

22 Gramercy Park LLC v Michael Haverland Architect, P.C.
2021 NY Slip Op 30307(U)
February 3, 2021
Supreme Court, New York County
Docket Number: 155017/2019
Judge: Shawn T. Kelly
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PRESENT: HON. SHAWN T. KELLY

Justice

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 57**

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22 GRAMERCY PARK LLC and
ERIC ELLENBOGEN,

Plaintiffs,

-against-

MICHAEL HAVERLAND ARCHITECT, P.C.,

Defendant.

-----X

MICHAEL HAVERLAND ARCHITECT, P.C.,

Third-Party Plaintiff,

-against-

LEHR ASSOCIATES CONSULTING
ENGINEERS LLP,

Third-Party Defendant.

-----X

MICHAEL HAVERLAND ARCHITECT, P.C.,

Second Third-Party Plaintiff,

-against-

INTEGRITY CONTRACTING, INC.,

Second Third-Party Defendant.

-----X

Index No. 155017/2019

Motion Sequence Numbers
004, 005 and 006

DECISION AND ORDER

Third-Party
Index No. 595848/2019

Second Third-Party
Index No. 595028/2020

Motions bearing sequence numbers 004, 005 and 006 are consolidated herein for resolution. In sequence number 004, third-party defendant Lehr Associates Consulting Engineers LLP (LACE) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the two cross-claims that second third-party defendant Integrity Contracting, Inc. (ICI) has asserted against it.

In motion sequence number 005, LACE moves, pursuant to CPLR 2221 (d) (2), for an order granting reargument of that portion of the court's decision and order entered July 20, 2020 (Decision [NYSCEF Doc No. 104]) in motion sequence number 003, which denied LACE's motion to dismiss the cause of action for contribution asserted against it by defendant and third-party plaintiff Michael Haverland Architect, P.C. (Haverland) in its third-party complaint (NYSCEF Doc No. 119).

In motion sequence number 006, Haverland moves to reargue the Decision, pursuant to CPLR 2221 (d) (2), insofar as it granted LACE's motion to dismiss Haverland's cause of action against LACE for common law indemnification.

Background

These motions relate to the construction and development of a condominium located at 22 Gramercy Park South in Manhattan (Condominium) by plaintiff 22 Gramercy Park, LLC, the project's developer, and plaintiff Eric Ellenbogen (plaintiffs). In their complaint (underlying complaint [NYSCEF Doc No 2]), at paragraph 16, plaintiffs identify defendant and third-party plaintiff Haverland as the architect of record for the project which, pursuant to a written contract between Haverland and Ellenbogen, made Haverland responsible for performance of architectural services in connection with the renovation and construction of the Condominium, including its mechanical and other building systems, facades, building-wide schematic design and interior design, as well as supervision of construction at the Condominium.

The underlying complaint alleges that Haverland performed its architectural design and construction supervision duties negligently, which resulted in defects in the Condominium's air conditioning, humidity and temperature controls, heating system, windows, and other miscellaneous defects. The underlying complaint further alleges that as a result of these defects, the Condominium's Board of Managers (Board) and the owner of Unit 2 of the Condominium, 22GramercyParkSouthGroup (22Group), had to cure the defects at their own expense. Their remediation included removing existing ceilings and walls, fabricating and installing seven access panels, and replacing or servicing existing air conditioning units throughout the Condominium (*id.* ¶ 27).

After the Board and 22Group threatened to sue to recoup the costs they incurred in fixing these defects, plaintiffs settled the claim for \$250,000. Plaintiffs then sued Haverland in this court under index number 155017/2019 for common law indemnification, seeking to recover the settlement amount of \$250,000, plus attorneys' fees and expenses of \$23,869.75.

In its third-party action under index number 595848/2019, Haverland sues LACE for common law indemnification and contribution, alleging that LACE, as the mechanical design engineer for the project, was responsible for the design of the Condominium's HVAC, plumbing, fire protection, and electrical systems and oversaw their installations (Haverland third-party complaint [NYSCEF Doc No. 119] ¶ 10). Haverland asserts that any damages plaintiffs may have sustained as alleged in the underlying complaint were caused by LACE's negligence, and that if judgment is rendered against Haverland, LACE must indemnify Haverland or contribute to any portion of such judgment attributable to LACE's negligence (*id.* ¶¶ 12-15).

In its second third-party action under index number 595028/2020, Haverland sues ICI for contractual indemnification and common law indemnification and contribution, alleging that ICI

as the general contractor for the Condominium project was responsible for the construction and installation of the Condominium's HVAC system, windows, and other miscellaneous items which plaintiffs allege were negligently constructed and negligently installed (Haverland second third-party complaint [NYSCEF Doc No. 110] ¶¶ 7-9). Haverland asserts that any damages plaintiffs may have sustained as alleged in the underlying complaint were caused by ICI's negligence, breach of contract, or breach of other duty and that if judgment is rendered against Haverland, ICI must indemnify Haverland or contribute to any portion of such judgment attributable to ICI, and/or caused by ICI, or those acting on its behalf (*id.* ¶¶ 10-21).

In motion sequence number 003, LACE moved pursuant to CPLR 3211 (a) (7) to dismiss the two causes of action asserted against it by Haverland in its third-party complaint. By decision and order entered July 20, 2020 (NYSCEF Doc No. 121 [Decision]), LACE's motion to dismiss the third-party complaint was granted as to Haverland's first cause of action for common law indemnification, but was denied as to Haverland's second cause of action for contribution.

Discussion

When a court rules on a motion to dismiss under CPLR 3211 it "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks and citations omitted]).

"However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence" (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] [citation omitted]). A motion to

dismiss under CPLR 3211 (a) (1) “may be granted if documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law. One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63 [internal quotation marks, alteration and citations omitted]).

On a motion to dismiss under CPLR 3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Again, the court must “accept the complaint’s factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal quotation marks and citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

“A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221 [d] [2]; *see also Sachar v Columbia Pictures Indus., Inc.*, 129 AD3d 420, 421 [1st Dept 2015] [“motion court providently exercised its discretion in granting [] motion for reargument on the basis that it had overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision”] [internal quotation marks and citation omitted]).

Each of the motions before this court address claims for common law indemnification and contribution. Common law indemnification generally “involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer” (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1st Dept 1985]). To state a claim for common law indemnification, a party must allege not only that the proposed indemnitor’s negligence contributed to the cause of the injury, “but also that the party seeking indemnity was free from negligence” (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010] [citation omitted]).

“CPLR Article 14 codifies the principles of equitable contribution” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C1401:1). Generally, “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” (CPLR 1401).

“Contribution is generally available as a remedy when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person” (*Trump Vil. Section 3*, 307 AD2d at 896 [internal quotation marks, alteration and citations omitted]). “A contribution claim can be made even when the contributor has no duty to the injured plaintiff” (*id.* [citation omitted]). “In such situations, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable” (*id.* [citation omitted]). “The critical requirement for apportionment by

contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*id.* internal quotation marks and citations omitted)).

A cause of action for contribution, however, must allege a particular tort liability as predicated by the statute. “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” (*id.* 307 AD2d at 897 [citations omitted]).

Motion Sequence Number 004

In motion sequence number 004, LACE moves to dismiss the cross-claims asserted against it by second third-party defendant ICI. ICI’s first cross-claim against LACE is premised on common law indemnification and contribution (ICI’s answer to second third-party complaint [NYSCEF Doc No. 100] ¶¶ 51-52). Its second cross-claim asserts a cause of action against LACE for contractual indemnification and reiterates its cross-claim for common law indemnification (*id.* ¶¶ 53-54).

LACE asserts each of ICI’s cross-claims must be dismissed. In its second cross-claim (¶ 53 of its second third-party complaint [NYSCEF Doc No. 100]), ICI alleges that LACE is obliged to indemnify it “under the common law and by contract.” LACE denies that it had a contractual relationship with ICI and asserts ICI has not alleged, and cannot allege, the existence of a contract between them to support a right to contractual indemnification (*see Utica Mut. Ins. Co. v Sweet Constr. Corp.*, 169 AD2d 382, 383 [1st Dept 1991] [where “[n]o allegations of express or implied contract are made. . . no valid claim for indemnification has been stated”]).

ICI opposes dismissal of this part of its indemnity cross-claim by noting that the documentary evidence submitted by LACE, namely its July 10, 2003 engineering proposal to plaintiff Ellenbogen (*see* affirmation of Jerome S. Olnier, Esq., executed December 10, 2020

[Olnier aff] [NYSCEF Doc No. 166], ¶¶ 3-4, citing exhibit D to affirmation of James P. Kelly, Esq., executed August 6, 2020 [NYSCEF Doc No. 111]), does not satisfy LACE's burden under CPLR 3211 (a) (1). The existence of a putative agreement between LACE and plaintiff Ellenbogen does not conclusively establish that ICI has no contractual relationship with LACE (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002] ["CPLR 3211(a)(1) motion to dismiss on the ground that the action is barred by documentary evidence . . . may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"] [citation omitted]).

In its answer to the second third-party complaint, however, ICI makes no affirmative allegation that an express or implied contract exists between it and LACE and offers no other evidence or argument in opposition to LACE's motion to dismiss its cross-claim for contractual indemnification. ICI's second cross-claim is therefore dismissed for failure to state a cause of action under CPLR 3211 (a) (7).

With respect to common law indemnification, LACE contends that it has no contractual or other relationship with ICI that would support a cause of action for common law indemnification and cites, among other authority, the Court of Appeals decision in *Raquet v Braun*, which states "the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor" (90 NY2d 177, 183 [1997] [internal quotation marks and citation omitted]).

ICI limits its opposition to LACE's motion to dismiss its common law indemnification cross-claim to again questioning the sufficiency of LACE's documentary evidence and arguing its cross-claim should be deemed viable, considering its similarity to the common law

indemnification cross-claim LACE has asserted against ICI (Olnier aff ¶¶ 4-5). These objections will not suffice. ICI's failure to specifically allege that LACE owed it an extra-contractual obligation to support common law indemnification is fatal to this cross-claim (*see* 23 NY Jur 2d Contribution, Etc. § 113, citing *Service Sign Erectors Co. v Allied Outdoor Adv.*, 175 AD2d 761, 762 [1st Dept 1991] [common law indemnification "does not apply outside of a contractual or quasi-contractual relationship, absent specific pleading alleging such an extra-contractual obligation"]).

Finally, ICI's cross-claim for contribution must be dismissed because, as discussed more fully below, the damages alleged by plaintiffs in the underlying complaint do not constitute injury to property within the ambit of CPLR 1401.

Motion Sequence Numbers 005 and 006

Reargument must be denied regarding Haverland's first cause of action for common law indemnification but granted regarding Haverland's second cause of action for contribution.

In its previous Decision, the court denied LACE's motion to dismiss Haverland's second cause of action for contribution based on its finding that Haverland's negligent design and supervision of construction of the Condominium's HVAC system was alleged to have caused leaks, which constitute an injury to property within the meaning of CPLR 1401. That finding is mistaken as it was based on a discussion of hypotheticals at oral argument about the types of injuries that fall within the contribution statute (*see* Decision at 10-11). Neither plaintiffs in their underlying complaint, nor Haverland in its third-party complaint allege that defects at the Condominium caused leaks or other property damage.

Here, plaintiffs seek the benefit of their contractual bargain with Haverland, the cost of repairing alleged defects to Haverland's installation and construction project at the

Condominium (*see Trump Vil. Section 3*, 307 AD2d at 896, citing, *inter alia*, *Rothberg v Reichelt*, 270 AD2d 760, 762 [3d Dept 2000]), and so Haverland's cause of action for contribution must be dismissed.

In its Decision, the court stated that “the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor” (*Raquet*, 90 NY2d at 183 [1997] [internal quotation marks and citation omitted]). Haverland argued that such a separate duty was created by LACE's “Authorization” for additional engineering services, signed by Haverland as project architect and referred to as a “letter agreement” in the underlying complaint. The court reiterates its findings that there is no indication in the Authorization that it altered the business relationships between LACE and Ellenbogen or between LACE and Haverland, that Haverland would be paying LACE, or that LACE had any direct responsibility to Haverland. Furthermore, there is no allegation that Haverland ever paid LACE or that LACE owed a duty to Haverland (Decision at 8). Accordingly, the court adheres to its prior determination that the Authorization did not show that any contractual relationship existed between LACE and Haverland, and so Haverland failed to state a cause of action for indemnification.

Haverland also cites *Prenderville v International Serv. Sys., Inc.* (10 AD3d 334, 338 [1st Dept 2004]), *Gomez v National Ctr. for Disability Serv.* (306 AD2d 103 [1st Dept 2003]), *Lopez v New York Life Ins. Co.* (90 AD3d 446 [1st Dept 2011]), and *Higgins v JPH Mgt, Inc.* (2018 NY Slip Op 30739 [U] [Sup Ct, NY County 2018]), to argue that it was inappropriate for the court to dismiss its common law indemnification cause of action because the First Department prohibits resolution of such claims until a determination is made as to the indemnitee's negligence. Each of these cases involved a motion for summary judgment and are inapposite.

Haverland further requests that LACE's motion to dismiss be denied at this time and that the court reserve judgment until a factual record is created. In support of this request, Haverland cites *City of New York v Bettigole* (57 AD2d 797 [1st Dept 1977]). In that case, the City sued a contractor for breach of contract and negligence. The contractor moved pursuant to CPLR 3211 to dismiss the negligence claim, and the cross-claim of a codefendant for common law indemnification, asserting that its liability, if any, could only be for breach of contract (*id.* 57 AD2d at 798). The Appellate Division affirmed the trial court's denial of the motion to dismiss by holding:

We do not think that these issues should be decided on the bare facts of these pleadings, but should await a further exploration of the facts.... We note whichever way this motion is decided, all the parties will still be in the case and the entire case will still have to be gone into. In those circumstances, it is better that the adjudication of the rights of the parties be made on consideration of the underlying facts rather than on the insufficiency of the pleadings.

(*Id.*).

As dismissal of ICI's cross-claims against LACE and Haverland's third-party claims against LACE will remove LACE from this action, *Bettigole's* rationale for awaiting a further exploration of the facts is missing here. Therefore, Haverland's motion to reargue this portion of Decision must be denied.

Accordingly, it is hereby

ORDERED that LACE's motion to dismiss the cross-claims of ICI is granted, in its entirety; and it is further

ORDERED that third-party plaintiff Haverland's motion to reargue the Decision, insofar as it granted third-party defendant LACE's motion to dismiss Haverland's cause of action for common law indemnification, is denied; and it is further

ORDERED that LACE's motion to reargue the Decision, insofar as it denied LACE's motion to dismiss Haverland's cause of action for contribution, is granted; and it is further

ORDERED that, upon reargument, LACE's motion to dismiss Haverland's cause of action for contribution is granted and Haverland's third-party complaint is dismissed.

This constitutes the decision and order of the court.

February 3, 2021

ENTER:



**HON. SHAWN T. KELLY,
J.S.C.**