

**Board of Mgrs. of the St. Tropez Condominium v  
JMA Consultants, Inc.**

2021 NY Slip Op 31646(U)

May 12, 2021

Supreme Court, New York County

Docket Number: 656079/2018

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM**

*Justice*

-----X

BOARD OF MANAGERS OF THE ST. TROPEZ  
CONDOMINIUM,

Plaintiff,

- v -

JMA CONSULTANTS, INC. D/B/A JMA OF NEW JERSEY  
IN NEW YORK, JMA CONSULTANTS, INC. D/B/A JMA OF  
NEW JERSEY, JMA CONSULTANTS AND ENGINEERS,  
P.C., EUGENE FERRARA, JOSEPH CANTON,

Defendant.

-----X

JMA CONSULTANTS, INC. D/B/A JMA OF NEW JERSEY,  
JMA CONSULTANTS AND ENGINEERS, P.C.

Plaintiff,

-against-

JOSEPH K. BLUM CO., LLP, NOVA RESTORATIONS OF NY  
INC., BRAXTON ENGINEERING, P.C., CHARLES MARINO,  
STEEL INDUSTRIES INC. OF NY, COMPANIES A THROUGH  
ZZ, JOHN/JANE DOES 31 THROUGH 40, QUALITY  
BUILDING CONSTRUCTION LLC, ZOLO SERVICE CORP.,  
MAJOR BUILDING CONSULTING, LLC, SITE SAFETY, LLC,  
THE ST. TROPEZ CONDOMINIUM, BARRY SCHNEIDER,  
CHRISTOPHER KLEIN, SYLVIE DURHAM, JOHN/JANE  
DOES 1 THROUGH 30

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90,  
91, 92, 95, 96, 101

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127,  
128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 152, 171, 173, 174, 175, 176,  
177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 188, 218, 219, 220, 221, 222, 223

were read on this motion to/for DISMISS.

**DECISION + ORDER ON  
MOTION**

INDEX NO. 656079/2018

MOTION DATE 02/27/2020,  
06/12/2020,  
08/13/2020,  
10/23/2020,  
03/19/2021

MOTION SEQ. NO. 003 005 006  
007 008

Third-Party  
Index No. 596075/2019

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 172, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 228, 229, 230, 232, 233, 234

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 189, 190, 191, 192, 193, 194, 195, 217, 224, 225, 226, 227

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 258, 259, 260

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

Upon the foregoing documents, JMA Consultants, Inc. d/b/a JMA of New Jersey and JMA Consultants and Engineers, P.C.'s (collectively, **JMA**) motion to consolidate (Mtn. Seq. No. 003) this action with the Subrogation Action (hereinafter defined) is granted for the purpose of discovery only.

Joseph K. Blum Co., LLP's (**Blum**) motion to dismiss (Mtn. Seq. No. 005) is granted to the extent that JMA's third-party claims for common-law indemnification (tenth cause of action) and contribution (eleventh cause of action) are dismissed. JMA is not entitled to common-law indemnification from Blum because JMA is the alleged wrongdoer and the first-party action does not seek indemnification predicated on being held vicariously liable for the tortious acts of others. JMA is also precluded from obtaining contribution because pure economic loss for breach of contract does not constitute injury to property so as to entitle JMA to contribution.

Nova Restoration of NY Inc. (**Nova**), Braxton Engineering, P.C. (**Braxton**) and Charles E. Marino, P.E.'s (**Marino**, together with Braxton, **B&M**) motions to dismiss (Mtn. Seq. No. 006, 008) are granted to the extent of dismissing JMA's third-party claims for common-law

indemnification (tenth cause of action) and contribution (eleventh cause of action) for the same reason, i.e., JMA is the alleged wrongdoer and cannot recover absent the predicate of vicarious liability.

The St. Tropez Condominium, Barry Schneider, Christopher Klein and Sylvie Durham's (collectively, the **Condominium Defendants**) motion to dismiss (Mtn. Seq. No. 007) is granted to the extent of dismissing JMA's third-party claim for tortious acts (fourth cause of action) because any claim framed in negligence is duplicative of the breach of contract claim. The claim for aiding and abetting the commission of a tort (fifth cause of action) is dismissed because there is no underlying tort to ground an aiding and abetting claim. The claims for personal tort liability (sixth cause of action), condominium liability (seventh cause of action) and tortious interference (ninth cause of action) are dismissed because JMA does not allege that the individual defendants committed independent tortious acts outside of their role as board members. The claim for negligent misrepresentation (twelfth cause of action) is dismissed because it is duplicative of the breach of contract claim. The claim for constructive fraud (thirteenth cause of action) is dismissed because JMA does not allege the existence of a fiduciary or confidential relationship with the Condominium Defendants and otherwise fails to plead fraud with particularity pursuant to CPLR § 3016(b). The claims for common-law indemnification (tenth cause of action) and contribution (eleventh cause of action) are also dismissed.

### **The Relevant Facts and Circumstances**

This action relates to the collapse of a south facing façade at the St. Tropez Condominium (the **Condominium**) at 340 East 64<sup>th</sup> Street, New York, New York (the **Building**) on December 7,

2015 (the **Incident**). The Board of Managers of the St. Tropez Condominium (the **Board**) is the governing body that administers the affairs of the Condominium (NYSCEF Doc. No. 4, ¶ 1), which is an unincorporated association of “unit owners” pursuant to Article 9-B of the New York Real Property Law (NYSCEF Doc. No. 103, ¶ 41). Sylvie Durham is the current President of the Board (*id.*, ¶ 53). Barry Schneider and Christopher Klein were former Presidents of the Board (*id.*, ¶ 51-52).

Prior to the Incident, the Condo and its Board had retained engineers and contractors to inspect and perform maintenance to the Building façade and common elements in compliance with local law requirements. Blum was the Building’s consulting and engineering firm for the 6th Cycle inspection period of April 1, 2006 through November 30, 2006 (*id.*, ¶ 26). Mr. Capobianco was Blum’s licensed professional engineer (*id.*). Nova allegedly performed repair work on the Building during the 6th Cycle from approximately March 2006 through November 2006 (*id.*, ¶ 27). Braxton was the Building’s consulting and engineering firm for the 7th Cycle that ended around January 31, 2013 (*id.*, ¶ 30). Mr. Marino was Braxton’s licensed professional engineer (*id.*).

Pursuant to four letter agreements (NYSCEF Doc. Nos. 5, 6, 8, 9; collectively, the **Agreements**), dated March 13, 2014, April 14, 2014, July 31, 2014, and December 1, 2014, each by and between the Condominium as “Owner” and JMA, JMA was retained to provide consulting and professional engineering services for a façade, terrace and roof restoration project at the Building. In August 2015, the contractor Quality Building Consulting, LLC (**Quality**) was retained to operate a drop scaffold and engage in probing inspections at the Building, which

began in September 2015 (NYSCEF Doc. No. 103, ¶¶ 13-18). The Incident occurred in December 2015 just days before JMA was scheduled to commence initial observations on the south elevation (*id.*).

On December 6, 2018, the Condominium's insurers filed a subrogation action captioned: *Fireman's Fund Insurance Company a/s/o St. Tropez Condominiums and other interested insureds under the policy of insurance v. Quality Building Construction, LLC, JMA Consultants, Inc., JMA Consultants and Engineers, P.C., Braxton Engineering, P.C., Major Building Consulting, LLC, Tower Building Services, LLC, and Zolo Services Corp.*, Index No. 161442/2018 (the **Subrogation Action**). The plaintiff in the Subrogation Action alleges claims for negligence and breach of contract/indemnification and seeks \$617,972.54 in property damages resulting from the Incident (NYSCEF Doc. No. 58).

On December 6, 2018, the Board commenced this action against JMA, JMA Consultants, Inc. d/b/a JMA of New Jersey in New York, Eugene F. Ferrara and Joseph Canton, P.E. (collectively, the **JMA Defendants**) seeking \$4,000,000 in damages arising out of the JMA Defendants' alleged failure to: (i) provide the Board with an accurate description of the south elevation, (ii) prepare proper specifications for their work and (iii) advise that repairs on the south façade should have been commenced immediately before the north façade (the **Complaint**; NYSCEF Doc. No. 4, ¶¶ 5-6).

The Board initially alleged claims in this action for: (1) breach of contract (first, second, and third causes of action), (2) negligence (fourth, fifth, sixth, seventh, and eighth causes of action)

and (3) professional malpractice (ninth and tenth causes of action). The JMA Defendants responded by filing a motion to dismiss (Mtn. Seq. No. 002). Pursuant to a decision and order (the **Prior Decision**) dated October 1, 2019, the court granted dismissal of the claims against Mr. Ferrara and Mr. Canton but denied dismissal of the negligence claims against the remaining defendants (NYSCEF Doc. No. 41). On October 28, 2019, those defendants filed a Notice of Appeal concerning the surviving negligence claims.

The defendants filed their answer on October 31, 2019 and JMA filed a third-party complaint on December 10, 2019 against Blum, Nova, Tower Building Services LLC, Braxton, Mr. Marino, Steel Industries Inc. of NY, Quality, Zolo Service Corp, Major Building Consulting, LLC, Site Safety, LLC and the Condominium Defendants (the **TPC**; NYSCEF Doc. No. 55). On March 16, 2020, third-party defendant Quality filed an answer to the TPC with a cross-claim for contribution against JMA and the third-party defendants (NYSCEF Doc. No. 98). On March 19, 2020, JMA filed an amended third-party complaint alleging claims for: (1) contractual indemnification (first and second causes of action), (2) breach of contract (third cause of action), (3) tortious acts (fourth cause of action), (4) aiding and abetting the commission of a tort (fifth cause of action), (5) personal tort liability (sixth cause of action), (6) condominium liability (seventh cause of action), (7) breach of contract (eighth cause of action), (8) tortious interference (ninth cause of action), (9) common-law indemnification (tenth cause of action), (10) contribution (eleventh cause of action), (11) negligent misrepresentation (twelfth cause of action) and (12) constructive fraud (thirteenth cause of action) (the **ATPC**; NYSCEF Doc. No. 103). JMA then filed the instant motion to consolidate this action with the Subrogation Action (Mtn.

Seq. No. 003). Blum, Nova, the Condominium Defendants and B&M subsequently filed the instant motions to dismiss (Mtn. Seq. Nos. 005, 006, 007, 008).

By a decision and order, dated February 2, 2021, the First Department, reversing the Prior Decision, dismissed all of the Board's negligence claims in the first-party action (NYSCEF Doc. No. 239). The First Department held that the negligence claims were duplicative of the contract claims "regardless of whether any failure by defendants to perform carefully could have had abrupt or catastrophic consequences" (*id.* [citing *Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 711-713 [2018]]). For the avoidance of doubt, the Board's three remaining claims are for breach of contract.

**I. JMA's Motion for Consolidation with the Subrogation Action is Granted for the Purpose of Discovery (Mtn. Seq. No. 003)**

The decision to consolidate rests within the sound discretion of the trial court (*Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d 518, 519 [1st Dept 2004]). Pursuant to CPLR § 602 (a), consolidation may be granted in the interests of judicial economy where there are common questions of law or fact (*id.*). However, consolidation should be denied if the opposing party can demonstrate prejudice to a substantial right (*id.*).

This action involves a breach of contract claim against JMA and its third-party claims against various engineers and contractors concerning the history of inspections and repairs of the Building façade and its subsequent failure. The Subrogation Action includes a breach of contract claim brought by the Condominium's insurers concerning the same subject matter. The defendants in the Subrogation Action are third-party defendants in this action. Thus, the two

matters involve common issues of fact and law as they arise out of the same Incident and involve overlapping parties. Under the circumstances, consolidation of both actions for discovery will promote judicial economy as common documents and witnesses are involved. However, consolidation for the purpose of trial is not necessary at this time given that the scope of the two actions may change after discovery is complete. Accordingly, JMA's motion to consolidate is granted solely to the extent of consolidating this action and the Subrogation Action for the purposes of discovery.

## **II. Blum's Motion to Dismiss is Granted as to JMA's Third-Party Claims for Common-Law Indemnification and Contribution (Mtn. Seq. No. 005)**

As the First Department has explained, “[since] the predicate for common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” of indemnification (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]). Here, JMA cannot assert a common-law indemnification claim against Blum because the Board has not alleged in the first-party action that JMA should be held vicariously liable for other parties, but only for its own alleged wrongdoing (*see Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009] [affirming dismissal of common-law indemnification claim because first party claim and cross claim did not allege vicarious liability attributed solely to the fault of proposed third-party defendant]).

Nor can the Defendants assert a claim for contribution against Blum. Pursuant to CPLR § 1401, parties “who are subject to liability for damages for ... injury to property ... may claim

contribution among them.” The only first-party claims against JMA sound in breach of contract and the resulting damages allege purely economic loss, which cannot constitute “injury to property” so as to permit a claim for contribution (*see Board of Educ. of the Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). Accordingly, Blum’s motion to dismiss both the indemnification and the contribution claims is granted.

### **III. Nova and B&M’s Motions to Dismiss are Granted as to JMA’s Third-Party Claims for Common-Law Indemnification and Contribution (Mtn. Seq. Nos. 006, 008)**

For the reasons set forth above, the branch of Nova and B&M’s motion to dismiss JMA’s third-party claims for common-law indemnification and contribution is also granted. The branch of Nova and B&M’s motion to dismiss the Quality’s cross-claim for contribution is denied because the parties’ dispute as to the extent of Nova and B&M’s involvement in prior work on the Building’s façade raises issues of fact that cannot be resolved on the instant motion to dismiss (*Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988] [claim for contribution requires that breach of duty by contributing party had a part in causing or augmenting the injury for which contribution is sought]; NYSCEF Doc. Nos. 199-215, 247).

### **IV. The Condominium’s Motion to Dismiss is Granted as to JMA’s Third-Party Claims for Tortious Acts, Aiding and Abetting the Commission of a Tort, Personal Tort Liability, Condominium Liability, Tortious Interference, Common-Law Indemnification, Contribution, Negligent Misrepresentation and Constructive Fraud (Mtn. Seq. No. 007)**

#### **A. Breach of Contract (Third and Eighth Causes of Action)**

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance, (3) the defendant’s breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The Condominium argues that the

breach of contract claim lies solely against the Board. The argument fails. The documentary evidence is clear that the Condominium, and not the Board, was party to the Agreements as the specified “Owner” (NYSCEF Doc. Nos. Doc. Nos. 5, 6, 8, 9). Inasmuch as the Condominium acknowledged in the Agreements that “this contract is solely with the Owner and not with the individual apartment/space owners/tenants, ... and any other third party” (*id.*), this does not mean that the Condominium cannot be sued under the Agreements. JMA has adequately plead that the Condominium breached the Agreements by failing to provide accurate and complete documentation regarding the Building façade (NYSCEF Doc. No. 103, ¶¶ 256-260). Accordingly, the branch of the Condominium’s motion to dismiss the third and eighth causes of action for breach of contract against it is denied.

#### **B. Tortious Acts (Fourth Cause of Action)**

JMA also asserts a claim against the Condominium for unspecified “tortious acts” by alleging that the Condominium knew or should have known about the true condition of the Building façade and that its failure to provide accurate information to JMA resulted in damages (*id.*, ¶¶ 261-273). JMA further alleges that the Condominium’s tortious acts were “grossly negligent” (*id.*, ¶ 271). To the extent that JMA’s claim for “tortious acts” is framed as one for negligence or gross negligence, it fails because any such claim is duplicative of the breach of contract claim. JMA does not allege any basis to distinguish between its negligence and contract with respect to the Condominium’s failure to provide accurate and complete information about the Building façade (*see Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389-390 [1987] [dismissing gross negligence claim as it merely restated implied contractual obligations rather alleging the violation of a legal duty independent of contract]). JMA fails otherwise to identify any

cognizable claim regarding the Condominium's allegedly tortious conduct. Accordingly, the branch of the Condominium's motion to dismiss the fourth cause of action for tortious acts is granted.

**C. Aiding and Abetting the Commission of a Tort, Personal Tort Liability, Condominium Liability, and Tortious Interference (Fifth, Sixth, Seventh and Ninth Causes of Action)**

The fifth cause of action for aiding and abetting the commission of a tort is dismissed because JMA fails to allege the existence of an underlying tort as discussed above. The sixth and ninth causes of action for personal tort liability and tortious interference against the individual Condominium Defendants are also dismissed because there are no allegations that these individuals "committed [any] independent tortious conduct outside of [their] role as a board member" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 56 [1st Dept 2012] [dismissing tortious interference claim against individual board members]). As such, the seventh cause of action imposing liability against the Condominium for the allegedly tortious acts of its officers and members must be dismissed.

**D. Common-Law Indemnification and Contribution (Tenth and Eleventh Causes of Action)**

For the reasons set forth above, the tenth cause of action for common-law indemnification is dismissed because the Board has only alleged claims against JMA for JMA's own wrongdoing and has not alleged any claims that are premised on JMA's vicarious liability on behalf of other parties (*see Richards Plumbing, supra*). In addition, the eleventh cause of action for contribution is dismissed because JMA is prohibited from recovering economic loss damages for breach of contract under a theory of contribution (*see Board of Educ. of the Hudson City Sch. Dist., supra*).

### **E. Negligent Misrepresentation (Twelfth Cause of Action)**

The elements of a claim for negligent misrepresentation 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” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). This claim fails because JMA cannot establish a special or privity-like relation and, in fact, does not allege the existence of any legal duty outside of the Agreements that would give rise to this independent tort claim. The claim for negligent misrepresentation is also deemed duplicative of a breach of contract claim where a party “fails to allege a breach of any duty independent from contractual obligations” (*Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]). Accordingly, the branch of the Condominium’s motion to dismiss the twelfth cause of action for negligent misrepresentation is granted.

### **F. Constructive Fraud (Thirteenth Cause of Action)**

A claim for constructive fraud requires: (1) a material misrepresentation of a fact, (2) the existence of a fiduciary or confidential relationship, (3) justifiable reliance by the plaintiff, and (4) damages (*see Brown v Lockwood*, 76 AD2d 721, 731 [2d Dept 1980] [existence of fiduciary or confidential relationship warrants the trusting party to repose confidence in defendant and therefore relax the care and vigilance ordinarily exercised]). Here, JMA’s does not allege any fiduciary or confidential relationship with the Condominium to ground a claim for constructive fraud. In addition, JMA does not describe the alleged fraud with the requisite particularity

pursuant to CPLR § 3016(b). Accordingly, the branch of the Condominium's motion to dismiss the thirteenth cause of action for constructive fraud is granted.

Accordingly, it is

ORDERED that JMA's motion to consolidate (Mtn. Seq. No. 003) is granted to consolidate this action with the Subrogation Action to the extent of discovery only; and it is further

ORDERED that Blum's motion to dismiss (Mtn. Seq. No. 005) is granted; and it is further

ORDERED that Nova and B&M's motions to dismiss (Mtn. Seq. No. 006, 008) are granted to the extent of dismissing JMA's third-party claims for common-law indemnification and contribution; and it is further

ORDERED that the Condominium Defendants' motion to dismiss (Mtn. Seq. No. 007) is granted to the extent of dismissing the claims for tortious acts (fourth cause of action), aiding and abetting the commission of a tort, personal tort liability, condominium liability (seventh cause of action), tortious interference (ninth cause of action), common-law indemnification (tenth cause of action), contribution (eleventh cause of action), negligent misrepresentation (twelfth cause of action) and constructive fraud (thirteenth cause of action); and it is further

ORDERED that the remaining third-party defendants shall respond to JMA's ATPC and Quality's cross-claims within 20 days of this decision and order; and it is further

ORDERED that the parties are directed to appear for a remote conference on June 10, 2021 at 12pm.

  
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5/12/2021  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE