ANTHONY CONTRACTING CORP.,
MICHAEL PERNA, HYMAN HAYES ASSOCIATES,
LLC, MYLES HYMAN, M/E ENGINEERING, P.C.,
F. JOSEPH STRAUB, P.E., HIG SERVICES, INC.,
LONG ISLAND CONCRETE INC., HART ROOFING
& WATERPROOFING, INC., ACTION STORE
FRONTS INC, ROMAN IRON WORKS, INC.,
MAX HOROWITZ & SON INC., and
JOHN DOES #1-10, inclusive, as those persons**

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Motion Date: 12/6/19

Sequence Nos.: 013

MD

DECISION AND ORDER

and entities having an interest in the trust funds received, or to be received by Michael Anthony Contracting Corp., for the improvement of the property located at 105-12 101st Avenue, Queens County, New York (a/k/a Block 9423, Lot 6 on the Land and Tax Map of Queens County, New York),

Third-Party Defendants.

The following papers were read on this motion:

Sequence No. 013 also read with Motion Sequence No. 011 papers:

Notice of Cross-Motion, Affirmation and Exhibits.....	1
Affidavit in Opposition and Exhibits.....	2
Memorandum of Law in Opposition.....	3
Affirmation in Support.....	4
Amended Complaint.....	5
Third Amended Third-Party Complaint.....	6
Memorandum of Law of Third-party Defendant in Support.....	7
Notice of Rejection.....	8

PRELIMINARY STATEMENT

Third-party defendants, M/E Engineering, P.C., and F. Joseph Straub, P. E. brings forth this application for an Order pursuant to CPLR §3212; a) granting the M/E defendants a complete dismissal of the third party claims asserted against them for the reasons set forth in sections V, VI, VII, IX, and XIV of Third-Party defendant Hyman Hayes Associates (“HHA”) Memorandum of Law in support of its motion for summary judgment; and b) denying HHA’s motion with respect to its request for the dismissal of all cross-claims asserted by the M/E defendants as against HHA; and c) for such other and further relief as this Court deems just and proper. Opposition and reply have been submitted.

BACKGROUND

M/E Engineering (“M/E”) is a sub-consultant to Hyman Hayes Associates, LLC (“HHA”) and does not have a contract with either Queens N.Y. Realty LLC, (“QNYR”) or Benjamin

Mason, M.D. ("Dr. Mason"). It was contracted to perform electrical services in connection with the project at 105-12 101st Avenue, Queens, New York, known as the Mason Eye Care Center.

M/E and its principal, F. Joseph Straub, P.E., cross-move to dismiss the Third-party Complaint against them on some of the same bases as HHA moved for dismissal of the Third-party Complaint against them:

- V. Dr. Mason was not sued by Michael Anthony Contracting Corp. ("MACC"), and therefore has no basis for a derivative claim (HHA Memorandum of Law in Support, pp. 11—12);
- VI. All claims for contribution should be dismissed pursuant to the Economic Loss Doctrine (*id.*, at pp. 12—13);
- VII. Dr. Mason and QNYR's common law indemnity claims are unsustainable because plaintiff's claims against QNRY are based upon contract, and plaintiff alleges that QNYR was actively negligent (*id.*, at pp. 14—16);
- IX. Dr. Mason and QNYR's claims for affirmative relief, including lost profits, and unnecessary change orders, should be dismissed, because, in a related action, Dr. Mason acknowledged that neither he, nor QNYR, have a viable claim to that relief (*id.*, at pp. 17—20);
- XIV. QNYR's and Dr. Mason's negligence/professional malpractice and negligent misrepresentation claims are barred by New York's Economic Loss Rule (*id.*, at pp. 28—30).

DISCUSSION

Dr. Mason's claims for indemnity and contribution are dismissed as against the M/E, third-party defendants. Dr. Mason has not been sued by plaintiff, and cannot be found personally liable for damages in this action. Thus, Dr. Mason has no reason to have a third-party action.

To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that . . . a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries (*Guerra v. St. Catherine of Siena*, 79 A.D.3d 808, 809 [2d Dept. 2010]). "Purely economic loss resulting from a breach of contract does not constitute

‘injury to property’ within the meaning of New York’s contribution statute [CPLR 1401]” (*Eisman v. Village of North Hills*, 149 A.D.3d 806 [2d Dept. 2017], quoting from *Board of Educ. Of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.YT.2d 21, 26

Third-party plaintiff, Dr. Mason, has not suffered damage to property, and is claiming pure economic loss. The cause of action for contribution is denied.

Dr. Mason claims common law indemnity against M/E and Straub. The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnifier. The key element is not a duty running from the indemnitor to the injured party, but rather is ‘a separate duty owed the indemnitee by the indemnitor (*Santoro v. Poughkeepsie Crossings, LLC*, 2019 WL 6720299 [2d Dept. 2019], quoting from *Raquet v. Braun*, 90 N.Y.2d 117, 183 [1997], quoting *Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680, 690 [1990]).

The action by MACC is based upon contract, not negligence. In *Carmania Corp. N.V. v. Hambrecht Terrell Intern.*, 705 F.Supp. 936 (U.S.D.C., S.D.N.Y. 1989), plaintiff alleged that omissions and breaches of contract by an architect were a breach of contract and constituted professional malpractice. It holds that, while merely charging a breach of duty and due care, employing tort language, does not, without more, transform a simple breach of contract into a tort claim.

Nonetheless, New York law allows concurrent recovery in tort and contract so long as a defendant violates distinct legal duties : one that arises from the contract at issue, and one that arises independently. Citing *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 70 N.Y.2d 382, 70 N.Y.2d 382 (1982), plaintiff’s tort claim must spring from circumstances extraneous to, and not constituting elements of the contract. The Court determined that as an architect, defendant was required to conform to the standard of skill and care that the law demands of professionals. As such, third-party plaintiff, QNYR, satisfied the *Clark-Fitzpatrick* standard. (See also *Dormitory Authority v Samson Construction Co.*, 30 N.Y. 3d 704,711.[2018]).

In the instant case, third-party plaintiff, QNYR, alleges that M/E and Straub have violated standards separate and apart from any contractual claim, in that they have failed to abide by the standards for engineers. The motion to dismiss the claim by QNYR for common law

indemnity is denied.

Third-party defendant seeks dismissal of claims of QNYR for lost profits or unnecessary change orders because, in a separate Queens action, Dr. Mason has testified that neither he nor QNYR sustained any such damages. The testimony in the related Queens County action does not unambiguously state that the damages to which Dr. Mason was referring to are the same damages which are claimed in the third-party action. The motion to dismiss the claims for lost profits and unnecessary change orders present factual issues which preclude dismissal, and the motion is denied.

Third-party plaintiff, QNYR, seeks dismissal of negligence/malpractice claims in the Third-party Complaint. A plaintiff may not maintain suits predicated on both tort and contract theories when the damages alleged were only cognizable in contract (*Carmania Corp., N.V. v. Hambrecht Terrell Intern.*, 705 F. Supp. 936 [U.S.D.C., S.D.N.Y. 1989]). Where a negligence/malpractice claim is in addition to a breach of contract claim, “ ‘[t]he key to determining whether a claim is duplicative of one for malpractice is discerning the essence of each claim’ ” (*Star Auto of Bayside, Inc. v. Voynow, Bayard, Whyte and Company, LLP*, 2019 WL 1333256 [U.S.D.C., E.D.N.Y. 2019], quoting *Johnson v. Proskauer Rose LLP.*, 129 A.D.3d [1st Dept. 2015]).

The Fifth Cause of Action in the Third Amended Third-party Complaint alleges negligence and professional malpractice against ME Engineering and Straub. It alleges that they had a duty to design and develop engineering plans and specifications for the construction of the Project in accordance with the applicable building codes, regulations and requirements for surgical centers. It is alleged that the third-party defendants prepared engineering plans and designs for the sprinkler and generator systems that failed to comply with applicable building codes and regulations.

The negligence/malpractice claims are contract related, and do not allege damages different from those sustained by third-party plaintiffs as a result of their claimed breach of contract claims against other third-party defendants. Third-party plaintiff does not have a contract with M/E or Straub, and there is no claim of contract breach against them. Therefore, the

negligence/malpractice claims are not duplicative of breach of contract claims, and the motion to dismiss the Fifth Cause of Action is denied. For similar reason the motion to dismiss the Sixth Cause of Action is also denied.

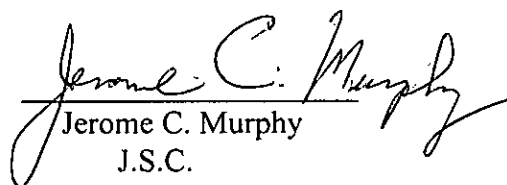
Additionally, and consistent with the aforesaid, there are questions of fact which must result in the denial of the requested dismissal of the M/E defendants' cross-claims against HHA & Hyman.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: January 28, 2020
Mineola, New York

ENTER:


Jerome C. Murphy
J.S.C.

ENTERED
FEB 03 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE