

**Institute for Community Living, Inc. v Linden
Courtyard, LLC**

2021 NY Slip Op 30262(U)

January 21, 2021

Supreme Court, Kings County

Docket Number: 524000/2018

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 21st day of January 2021.

PRESENT:

Honorable Reginald A. Boddie, JSC

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INSTITUTE FOR COMMUNITY LIVING, INC.,

Plaintiff(s),

Index No. 524000/2018
Cal. No. 15 MS 4

-against-

DECISION AND ORDER

LINDEN COURTYARD, LLC,

Defendant(s).

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LINDEN COURTYARD, LLC,

Third-Party Plaintiff,

-against-

JBM CONTRACTING CORP., LNC HOLDING CORP.,
BROOKER ENGINEERING, PLLC, TWIN PEAKS,
INC., CITI-WIDE TESTING INC., REPUBLIC
SCAFFOLD & HOIST CORP., NAVI STRUCTURAL
ENGINEERING, PLLC, PACE ENGINEERING PC,
JAFAR HAIDER d/b/a HAIRDER ENGINEERING,
and J&G CONSTRUCTION SERVICES, INC.,

Third-Party Defendants.
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Papers Numbered
MS 4 Docs. # 121-128, 136, 147-152

Upon the foregoing cited papers, the decision and order on Brooker Engineering, PLLC's motion to dismiss Linden Courtyard, LLC's Amended Third Party Complaint against it, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), is as follows:

Plaintiff commenced this action alleging damages for breach of contract, trespass, and unjust enrichment against defendant/third party plaintiff Linden Courtyard, LLC's (Linden). In

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September 2016, plaintiff granted Linden a license to enter its premises to install rooftop protections, drainage systems, weatherproofing, and crack monitors to protect it from any damages caused by construction at the adjoining Linden property. Plaintiff alleged its contract with Linden required Linden to prevent, monitor, fix, reimburse, and/or indemnify it for any and all damages to its premises resulting from construction on the Linden property. Plaintiff alleged substantial physical damage occurred to its property as the result of construction, which it paid to mitigate or repair, and for which Linden failed to make it whole. Plaintiff also alleged, after expiration of the license, Linden's failure to remove protective equipment and machinery from its premises constituted trespass and unjust enrichment.

Linden brought a third party complaint against its various subcontractors alleging claims for contribution and indemnification and that, if plaintiff suffered damages, they were the result of the subcontractors' negligence. Third party defendant, Brooker Engineering, PLLC (Brooker), sought to dismiss Linden's Amended Third Party Complaint against it, pursuant to 3211 (a) (1) and (a) (7). Brooker argued Linden's claims for contractual indemnification fail because Brooker never entered into any contract, written or otherwise, by which it agreed to procure or maintain an insurance policy with Linden named as an additional insured or to defend, hold harmless, or indemnify Linden. Brooker averred it was never retained to perform any work with regard to construction or supervision of any physical work, or the maintenance or removal of the scaffold and construction equipment complained of in the main action. Brooker further argued Linden's claims for common law indemnification fail because plaintiff's claims against Linden in the main action alleged Linden's breach of its contract with plaintiff, including Linden's alleged failure to remove scaffolding and construction equipment from the subject premises and/or to reimburse plaintiff for expenses it was contractually obligated to pay, caused plaintiff's damages.

Brooker proffered the affidavit of its principal, Brian Brooker. Mr. Brooker averred that Brooker never entered into a contract, written or otherwise, by which it agreed to procure or maintain insurance naming Linden as an additional insured or indemnify and hold harmless Linden. Mr. Brooker proffered the December 2, 2014 Proposal for Engineering Services (Proposal) for the 200-210 Linden Boulevard – SOE project and its September 25, 2015 Additional Work Authorization Form (AWAF) signed by Brooker Engineering and Lightstone Management.

The Proposal indicated Brooker was “. . . pleased to provide [J. Frank] Associates, Inc.] with a proposal for preparing a temporary shoring structure with regard to the construction and excavation for the proposed structure at the above referenced property” [and] “. . . the support of excavation drawings for the above referenced building in accordance with the architectural layout by [the architect].” The services included in the Proposal appear to describe shoring work. The AWAF indicated Brooker was to revise drawings related to an audit of Linden’s project by the Excavation Unit of the relevant buildings department and communications from plaintiff’s engineer regarding cracks on plaintiff’s building. Lightstone agreed to indemnify and hold harmless Brooker for liability related to plaintiff’s property.

Linden filed untimely opposition on January 6, 2021, without any excuse for its lateness. According to the stipulation of the parties, opposition was due on or before December 9, 2020. Therefore, the Court declines to consider Linden’s opposition. Nevertheless, the motion is denied.

“When a party moves to dismiss a complaint for failure to state a cause of action, the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (CPLR 3211 [a]; *Bokhour v GTI Retail Holdings*, 94 AD3d 682 [2d Dept 2012]). “In considering such motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only

whether the facts as alleged fit within any cognizable legal theory” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010] [citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus’ ” (*Sokol*, 74 AD3d at 1181, quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Furthermore, “affidavits submitted by a defendant on a motion to dismiss for failure to state a cause of action will almost never warrant a dismissal unless they establish conclusively that the plaintiff has no cause of action” (*Sokol*, 74 AD3d at 1182).

Here, the documents proffered and the affidavit of Mr. Brooker fail to establish Brooker’s contention that it provided nothing more than drawings. Therefore, Linden has asserted cognizable claims against Brooker in its third party complaint and the motion is denied.

ENTER:



 Honorable Reginald A. Boddie
 Justice, Supreme Court

**HON. REGINALD A. BODDIE
 J.S.C.**

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