

**163 Chrystie Realty LLC v DRK Chrystie LLC**

2022 NY Slip Op 32260(U)

July 12, 2022

Supreme Court, New York County

Docket Number: Index No. 656239/2018

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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163 CHRYSTIE REALTY LLC

Plaintiff,

- v -

DRK CHRYSTIE LLC

Defendant.

INDEX NO. 656239/2018

MOTION DATE 08/25/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

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NEXUS BUILDING DEVELOPMENT GROUP, INC., DRK  
CHRYSTIE LLC

Plaintiff,

-against-

J.C. CONTRACTING OF WOODSIDE CORP., KINETIC  
DESIGN CONSULTANT LLC

Defendant.

Third-Party  
Index No. 565701/2019

-----X

DRK CHRYSTIE LLC, NEXUS BUILDING DEVELOPMENT  
GROUP, INC.

Plaintiff,

-against-

RCM TECHNOLOGIES, INC., BGA, LLC, BRUCE I.  
GOLDMAN, P.E., K-SQUARE DEVELOPERS, INC.

Defendant.

Second Third-Party  
Index No. 595577/2021

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 85, 86, 87, 88, 89,  
90, 91, 92, 93, 94, 95, 96, 101, 102, 103, 104, 105, 106, 108

were read on this motion to/for DISMISS.

Upon the foregoing documents, Second Third-Party Defendants RCM Technologies, Inc.

(RCM), BGA, LLC (BGA), and Bruce I Goldman, P.E.'s (hereinafter, collectively, the **Moving**

**Defendants**) motion to dismiss the Second Third-Party Complaint is granted to the extent of (i) dismissing the complaint as against Mr. Goldman and (ii) dismissing the failure to procure insurance (fourth cause of action) solely as it relates to RCM's failure to procure insurance for the years 2013-2014 and 2020-2021 but is otherwise denied.

DRK Chrystie LLC (**DRK**) and Nexus Building Development Group, Inc. (**Contractor**) (hereinafter, collectively, the **Second Third-Party Plaintiffs**) is suing the Moving Defendants for their engineering services on DRK's property in the event that the Second Third-Party Plaintiffs are found liable for DRK and the Contractor's alleged actions leading to damage to 163 Chrystie Realty LLC's (**163 Chrystie**) adjacent property.

Reference is made to a proposal letter (the **Engineering Agreement**; NYSCEF Doc. No. 91) dated October 11, 2013, by and between RCM/BGA Engineering (**RCM/BGA**; and *not merely RCM*) and DRK pursuant to which DRK accepted RCM/BGA's proposal to perform engineering services on DRK's property. The Engineering Agreement addresses both BGA's responsibilities regarding the construction methods and site safety, and also requires RCM/BGA to maintain insurance (NYSCEF Doc. No. 91).

In considering a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must accept all facts alleged in the complaint as true, according "the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994], quoting *Morone v Morone*, 50 NY2d 481, 484 [1980]). A motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) will

be granted if the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). On a motion to dismiss pursuant to CPLR 3211(a)(5), it is the defendant's burden to establish that the cause of action is time barred by the statute of limitations (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]).

***I. Common Law Indemnity (first cause of action), Contractual Indemnity (second cause of action), and Contribution – Not Dismissed***

The statute of limitations did not yet accrue for the common law indemnity (first cause of action), contractual indemnity (second cause of action) and contribution (third cause of action) causes of action because no judgment has been entered in the main action (*McDermott v New York*, 50 NY2d 211, 216-17 [1980]; *Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 [2007]). Thus, to the extent that dismissal is sought based on the statute of limitations, the motion must be denied.

***II. Failure to Procure Insurance (fourth cause of action) – Not Dismissed***

The Moving Defendants have conclusively established that RCM procured insurance pursuant to the Engineering Agreement (*Goshen*, 98 NY2d at 326) for the years 2013-2014 and 2020-2021 because RCM provided evidence that it maintained the insurance required by the Engineering Agreement in 2013 and 2020-21 (NYSCEF Doc. Nos. 92 and 93). Accordingly, the branch of the Moving Defendants' motion seeking to dismiss the failure to procure insurance (fourth cause of action) claim is granted solely to the extent that this claim is predicated on RCM's failure to

maintain insurance from 2013-2014 and 2020-2021. For the avoidance of doubt, nothing is adduced as to any other year or any insurance procured on behalf of BGA.

***III. Bruce Goldman as a Second Third-Party Defendant – Dismissed***

The claims against Mr. Goldman personally must be dismissed. An agent that signs an agreement on behalf of its principal is not held personally liable for the principal's actions unless there is express evidence of the agent's intent to be personally bound (*Star Video Entertainment, LP v J & I Video Distrib., Inc.*, 268 AD2d 423, 423-24 [2d Dept 2000]). Here, there is none. Mr. Goldman signed the Engineering Agreement as the President of RCM/BGA (*Star Video Entertainment, LP*, 268 AD2d at 423-24). Nothing in the record indicates his intention to be personally bound. Accordingly, the branch of the Moving Defendants' motion seeking to dismiss the claims as against Mr. Goldman is granted.

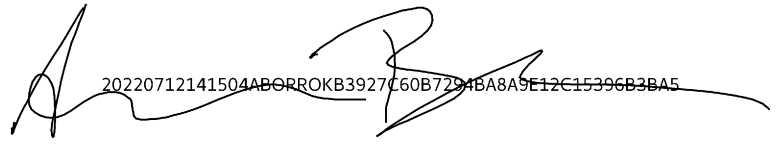
***IV. BGA as a Second Third-Party Defendant – Not Dismissed***

BGA can not be dismissed from this lawsuit because it is a party to the Engineering Agreement (NYSCEF Doc. No. 91, at 4). Any argument to the contrary is simply frivolous. Subsequent changes in BGA and RCM's relationship do not change BGA's relationship with the plaintiff in this case. Accordingly, the branch of the Moving Defendant's motion seeking to dismiss BGA as a Second Third-Party Defendant is denied.

Accordingly, it is

ORDERED that the motion to dismiss the Second Third-Party Complaint is granted to the extent of (i) dismissing the complaint as against Mr. Goldman and (ii) dismissing the failure to procure insurance (fourth cause of action) solely as it relates to RCM’s failure to procure insurance for the years 2013-2014 and 2020-2021 but is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference on **July 13, 2022 at 11:30 AM.**



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7/12/2022

DATE

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