

63rd & 3rd NYC LLC v RSC Group LLC
2022 NY Slip Op 31386(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 657421/2019
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

63RD & 3RD NYC LLC,

Plaintiff,

- v -

RSC GROUP LLC,

Defendant.

-----X

RSC GROUP LLC

Plaintiff,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,
DOMANI INSPECTION SERVICES INC., WSP, MANUEL
GLAS ARCHITECTS

Defendant.

-----X

INDEX NO. 657421/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595281/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for AMEND PLEADINGS.

BACKGROUND

In this action, 63rd & 3rd seeks a declaratory judgment that RSC Group, LLC ("RSC") is obligated to defend, indemnify and hold harmless 63rd & 3rd in connection with an action filed by Stephen Jones against 63rd & 3rd in the Supreme Court of the State of New York ("Jones Action"), and for all damages incurred by 63rd and 3rd, arising from the January 9, 2019 incident when a partially-constructed non-load bearing concrete masonry unit ("CMU") wall panel built by RSC at a construction project fell onto an adjacent building located at 200 East 63 d Street, New York, New York ("200 Property") causing substantial damage to the building and to the

personal property of the residents of the 200 Property. 63rd and 3rd also seeks monetary damages against RSC for breach of contract and for negligence.

63rd & 3rd is the owner/developer of a thirty-story mixed-use building under construction at 1059 Third Avenue, New York, New York ("Project"). Defendant RSC was the masonry subcontractor that constructed the CMU wall that fell. 63rd & 3rd hired Hudson Meridian Construction Group LLC ("Hudson Meridian") as the Construction Manager for the Project. Manuel Glas, AIA ("Glas") was the architect. WSP USA Buildings, Inc. ("WSP") was the structural engineer. Domani was the special inspection agency retained by 63rd & 3rd.

Hudson Meridian and 63rd & 3rd entered into a Construction Management Agreement dated September 1, 2016 in connection with the Project. On August 11, 2017, Hudson Meridian entered into a Subcontract Agreement with RSC to perform masonry work in connection with the Project, including installation and construction of the CMU walls.

The Complaint avers that 63rd & 3rd is entitled to a declaratory judgment that RSC is obligated to defend, indemnify and hold harmless 63rd & 3rd in connection with the Jones Action, and to reimburse 63rd & 3rd for all costs incurred and to be incurred, arising out of the January 9, 2019 incident, and further alleges causes of action predicated on breach of contract and negligence.

RSC has impleaded various third-party defendants in this action including the following entities: HM, WSP and Manuel Glass Architects. RSC has also impleaded Domani as a third-party defendant. As to Domani on this project, the Third-Party Complaint asserts a cause of action sounding in common law contribution. RSC alleges that Domani was the inspection firm that observed and approved the installation of the CMUs at the Project.

RSC further alleges that the original design for the Project called for 8” CMU and drilled-in dowels instead of cast-in-place rebar dowels, but that WSP allowed 6” CMU wall panels in concert with Manual Glas and HM.

RSC alleges that it was negligent and a breach of the parties’ agreements to make these changes. RSC alleges that based on the negligence claimed in inspecting and allowing the 6” CMU as opposed to the 8” CMU provided for in the original structural designs, it is entitled to recovery from Domani on contribution and common law indemnification theories.

PENDING MOTION

On June 14th, 2021, Domani moved for an order pursuant to CPLR §3025, granting it leave to amend its Answer to the Third-Party Complaint. The motion was fully briefed and recently submitted to this court for determination.

For the reasons stated below, the motion is granted.

DISCUSSION

Domani wishes to assert two additional affirmative defenses, as well as a counterclaim against 63rd & 3rd. The affirmative defenses and counterclaim assert contractual defenses and Domani’s entitlement to indemnification from 63rd & 3rd. 63rd & 3rd opposes that part of the motion that seeks to add a counterclaim against based on the argument that no negligence is asserted against it, and 63rd & 3rd asserts such an allegation is necessary to make out a cause of action under the applicable contract.

CPLR §3025(b) provides that "leave shall be freely given..." when a party files an application to amend its pleadings. "Applications for leave to amend pleadings under CPLR §3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit." *Favia*

v. Harley Davidson Motor Vehicle Inc., 119 A.D.3d 836 837 (2d Dept. 2014). *See also Maldonado v. Newport Gardens, Inc.*, 91 A.D.3d 731 (2012). "No evidentiary showing of merit is required under CPLR 3025(b)." *Favia v. Harley Davidson*, 119 A.D.3d at 837 (*quoting Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2008)).

Likewise, as the Court concluded in *Leutloff v. Leutloff*, 47 Misc.2nd 458 (1965), "this section [CPLR 3025 (b) is to be liberally construed to permit pleadings to be amended in the absence of laches, undue prejudice and unfair advantage." *See Leutloff*, 47 Misc. 2nd at 459.

The counterclaim is based upon two separate indemnification clauses in the parties' contract for the Project. The first clause provides, in pertinent part that "[c]lient [63rd & 3rd] agrees to indemnify, defend and hold Domani harmless from any and all claims, suits, losses, liabilities and damages including but not limited to claims, suits, losses, liabilities and damages resulting from personal injury, wrongful death, property damage, contractual damage, federal, state and local governmental fines, and penalties and reasonable attorney's fees arising out of unsafe conditions or building code violations." This indemnification obligation is not tied to plaintiff's negligence.

The second contractual provision which provides for indemnification in favor of Domani states, in pertinent part, that "Plaintiff agreed to indemnify, defend and hold Domani harmless from any claims, suits, losses, costs, and expenses including but not limited to damages due to personal injury, wrongful death, property damage, contractual damages, federal, state and local government fines and penalties and including court costs reasonable attorney's fees arising out of or alleged to have arisen out of DOMANI's performance of the work on or about the subject Project and caused in whole or in part by any negligent or willful act of the Client."

The court finds that a liberal reading of the proposed pleading does evince the allegation of negligence necessary to assert a cause of action under this provision.

Based on the foregoing the motion is granted.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Domani’s motion for leave to amend its answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further


ORDERED that plaintiff shall serve a reply to the counterclaim in the amended answer or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that, within 20 days from entry of this order, Domani shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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SABRINA KRAUS, J.S.C.

4/26/2022
DATE

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER