

**American Constr., Inc. v Cirocco & Ozzimo, Inc.**

2021 NY Slip Op 31101(U)

March 31, 2021

Supreme Court, New York County

Docket Number: 657158/2019

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

-----X  
AMERICON CONSTRUCTION, INC. d/b/a  
AMERICON-HITT,

Plaintiff,

- v -

CIROCCO & OZZIMO, INC., THE OHIO CASUALTY  
INSURANCE COMPANY, THE LAQUILA GROUP,  
and LIBERTY MUTUAL SURETY,

Defendants.

INDEX NO.	657158/2019
MOTION DATE	
MOTION SEQ. NO.	001 & 002

**DECISION + ORDER ON MOTIONS**

-----X  
THE LAQUILA GROUP INC.,

Third-Party Plaintiff,

- v -

TOMASETTI CONSULTING, LLC, THORNTON  
TOMASETTI, LLC, THORNTON TOMASETTI, INC.  
and DELTA TESTING LABS CORP.,

Third-Party Defendants.

-----X  
HON. BARRY R. OSTRAGER

The Court held oral argument on the record via Microsoft Teams on March 30, 2021 on the motion by the Third-Party Defendant Thornton Tomasetti, Inc. (“Thornton”) to dismiss the claims asserted against it by the Third-Party Plaintiff The Laquila Group Inc. (“Laquila”) pursuant to CPLR 3211(a)(7) for failure to state a cause of action (mot. seq. 001).<sup>1</sup> The Court also heard argument at that time on the motion by Plaintiff Americon Construction, Inc.

<sup>1</sup> The third-party action was voluntarily discontinued without prejudice as against Third-Party Defendants Tomasetti Consulting, LLC and Thornton Tomasetti, LLC (see NYSCEF Doc. No. 42).

(“Americon”) to serve a Supplemental Summons and Amended Complaint adding new parties and new claims (mot. seq. 002). Decision was reserved at the conclusion of the argument. For the reasons that follow, Thornton’s motion to dismiss is denied without prejudice and Americon’s motion is granted, without prejudice to any future motion addressed to the pleadings.

The action arises out of a project concerning the construction of a new, ground-up medical facility known as the Maimonides Medical Center Office Building in Brooklyn, NY (“the Project”). Americon was retained by the property owner, non-party Brooklyn Healthcare Investors, LLC, pursuant to a written agreement dated January 20, 2015, to perform construction management services for the Project. Americon, in turn, engaged various subcontractors, including defendants Cirocco & Ozzimo, Inc. (“C&O”) and The Laquila Group, to perform certain work for the Project. Specifically, by written agreement dated January 23, 2015, (NYSCEF Doc. No 51), C&O agreed to perform certain labor and furnish certain equipment and materials associated with the concrete, brick, masonry and structural grout work for the Project. Americon also entered into a written agreement, dated January 23, 2015, pursuant to which Laquila agreed to perform certain labor and furnish certain equipment and materials associated with the excavation, foundation, concrete and steel rebar work required at the Project, in accordance with the plans and specifications (see NYSCEF Doc. No. 72).

On November 17, 2016, while concrete was being poured on the Project’s sixth-level floor decks, the steel superstructure, which sits on concrete columns, abruptly dropped, which allegedly set off a chain reaction of damage throughout the building that required significant remediation measures to stabilize the building so construction could safely resume. Americon claims forensic investigations revealed that defects in C&O and Laquila’s installed work had caused or contributed to the November 2016 incident. Americon commenced this action on

December 3, 2019 against C&O and Laquila seeking unspecified damages for breaches of their contracts, naming also their sureties The Ohio Casualty Insurance Company and Liberty Mutual.

As particularly relevant to the pending motions, Thornton had a contract dated January 13, 2014 with non-party Gensler Architecture, Design & Planning, P.C. to provide Structural Engineering consulting services in connection with the Project (NYSCEF Doc. No. 46). Laquila impleaded Thornton by Third-Party Complaint filed on June 25, 2020, asserting claims sounding in negligence and common law contribution (NYSCEF Doc. No. 23). In lieu of answering, Thornton filed this motion to dismiss (seq. 001), asserting that Laquila has no privity of contract with Thornton, nor the functional equivalent of privity, as required to recover for the purely economic losses arising out of Americon's breach of contract claim against Laquila in the underlying Complaint. Absent privity of contract, economic loss cannot be recovered by means of a negligence cause of action, and Thornton owes no independent duty of care to Laquila to support a negligence claim.

Regarding contribution, the governing statute is CPLR § 1401, which provides that: “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 ...” (emphasis added).

Thornton reiterates that Americon's underlying Complaint seeks recovery for purely economic loss arising from alleged breaches of contract, not for personal injury, property damage, or death, by alleging that Laquila breached its Subcontract with Americon by failing to “properly install steel reinforcement within the concrete columns at locations and quantities required by the contract documents, which breach caused or contributed to the Incident.” In sum, Thornton argues that Americon seeks to recover from Laquila the benefit of its contractual bargain in the form of costs to complete and correct deficient work, delay costs, and liquidated and

consequential damages, and Laquila in turn claims Thornton is liable for those damages based on Thornton's alleged failure to "properly plan, design, complete, install, and inspect the shear wall pursuant to their contractual responsibilities" under TT's contract with nonparty Gensler. Because all the claims sound in contract, not tort, and because economic loss based on breach of contract does not qualify as "injury to property" under CPLR 1401, there is no legal basis for Laquila's contribution claim against Thornton, Thornton asserts.

Before Laquila filed its opposition to Thornton's motion, Americon moved to amend its Complaint to add claims against C&O and Laquila sounding in negligence, contractual and common law indemnification, and contribution (seq. 002, NYSCEF Doc. No. 73). In addition, Americon sought to add direct claims sounding in negligence, indemnification and contribution against Third-Party Defendant Delta Testing Labs Corp., the professional inspecting and testing company allegedly responsible for overseeing and ensuring that the work performed by Americon and its subcontractors, including Laquila, complied with the Project's design and the Building Code. Lastly, Americon moved to add two new parties, AK Engineering P.C. and Chen Engineering Services P.C., asserting claims sounding in negligence and indemnification based on the purported obligation of those firms to provide inspection and testing services pursuant to agreements with the Owner.

Significantly, Americon does not seek to add any direct claim against Thornton. It appears, however, that Americon's proposed new pleadings contain allegations designed to address some of the arguments asserted by Thornton in its motion to dismiss by, for example, expanding the description of "property damage" that is alleged and including losses that sound more in keeping with traditional tort damages, as opposed to the economic damages traditionally asserted in contract cases. Laquila tries to cover all its bases, by not objecting to the proposed

new pleadings (and relying on them to oppose Thornton's motion to dismiss) while simultaneously seeking to preserve all of its defenses, including that the new claims may be time-barred. Thornton objects to the proposed amended pleadings, arguing that the new tort claims against Laquila (on which Laquila is relying to oppose dismissal of its third-party complaint against Thornton) are merely the original contract claims repackaged to make them appear to sound in tort when they are, in fact, duplicative of the contract claims. Further, Thornton argues that only an owner of the damaged property can seek noneconomic property damages for negligence. Citing *Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 192 AD2d 151 (1st Dep't 1993), Americon asserts that its claims are viable because it was the owner of the project materials that were damaged by the collapse.

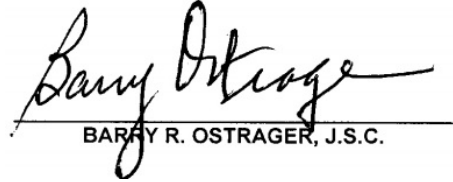
Although the proposed new claims may well be subject to dismissal at some point in the future as duplicative of the contract claims, as time-barred, or as otherwise lacking in merit, the Court cannot find as a matter of law at this stage of the litigation that either Laquila's third-party claims against Thornton, or Americon's proposed new pleadings, are wholly lacking in merit. Accordingly, it is hereby

ORDERED that Laquila's motion to amend (seq. 002) is granted, and Thornton's motion to dismiss (seq. 001) is denied, without prejudice to any motion to dismiss that any party may file directed to the new pleadings or the Third-Party Complaint; and it is further

ORDERED that Americon is directed to file its Supplemental Summons and Amended Complaint in the form proposed and to serve the new parties pursuant to the CPLR without delay. In light of the large number of parties involved in this action and the anticipated high cost of discovery and experts, counsel are urged to pursue an early settlement of this action and to file

a letter if a referral to mediation is requested. A conference is scheduled for June 1, 2021 at 10:00 a.m.

Dated: March 31, 2021



Barry R. Ostrager, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE