

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

2022 NY Slip Op 31753(U)

May 31, 2022

Supreme Court, New York County

Docket Number: Index No. 657158/2019

Judge: Barry R. 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,

- against -

CIROCCO & OZZIMO, INC., THE OHIO CASUALTY INSURANCE COMPANY, THE LAQUILA GROUP, LIBERTY MUTUAL SURETY, DELTA TESTING LABS CORP., AK ENGINEERING P.C., and CHEN ENGINEERING SERVICES, P.C.,

Defendants.

-----X

THE LAQUILA GROUP INC.,

Third-Party Plaintiff,

- against -

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

Third-Party Defendants.

-----X

CIROCCO & OZZIMO, INC.,

Second Third-Party Plaintiff,

-against -

B.P PRECISE CONSTRUCTION CORP. and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Second Third-Party Defendants

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HON. BARRY R. OSTRAGER

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and values: 657158/2019, (blank), 006, 007 & 008

DECISION + ORDER ON MOTIONS

Before the Court in this heavily litigated action are three motions. The first motion (seq. 006) was filed by the Third-Party Defendant Thornton Tomasetti, Inc. ("Thornton") for an Order

(i) pursuant to CPLR 3211(a)(5) and (a)(7), dismissing the negligence and contribution claims asserted by Third-Party Plaintiff The Laquila Group Inc. (“Laquila”) against Thornton in Laquila’s Amended Third-Party Complaint, dated August 27, 2020 (NYSCEF Doc. No. 30), or, alternatively, pursuant to CPLR Rule 3212, granting summary judgment dismissing those Third-Party Claims with prejudice; and (ii) pursuant to the leave granted to Thornton in the Court’s Amended Decision and Order, dated December 2, 2021 (mot. seq. 004, NYSCEF Doc. No. 238), for reargument pursuant to CPLR Rule 2221(d) and renewal pursuant to CPLR Rule 2221(e) of Thornton’s prior motion to dismiss the Third-Party Claims for failure to state a cause of action (mot. seq. 001).¹ The second motion (seq. 007) was filed by Third-Party Plaintiff Laquila for an Order pursuant to CPLR §2221(d), granting reargument of this Court’s December 2, 2021 Amended Decision and Order (NYSCEF Doc. No. 238), and upon reargument, denying the motion to dismiss by Third-Party Defendant Delta Testing Labs Corp. (“Delta”), and further withdrawing this Court’s *sua sponte* grant of leave to reargue to Thornton. The third motion (seq. 008) was filed by Defendant Chen Engineering Services, P.C. (“Chen”) for an Order pursuant to CPLR 3211 (a) (5) and (a) (7) dismissing the Amended Complaint (NYSCEF Doc. No. 90) filed by Plaintiff Americon Construction, Inc. (“Americon”) and all cross-claims asserted against Chen, or in the alternative, pursuant to CPLR 3212 granting summary judgment to Chen dismissing Americon’s Amended Complaint against Chen with prejudice.

The action arises out of a project for 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

¹ 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).

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 Laquila, 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. 90).

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 breach of contract, also naming their sureties The Ohio Casualty Insurance Company and Liberty Mutual (Doc. 1).

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), and Thornton moved to dismiss (seq. 001).

At or about the same time, 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. Americon further moved to add two new parties, AK Engineering P.C. and Chen Engineering Services P.C., asserting claims sounding in negligence, contribution and indemnification based on the purported obligation of those firms to provide inspection and testing services pursuant to agreements with the Owner (seq. 002). Those two motions by Thornton to dismiss and by Americon to amend were determined in a single Decision and Order, entered April 1, 2021, which was appealed (NYSCEF Doc. No. 80).

An Amended Complaint was filed with leave of Court over the objection of various parties without prejudice to further motions directed to those pleadings (NYSCEF Doc. No. 90). Subsequent motions to dismiss resulted in the issuance of an Amended Decision and Order dated December 2, 2021 (seq. 004 & 005, NYSCEF Doc. No. 238) which not only dismissed some of the claims in the Amended Complaint but which also granted Thornton leave to renew its earlier motion to dismiss. The three motions at issue here were then filed.

After the three motions at issue here were submitted and scheduled for argument, the Appellate Division, First Department, determined the appeal of the April 1, 2021 Decision in a Decision and Order dated May 24, 2022 that significantly altered the pleadings.(NYSCEF Doc. No. 379). First, the Appellate Division granted Thornton's motion to dismiss Laquila's Amended Third-Party Complaint as against Thornton. The contribution claim against Thornton was dismissed because the underlying claim by Americon against Laquila was for purely economic loss resulting from a breach of contract. The appellate court also dismissed Laquila's negligence

claim against Thornton, holding that there “can be no recovery for purely economic losses arising out of negligent construction in the absence of contractual privity.” Here, because Thornton had been retained by the nonparty architect, Thornton had no contractual relationship with Laquila, nor the “functional equivalent of contractual privity.”

The Appellate Division also held that Americon’s motion for leave to amend its complaint to add a negligence claim against Laquila should have been denied because “such a claim would be time-barred. The original complaint was not filed until over three years after the subject incident took place and the alleged property damage was apparent.” The appellate court further held that Americon’s motion to amend to add contractual and common-law indemnification and contribution claims against Laquila should have been denied “because these claims have not yet accrued.” The Court stated that such claims “do not accrue for purposes of the Statute of Limitations until the party seeking indemnification and/or contribution has made payment to the injured person” and no allegation of payment had been made here.

The Appellate Division’s May 24, 2022 Decision has a very direct application to the motions being determined here. In the Third-Party Complaint (NYSCEF Doc. No. 30), Laquila asserted three claims against the Thornton entities for common law contribution (the First, Second and Third) and three claims for negligence (the Fifth Sixth, and Seventh). The Appellate Division held that all of Laquila’s contribution claims against Thornton should have been dismissed because the underlying claim by Americon against Laquila was for purely economic loss resulting from a breach of contract. The appellate court added that Laquila’s negligence claims against Thornton should have been dismissed because there “can be no recovery for purely economic losses arising out of negligent construction in the absence of contractual privity” or its equivalent, which was not present here. Accordingly, Thornton is entitled to

summary judgment dismissing with prejudice the First, Second, Third, Fifth, Sixth and Seventh Causes of Action in the Third-Party Complaint.

The Appellate Division's Decision also compels the denial of Laquila's motion seq. 007 insofar as it relates to Thornton for the reasons stated above. Laquila's motion 007 is also denied insofar as it seeks reargument of this Court's December 2, 2021 Amended Decision and Order which granted Delta's motion to dismiss (Doc. 238). Laquila has failed to demonstrate that this Court overlooked any fact or law when it granted Delta's motion (seq. 004) and dismissed the Thirteenth, Fourteenth, and Fifteenth Causes of Action in the Amended Complaint by Americon sounding in negligence, common law indemnification and contribution (Doc. 90) and the Fourth and Eighth Causes of Action in Laquila's Third-Party Amended Complaint (Doc. 30) sounding, respectively, in common law contribution and negligence. This Court had dismissed the negligence claim against Delta as time-barred. Although the Appellate Division's Decision did not involve a direct appeal by Laquila of this Court's Delta Decision, it held that Americon's negligence claim against Laquila was time-barred because the subject incident had occurred more than three years earlier and the property damage was immediately apparent. By extension, Laquila's negligence claim against Delta is time-barred, and this Court did not err in dismissing the claim.

Further, the reasoning underlying the Appellate Division's holding with respect to Laquila's third-party contribution claims against Thornton applies with equal force to Laquila's third-party contribution claim against Delta. Simply put, Laquila's contribution claim against Delta fails "because the underlying claim by Americon against Laquila was for purely economic loss resulting from a breach of contract." The Appellate Division held that Americon had no negligence claim against Laquila. Thus, Laquila's motion (seq. 007) is denied in its entirety.

The final motion (seq.008) is by Defendant Chen to dismiss Americon's claims in the Amended Complaint as against it sounding in negligence, common law indemnification, and contribution (the Sixteenth, Seventeenth, and Eighteen Causes of Action). When the Court granted Americon leave to amend in the Decision and Order entered April 1, 2021, it noted that the claims might well be subject to dismissal on the merits but that a sufficient showing had been made to allow amendment, which is freely granted (Doc. No. 81). However, the Appellate Division held on May 24, 2022 that leave to amend should not have been granted to allow Americon to assert additional claims against Laquila because the negligence claim was time-barred and the direct indemnification and contribution claims were premature. Therefore, by extension, Chen is entitled to the dismissal with prejudice of Americon's direct claims sounding in negligence, indemnification, and contribution and any cross-claims against Chen, and Chen's motion is granted in its entirety.

Accordingly, it hereby

ORDERED that Thornton's motion (seq. 006) is granted, and the Clerk is directed to enter judgment dismissing with prejudice the First, Second, Third, Fifth, Sixth and Seventh Causes of Action in Laquila's Third-Party Complaint (NYSCEF Doc. No. 30), along with any cross-claims; and it is further

ORDERED that Laquila's motion for reargument and related relief (seq. 007) is denied in its entirety; and it is further

ORDERED that Chen's motion (seq. 008) is granted, and the Clerk is directed to enter judgment dismissing with prejudice the Sixteenth, Seventeenth, and Eighteen Causes of Action in Americon's Amended Complaint as well as any cross-claims against Chen.

Although the Court understands Americon’s attempt to cast a wide net to include all the parties who worked on the Project so Americon may recover damages to the fullest extent possible, this case is now in its third year and is nowhere near trial ready, despite the expenditure of significant sums on motions and appeals. Because of the multiple third-party defendants added into the case, the deadline for the Note of Issue is now June 28, 2023. The parties would be well advised to meet and confer to confirm which parties and claims remain in the case in light of the Appellate Division’s Decision and to agree upon a proposal for the expeditious completion of outstanding discovery for any remaining parties and claims. Counsel are also urged to pursue mediation.

In light of this decision, the oral argument on the motions is cancelled and the June 6, 2022 conference is adjourned to September 7, 2022 at 11:00 a.m. via Microsoft Teams at which time the Court will discuss with the parties a schedule for the completion of discovery and settlement efforts. The appearance will be held via Microsoft Teams, and an updated Appearance Sheet shall be efiled by August 15, 2022 along with a cover letter and a proposed Stipulation for the completion of discovery and a brief letter outlining the parties and claims that remain in the action. Discovery shall continue in the interim.

Dated: May 31, 2022


 BARRY R. OSTRAGER, J.S.C.

CK 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 checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE