XPO Logistics, Inc. v Malcomb
2021 NY Slip Op 30352(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 654921/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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XPO LOGISTICS, INC.,

Plaintiff,

- v -

WARE MALCOMB and WARE MALCOMB ARCHITECUTRE P.C., and W.B. ENGINEERING & CONSULTING PLLC,

Defendants.

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INDEX NO. 654921/2017

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

WARE MALCOMB and WARE MALCOMB ARCHITECUTRE P.C,

Defendants/Third-Party Plaintiffs,

- v -

PAVARINI NORTH EAST CONSTRUCTION CO., LLC, CERAMI & ASSOCIATES, INC., W.B. ENGINEERING & CONSULTING PLLC, LABRADOR TECHNOLOGY, INC., and SAVILLS, INC.

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document numbers 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154,155, 156, 157, 158, 159, 160, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208. 209. 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 230, 231, 232, 233, 234, 235.

were read on this motion to/for SUMMARY JUDGMENT/CROSS MOTION TO AMEND .

In this action to recover damages for alleged design and construction defects, third-party defendant Pavarini North East Construction Co., LLC ("Pavarini") moves for summary judgment dismissing the third-party claims, cross claims, and counterclaims asserted against it by defendants/counterclaim plaintiffs/third-party plaintiffs Ware Malcomb and Ware Malcomb Architecture, P.C. (together "WM"), and third-party defendant Cerami & Associates, Inc. ("Cerami"). Cerami and WM

oppose the motion and separately cross move for leave to amend their respective pleadings.

Background

This action arises out of a project to renovate and build out the corporate headquarters of plaintiff/counterclaim defendant XPO Logistics, Inc. ("XPO") in Greenwich, Connecticut ("the project"). By contract dated June 27, 2016, XPO retained WM, an architectural firm, to perform architectural, engineering, and interior design service on the project (NYSCEF #69). WM, in turn, entered into various subcontracts, including one with Cerami, to provide acoustical design and technology services. XPO retained Pavarini as the general contractor for the project by contract dated December 7, 2016 ("the GC Contract") (NYSCEF # 145).

XP's initial complaint asserts claims for breach of contract, professional malpractice, negligence, and gross negligence against WM allegedly arising out of WM's breach of its "obligations in designing and overseeing the buildout of [the project]" resulting in more than $1.4 million in damages (NYSCEF # 4, ¶1). The complaint further alleges that WM is responsible for certain construction defects with regard to "Executive Corridor," "Sound Management," "Misalignment," "Wire Management," "Glass Panels," "Flooring," "HVAC," and "Front Doors," resulting from WM's purported failure to properly supervise construction (*id.*, ¶¶ 12-24). WM filed an answer with counterclaims against XPO (NYSCEF # 39).

On May 24, 2019, WM filed a third-party complaint which, in addition to claims against its subcontractors, including Cerami, asserted claims against Pavarini for common law contribution and indemnification (NYCEF # 46, ¶¶ 24-31). In its answer to the third-party complaint, Cerami asserted cross claims against Pavarini for common law contribution and indemnification (NYSCEF # 73, ¶¶24-31)

XPO subsequently filed a first amended complaint (NYSCEF # 64), followed by a second amended complaint, which asserted the same claims as the original and first amended complaint, as well as direct claims for breach of contract and negligence against third-party defendants Cerami and WM's other subcontractors (NYSCEF # 69). In its answer to the second amended complaint Cerami asserted counterclaims and cross claims against Pavarini for common law contribution and indemnification (NYSCEF # 72, ¶¶ 105, 106).

Pavarini now moves for summary judgment dismissing the claims for common law indemnification and contribution asserted against it by WM and Cerami. In support of its motion, Pavarini submits the affidavit of its employee Michael Krantz, a Project Manager, who avers to have personal knowledge of the project (NYSCEF # 144). Mr. Krantz states that of the entities that are parties to the action and third-party action, XPO was the only one with which Pavarini was in

contractual privity, and that WM and the other third-party defendants were not subcontractors or affiliated companies of Pavarini. He also states that Pavarini "did not design the project, generally, or the project's acoustic and sound masking systems in particular… [and that] Pavarini's scope of the work on the project encompassed construction or installation of walls, ceilings, floors, glass partitions, electric lighting, HVAC and plumbing" (*id.*, ¶¶ 8,9). Mr. Krantz further states that XPO has not asserted any claims against Pavarini in connection with the project (*id.*, ¶ 10).

Pavarini argues that the WM's and Cerami's claims for common law contribution must be dismissed under the "economic loss rule," as the damages sought by XPO, for which WB and Cerami seek contribution from it, are for purely economic loss and therefore contribution is unavailable. With respect to the claims for common law indemnification, Pavarini contends that these claims must be dismissed since as the general contractor on the project, Pavarini cannot be found vicariously liable or wholly responsible for the design errors for which XPO and WM seek indemnification.

Cerami and WM oppose the motion, variously arguing that summary judgment is premature as the parties have not engaged in sufficient discovery, and that depositions, including Pavarini's, have not been taken. Moreover, they argue Pavarini is not entitled to summary judgment as it is potentially liable for multiple purported construction defects alleged in the second amended complaint and the third-party action, including improperly installed doors, glass panels, and floors, and defective electric lighting, HVAC, and plumbing. In support of this position, WM submits the affidavit of its Chief Financial Officer, Tobin Sloan (NYSCEF # 198), who states that Pavarini was responsible for supervising and directing construction and that "neither WM nor any its subconsultants performed any construction work on the [p]roject ...[or] were responsible for directing or supervising the work of Pavarini or its subcontractors on the [p]roject" (*id.*, ¶¶ 7-9).

Cerami and WM also seek to amend their respective pleadings to add claims for contractual indemnification and a failure to provide a defense based on § 9.15 of the GC Contract, and for negligent misrepresentation. WM also seeks to add a claim for breach of express warranties and representations as to the work performed by Pavarini under § 9.4 of the GC Contract, while Cerami seeks to assert a claim for failure to procure insurance naming it as an additional insured under § 17.1 of the GC Contract.

Pavarini opposes the cross motions to amend, arguing that the proposed claims are without merit. Specifically, Pavarini argues that with respect to any construction defects attributable to its work, WM's (and XPO's) sole remedy for such defects was a timely claim pursuant to the warranty provision under § 9.4 of the GC Contract, and that WM waived its warranty rights by failing to present its claims

under the warranty provision within a year of the project's substantial completion in 2017 as required by § 18.2 of the GC Contract.

As for the proposed claims for contractual indemnification and for breach of the obligation to provide a defense under § 9.15 of the GC Contract, Pavarini asserts that provision applies only to tort claims involving death, bodily injury, and damage to property, and that such claims are not at issue in XPO's action which seeks economic damages for breach of contract, professional malpractice and negligence by WM and its subcontractors. As for the duty to defend, Pavarini argues that as a general contractor, as opposed to an insurer, its duty to defend is no broader than its duty to indemnify.

With regard to the proposed negligent misrepresentation claims, Pavarini argues that these claims are insufficient as, *inter alia*, the parties lack a special relationship, the claims are duplicative of the breach of contract claims, and there are no allegations that the purported misrepresentations induced WM or Cerami to enter into their respective contracts and/or directly caused their losses.

In reply, WM argues that the language of § 9.15 applies to its claim for contractual indemnification, that the warranty provided under § 9.4 is not limited to a year from the substantial completion of the project, and that its claim for negligent misrepresentation is adequately stated.

Discussion

Leave to amend pleadings is freely given absent prejudice or surprise (*see* CPLR 3025[b]; *Cherebin v Empress Ambulance Serv., Inc.,* 43 AD3d 364, 365 [2007]). At the same time, however, a court must examine the merit of the proposed amendment in order to conserve judicial resources (*see Zaid Theatre Corp. v Sona Realty Co.,* 18 AD3d 352, 354-355 [2005]).

In this case, as Pavarini does not claim prejudice or surprise, the only issue before the court is whether the proposed amendments are of sufficient merit to permit their addition.

With respect to the proposed claims for contractual indemnification, the court notes that "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 86 [1st Dept 2018] [internal quotation and citations omitted]). In this connection,"[t]he right to contractual indemnification depends upon the specific language of the contract"(*Sherry v Wal–Mart Stores East L.P.,* 67 AD3d 992, 994 [2d Dept 2009][internal citation and quotation omitted]).

The indemnity provision at issue in this case provides, in relevant part, that:

> § 9.15.1 Subject to the following conditions including the subparagraphs below… the Contractor (i.e. Pavarini) shall defend, indemnify, reimburse, and hold harmless the Owner, the landlord, the Architect, Architect's consultants … (collectively, the "Indemnified Parties") from, for, and against all claims, damages, losses and expenses, direct and indirect, including but not limited to design professional and consultant fees, attorneys' fees, and costs incurred on such claims and in proving the right to indemnification, arising out of or resulting from performance of the Work, in any act or omission of the Contractor, its agents, any of the Subcontractors of any tier, and anyone directly or indirectly employed by the Contractor or Subcontractors of any tier ("Indemnitor") but only as set forth in the subparagraphs below . . . .
>
> §9.15.2 The Contractor will fully defend, indemnify, reimburse, and hold harmless the Indemnified Parties for the sole negligence or fault of the Indemnitor. In the event of bodily injury to persons or damage to property (other than the Work itself), the Contractor will defend, indemnify, reimburse, and hold harmless the Indemnified Parties to the extent that the death or bodily injury to persons or damage to property (other than the Work itself) arises out of the fault of the Indemnitor, or the fault of the Indemnitor's agents, representatives or Subcontractors. **In the event of concurrent negligence involving the Indemnitor and the Indemnified Parties not involving bodily injury to persons or damage to property (other than the Work itself), the Contractor will indemnify the Indemnified Parties only to the proportionate extent of the Indemnitor's negligence** . . . .

(emphasis supplied).

This provision does not, as argued by Pavarini, apply solely to tort claims resulting in bodily injury, or property damages. Instead, it specifically provides for indemnification for Indemnified Parties, who are defined to the Architect (i.e. WM), and Architect's consultant (i.e. Cerami), in connection with concurrent negligence "**not** involving bodily injury or damages to property (other than the Work itself)" (emphasis supplied). Accordingly, as the indemnification clause encompasses the type of claims for which WM and Cerami seek to be indemnified, the proposed amended claims for contractual indemnification are of sufficient merit to be added.

In contrast, as the applicable part of the indemnification provision allows only for indemnity and not for a defense, to the extent proposed claims assert that Pavarini breached its obligation to provide a defense, they are without merit. Likewise, the proposed claim for breach of the obligation to procure insurance under § 17.1 of the GC Contract, cannot be added as the provision does not require the purchase of insurance to cover the types of damages at issue in this action.

With regard to WM's proposed claim for breach of warranty under § 9.4 of the GC Contract, the court finds that the claim is potentially meritorious. Section 9.4, entitled "Warranty," provides, in relevant part, that "[t]he Contractor [i.e., Pavarini] warrants to the Owner [i.e., XPO] and Architect [i.e., WM] that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor warrants that the Work will be performed in a skilled and workmanlike manner. . .." While Pavarini asserts that a breach of warranty under § 9.4 must be asserted one year after substantial completion of the work in accordance with § 18.2 of the GC Contract, such assertion is unavailing as this section pertains to Pavarini's obligation to "correct the Work," and not to its warranty obligations. In fact, § 18.2 states that the correction of the Work is "in addition to the Contractor's (i.e., Pavarini's) obligations under § 9.4." Next, as to Pavarini's argument that under § 7.2, it only owes contractual obligations to XPO, as this general provision conflicts with the more specific provision under § 9.4 creating a warranty in favor of WM, § 9.4 governs (*see Bank of Tokyo-Mitsubishi, Ltd v Kvaerner*, 243 AD2d 1, 8 [1st Dept 1998] ["if there is an inconsistency between a general provision and a specific provision of a contract, the specific provision controls"] [internal quotation and citation omitted]).

As for the proposed claims for negligent misrepresentation, the elements of such claim are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007])."In the commercial context, liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Fresh Direct, LLC v Blue Martini Software, Inc.,* 7 AD3d 487, 489 [2d Dept 2004]; *see also Silvers v State of New York,* 68 AD3d 668, 669 [1st Dept. 2009], *lv denied* 15 NY3d 705 [2010]).

Even assuming *arguendo* that the relationship between Pavarini and WM and/or Cerami were sufficient to impose a duty on Pavarini, a claim of negligent misrepresentation cannot be independently asserted within the context of a breach of contract action unless "the alleged misrepresentation concerns a matter which is extraneous to the contract itself" (*Alamo Contract Builders, Inc. v CTF Hotel Co.,*

242 AD2d 643, 644 [2d Dept 1997). In this case, as the only duty at issue relates to Pavarini's contractual obligations, the proposed claims for negligent misrepresentation are insufficient to permit their addition (see *Board of Mgrs of Soho N. 267 W. 124th St. Condominium v NW 124 LLC,* 116 AD3d 506, 507 [1st Dept 2014]["A claim for negligent misrepresentation is not separate from a breach of contract claim where the plaintiff fails to allege a breach of any duty independent from contractual obligations"];*compare Samuels v Fradkoff*, 38 AD3d 208 [1st Dept 2007][property owner stated a cause of action against architects for negligent misrepresentation based on allegations that they submitted inaccurate work permits with containing owner's forged signature]).

As for the originally asserted claims of common law indemnification and contribution, these claims, which are included in the proposed amended pleadings, are without merit. With respect to the proposed common law indemnity claims, it is well established that "since the predicate of [such claims] is vicariously liability without actual fault on the part of the proposed indemnitee, it follows that the party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustee of Columbia Univ. v Mitchell/Giurgolas Assoc*, 109 AD2d 449, 453 [1985]). Here, to the extent that Pavarini as construction manager may be potentially responsible, along with WM and Cerami, for the design and other defects which provide the basis for the underlying complaint, as the liability for such defects is not vicarious or be solely attributed to Pavarini, the doctrine of implied indemnity is inapplicable (*see e.g. Richards Plumbing and Heating Co., Inc. v Washington Group Int'l*, 59 AD3d 311, 312 [1st Dept 2009][dismissing construction manager's third-party claim for common law indemnity against architect where underlying action asserted claim of breach of contract by construction manager and not vicarious liability solely attributable to architect]; *compare Children's Corner Learning Center v Miranda Contracting Corp*, 64 AD3d 318, 325-326 [1st Dept 2004][finding that defendant architect sued by owner for failure to timely perform work stated a claim for common law indemnification against expediter based on allegations that expediter was responsible for obtaining permits and licenses, since "the possibility exists that an ultimate finding of liability against the [architect] could be due solely to [the expediter's] negligence"]).

With regard to proposed claims for contribution, since the underlying action seeks damages for purely economic losses, contribution is unavailable (*see Board of Mgrs. of A. Bldg. Condominium v 13th & 14th Street Realty LLC,* 137 AD3d 505, 506 [1st Dept 2016] [finding that trial court properly dismissed contribution claims where underlying complaint sought economic damages arising from breach of contract, including based on allegations that the work was negligently performed];*Children's Corner Learning Center v Miranda Contracting Corp*, 64 AD3d at 324 ["the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein" [internal citations omitted]).

Conclusion

In view of the above, it is

ORDERED that Cerami's cross motion to amend is granted to the extent of granting it leave to add cross claims against Pavarini for contractual indemnification and is otherwise denied; it is further

ORDERED that WM's cross motion to amend is granted to the extent of granting it leave to add third-party claims against Pavarini for contractual indemnification and breach of warranty under § 9.4 of the GC Contract and is otherwise denied; it is further

ORDERED that Pavarini's motion for summary judgment is denied as moot; and it is further

ORDERED that within 30 days of entry of this order, Cerami and WM shall efile amended pleadings consistent with this this decision and order.

This constitutes the decision and order of the court.

MARGARET A. CHAN, J.S.C.

2/5/21
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	