

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

2022 NY Slip Op 31045(U)

March 29, 2022

Supreme Court, New York County

Docket Number: Index No. 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
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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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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INDEX NO. 656079/2018

MOTION DATE 07/23/2021

MOTION SEQ. NO. 010

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596075/2019

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 313

were read on this motion to/for DISMISS.

Upon the foregoing documents, third party defendant Quality Building Construction's (QBC) motion to dismiss the third-party complaint and all cross claims against it is granted in part.

The portions of QBC's motion seeking to dismiss the third-party claims for breach of contract and contractual indemnification are denied because the language in QBC's contract with the St. Tropez Condominium (the **Condo**) is clear that JMA was an intended beneficiary of the contract (*Dominion Financial Corp. v Asset Indem. Brokerage Corp.*, 60 AD3d 461, 462 [1st Dept 2009]; *Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.*, 108 AD3d 634 [2nd Dept 2013]). QBC's motion to dismiss JMA's contribution claim is granted because the economic loss doctrine prevents JMA from seeking contribution on the sole remaining claim against it, breach of contract (*Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 71 NY2d 599, 602-603 [1988]; *Board of Ed. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28-29 [1987]). QBC's motion to dismiss JMA's common law indemnification claim is granted as duplicative of the contractual indemnification claim (*Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142 [4th Dept 2009]). QBC's motion to dismiss the cross claims asserted against it is denied because it failed to assert any arguments in support of that relief. Finally, JMA's request for leave to replead is denied because they failed to submit a proposed second amended third-party complaint to the Court for its review (*Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2nd Dept 2008]).

Relevant Facts and Procedural History

The main and third-party actions in this matter arise from the collapse of the façade from the south side of the Condo, located at 340 East 65th Street, New York, New York, on December 7, 2015. Third party plaintiffs JMA Consultants, Inc. and JMA Consultants and Engineers, P.C. (collectively **JMA**) were hired by the Board of Managers of the St. Tropez Condominium (the

Board) to perform consulting and engineering services in connection with a restoration project pursuant to letter agreements executed in 2014.

QBC was retained by the Board to complete 8th cycle mortar repair of the masonry façade of the building in accordance with Rule 11 of the New York City Department of Buildings (**DOB**).

QBC entered directly into contract with the Condo, which identified and defined QBC as the “Contractor” and JMA as the “Architect/Engineer” on the project [NYSCEF Doc. No. 300, the **Contract**]. The Rider to the Contract (the **Rider**) required QBC to obtain “for the protection and benefit of the Owner, the Architect and the Contractor” insurance policies which afforded coverage for JMA [NYSCEF Doc. No 300, Rider, ¶ 28]. Section 22 of the Rider also provided that QBC would indemnify the Condo and JMA

...against any and all suits, claims, damages, costs, expenses or losses, including the costs and expense of litigation and attorney’s fees, for bodily injury, property damage, other than to the Work itself, and to the extent such claims, damages, costs, expenses or losses are not covered by insurance purchased pursuant to this Contract, that may arise from the performance of the Work to the extent such claims, damages, costs, expenses, or losses are caused by the negligence of the Contractor, any of its subcontractors, or material suppliers arising out of the acts or omissions of the Contractor, any of its subcontractors, or material suppliers, anyone directly or indirectly employed by any of them, or any entity or anyone for which the Contractor or any of its subcontractors or material suppliers may be liable regardless of whether such claims, damages, costs, expenses, or losses are caused in part by a party indemnified hereunder. The obligations set forth in this provision shall not be construed to negate, limit, abridge or reduce any other rights or obligations of indemnity which would otherwise exist as to an entity or person described in this provision.

[NYSCEF Doc. No. 300, Rider, ¶ 22.1]. The Board filed a complaint against JMA, alleging breach of contract and negligence, and seeking damages relating to the property destruction as a result of the façade collapse. The First Department dismissed the Board’s negligence claim as duplicative of the breach of contract claim [NYSCEF Doc. No. 307].

JMA's amended third party complaint [NYSCEF Doc. No. 103] alleged causes of action for contractual and common-law indemnification, breach of contract, and contribution against QBC. JMA alleged that QBC performed work on the portion of the façade that ultimately collapsed, and that QBC's work on and near the façade caused the collapse. QBC, the Condo and other third-party defendants Braxton Engineering, P.C. (**Braxton**), Charles E. Marino, P.E., Major Building Consulting LLC (**Major Building**) and Site Safety, LLC (**Site Safety**) asserted cross claims against each other for contribution and indemnity.

Discussion

On a motion to dismiss, the pleading is afforded a liberal construction, the facts as alleged are accepted as true, and the court must determine whether the facts as alleged fit any cognizable legal theory, according the plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). When a motion is made pursuant to CPLR § 3211(a)(7), a court “may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Breach of Contract and Contractual Indemnification

Although QBC did not enter into a contract with JMA, JMA asserts breach of contract and contractual indemnification claims against QBC as an intended beneficiary of the Contract with the Board.

It is well settled that an intended beneficiary of a contract may maintain a third-party action against a contracting party “by establishing (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental” (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]; *Alicea v City of New York*, 145 AD2d 315 [1st Dept 1988]).

QBC’s assertion that JMA was not an intended beneficiary of the Contract is not true. The language in the Rider with regard to both QBC’s obligation to maintain insurance coverage on behalf of JMA and indemnify JMA makes it very clear that JMA was an intended beneficiary of the Contract (*see Dominion Financial Corp. v Asset Indem. Brokerage Corp.*, 60 AD3d 461, 462 [1st Dept 2009]; *Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.*, 108 AD3d 634 [2nd Dept 2013]). Specifically, the requirements that QBC (1) maintain an insurance policy “for the protection and benefit... of the Architect” and (2) indemnify the Architect “regardless of whether such claims, damages, costs, expenses, or losses are caused in part by a party indemnified hereunder” unequivocally express that JMA was an intended beneficiary of the Contract (NYSCEF Doc. No. 300, Rider, ¶¶ 22.1, 28). As pled in the amended third-party complaint, JMA’s claims for breach of contract and contractual indemnification are sufficient to survive QBC’s motion to dismiss because there is no dispute that the Contract was valid, and JMA was an intended beneficiary of the insurance and indemnification clauses of the Contract.

Contribution

JMA’s contribution claim must be dismissed because the predicate for any such contribution claim is the Board’s breach of contract claim [NYSCEF Doc. No. 307]. This is plainly improper.

It is well established that CPLR 1401 was not intended for the apportionment of liability arising solely from breach of contract (*Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 71 NY2d 599, 602-603 [1988]; *Board of Ed. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28-29 [1987]). Accordingly, JMA's claim for contribution must be dismissed.

Common Law Indemnification

The common law indemnification must also be dismissed as duplicative. A valid binding agreement exists between QBC and the Condo. The agreement provides for indemnification. Thus, JMA's common law claim is duplicative and must be dismissed (*Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142 [4th Dept 2009]).

Cross Claims for Contribution and Indemnification

The branch of QBC's motion seeking dismissal of the co-defendant's cross claims must be denied because QBC fails to make any compelling arguments in support of its request that such cross-claims be dismissed.

Leave to Amend Pleadings

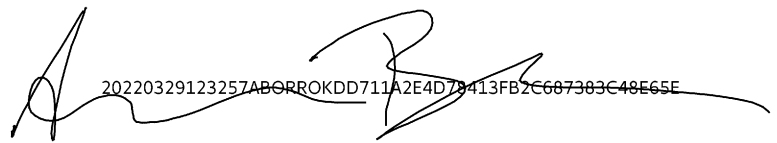
The branch of JMA's motion seeking leave to amend its pleadings must be denied. CPLR § 3025 requires a proposed amended pleading to be submitted in connection with any such request (*Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2nd Dept 2008]). Failure to submit any such proposed amended pleading requires denial of this request.

Accordingly, it is

ORDERED that QBC’s motion to dismiss is granted in part. JMA’s third party claims for contribution and common law indemnification are dismissed. The remaining portions of QBC’s motion to dismiss the third-party complaint against it are denied; and it is further

ORDERED that JMA’s request to replead the amended third-party complaint is denied; and it is further

ORDERED that the parties appear via Microsoft Teams for a status conference on April 7, 2022 at 11:30 a.m.


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3/29/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: