G-Z/10 UNP Realty, LLC v SLCE Architects, LLP
2022 NY Slip Op 33538(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 160818/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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G-Z/10 UNP REALTY, LLC,

Plaintiff,

- v -

SLCE ARCHITECTS, LLP,

Defendant.

INDEX NO. 160818/2019

MOTION DATE 04/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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SLCE ARCHITECTS, LLP,

Third-Party Plaintiff,

-against-

FOSTER PLUS PARTNERS, INC., D/B/A FOSTER & PARTNERS

Third-Party Defendant.

Third-Party Index No. 595586/2021

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 108
were read on this motion to/for DISMISS THIRD-PARTY COMPLAINT.

Third-Party Defendant Foster Plus Partners, Inc. d/b/a Foster + Partners'("FP") moves (NYSCEF 78) pursuant to CPLR 3211(a)(1) and (7) to dismiss Defendant/Third-Party Plaintiff SLCE Architects, LLP's ("SLCE") Third-Party Complaint ("TPC" [NYSCEF 58]) filed on June 22, 2021. For the following reasons, the motion is GRANTED.

BACKGROUND

The primary action in this case concerns Plaintiff G-Z/10 UNP Realty LLC's ("G-Z" or "Plaintiff") breach of contract claim against SLCE Architects, LLP ("SLCE" or "Defendant") for

alleged architectural design deficiencies, in particular those relating to bathroom showers, resulting in water damage at 50 United Nations Plaza ("Project") (Complaint ¶4 [NYSCEF 21]).[1] G-Z and SLCE are in privity of contract (TPC ¶¶9-12). G-Z is also in privity of contract with FP (TPC ¶13). However, SLCE and FP are not in privity of contract with each other (TPC ¶24) and G-Z has not asserted a claim against FP. Instead, SLCE asserts claims against FP for negligent misrepresentation, contractual and common law indemnification, and contribution in a Third-Party Complaint seeking money damages in the event that SLCE is found liable to G-Z (TPC *ad damnum* clause).

The Third-Party Complaint alleges the following material facts. In 2008, G-Z, as owner, and SLCE reached an agreement ("Contract") for SLCE to provide architectural services as "architect of record" at the Project (TPC ¶¶9-11). In 2012, G-Z and SLCE entered into a contract for architectural services ("Completion Agreement" [TPC Ex. F]) which, among other things, adopted the previously unexecuted Contract under which G-Z and SLCE had been operating.

The relevant contract documents are annexed to the TPC and are "part thereof for all purposes" (CPLR 3014). The following provisions are relevant to the instant motion.

- Section 1.1 of the Contract provides that SLCE was retained to "serve as Architect of Record to perform architectural services in accordance with the terms and conditions set forth in this Agreement."

- Section 1.3.1 of the Contract provides: "Foster and Partners, Ltd. (the 'Design Architect') has been retained by Owner pursuant to a separate agreement to provide certain design and construction administrative services. The relative responsibilities of the Architect of Record and Design Architect and are delineated in the Matrix of Responsibilities annexed hereto as Appendix D."

[1] Plaintiff's architectural malpractice claim was dismissed on December 9, 2020 (NYSCEF 42).

- The Matrix of Responsibilities includes FP "Scope of Services." FP had "primary" responsibility for "Kitchen/Bathrooms finishes and fixtures" but SLCE retained "Primary Responsibility for verification of design for conformance with technical and local code requirements."
- Section 2.0.13 of the Completion Agreement provides that SLCE "shall work professionally and promptly cooperate with any peer review process and/or consultants retained and/or requested by Owner and make any appropriate changes recommended by such process and/or consultants."

SLCE's TPC generally asserts that FP "recommended certain interior materials," most importantly "the stone to be utilized in the bathrooms of units in connection with the Project" and that "SLCE reasonably relied on F+P's specification of materials" which ultimately led to G-Z's Complaint for damages (TPC ¶¶16-26). The TPC's *ad damnum* clause makes clear that SLCE seeks damages only to the extent that SLCE is found to be liable to G-Z (TPC at 7).

On April 14, 2022, FP moved to dismiss arguing, primarily, that SLCE was wrongfully attempting to shift its contractual liability to FP (Moving Memo at 1-2 [NYSCEF 79]). Specifically, FP argues that absent a "special relationship," no claim for negligent misrepresentation can be maintained. With respect to indemnification, FP argues that there can be no contractual indemnification absent privity and no common law indemnification absent a complete delegation of SLCE's contractual responsibility to G-Z. Finally, FP argues that contribution is no available solely for economic loss damages under CPLR 1401.

On June 6, 2022, SLCE submitted opposition to FP's motion. SLCE's first argument is that it is entitled to discovery "to determine F+P's potential responsibility for plaintiff's alleged damages" (Opp. Memo at 8). Next, SLCE argues that it adequately pled the existence of a special relationship for purposes of its negligent misrepresentation claim (Opp. Memo at 9); that responsibility for the bathroom materials was delegated to FP such that the common law indemnification claim should survive (Opp. Memo at 14); and that there is evidence that FP

caused the damages alleged by G-Z such that the contribution claim should survive (Opp. Memo at 16).

SLCE partner Gloria B. Glas states in her Affidavit in Opposition that "F+P played a role in connection with the 'Final Marble Selection' and the identification 'Interior Stone Flooring' and that FP "played a role in the election of the "Interior Marble Grout and Sealant" used at the Project (NYSCEF 98 ¶¶9-10). Ms. Glas also states that "F+P reviewed and approved non-party Pace Plumbing Corp.'s design for the showers at the Project. . ." (*Id.* ¶11).

The documents annexed to Ms. Glas' affidavit show that SLCE retained responsibility for the items cited in her affidavit. The marble submittal indicates that the document was transmitted to SLCE – not FP - by non-party Lend Lease and, moreover, that SLCE responded to FP's April 2, 2013 comments on April 6, 2013 and directed that the proposal be resubmitted with corrections (Glas Aff. Ex. C [NYSCEF 101]). Similarly, the sealant submittal was transmitted to SLCE – not FP – by Lend Lease and SLCE issued an approval on October 24, 2013 "PER F+P Comments" (Glas Aff. Ex. D [NYSCEF 102]). Finally, the shower design was "reviewed for aesthetic compliance with the design" by FP as of September 25, 2013 and SLCE subsequently directed corrections on October 3, 2013 (Glas Aff. Ex. E [NYSCEF 103]).

FP has participated in discovery (NYSCEF 118), including by producing a deponent, during the pendency of its motion to dismiss. However, by letter dated October 11, 2022, FP requested that its motion be advanced or taken on submission or that discovery deadlines be stayed as it continues to incur costs in discovery (NYSCEF 117). The Court has reviewed the parties' submissions and finds that it is appropriate to decide the motion on submission.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the challenged pleading is afforded a "liberal construction" with all inferences made in favor of the non-movant (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994][citations omitted]). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, 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'" (*Id.* [citations omitted]).

Negligent Misrepresentation

A negligent misrepresentation claim must be pled with particularity pursuant to CPLR 3016(b) (*Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]). "The elements of a cause of action 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'" (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011]*quoting J.A.O. Acquisition Corp. v Stavitsky,* 8 NY3d 144, 148 [2007]). Relevant here, "a negligent misrepresentation cause of action requires a party to plead facts showing a special relationship of trust and confidence between the parties, which created a duty on the part of one party to impart correct information.

A special relationship exists when (1) the parties are in a relationship of trust and confidence, or (2) one of the parties has superior knowledge. Generally, the requisite 'special relationship' does not exist between sophisticated commercial entities that enter into an

agreement through an arm's-length business transaction" (*MBIA Ins. Co. v GMAC Mortg. LLC*, 30 Misc 3d 856, 863 [Sup Ct New York County 2010] [collecting cases, citations omitted]).

SLCE has failed to adequately plead a special relationship between itself and FP. Despite SLCE's invocation of the term "special or privity-like relationship" in its recitation of the elements, SLCE's factual allegation is that "SLCE's reliance upon F+P's services was contractually proscribed in the Completion Agreement between Plaintiff and SLCE" (*Cf.* TPC ¶29, 35). Thus, the only relationship between SLCE and FP is their common retention by G-Z, which has not filed a claim against FP. The Third Party Complaint's allegations vis-à-vis the pertinent contract documents and SLCE's submissions do not indicate that any special relationship existed, and its pleading does not satisfy CPLR 3016(b) (*Stan Winston Creatures, Inc. v Toys "R" Us, Inc*., 4 Misc 3d 1019(A) [Sup Ct 2004] [collecting cases]). Accordingly, dismissal is warranted (*OP Sols., Inc. v Crowell & Moring, LLP*, 72 AD3d 622 [1st Dept 2010] ["The claim for negligent misrepresentation is also defective in the absence of a special relationship of confidence and trust between the parties"]; *GSCP VI EdgeMarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC,* 192 AD3d 454, 456 [1st Dept 2021]).

Indemnification

SLCE's opposition does not address FP's motion with respect to contractual indemnification. Accordingly, SLCE's claim for contractual indemnification is dismissed as abandoned (*Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573, 574 [1st Dept 2022]; *Bd. of Managers of 125 N. 10th Condominium v 125 N. 10, LLC*, 45 Misc 3d 1215(A) [Sup. Ct. Kings County 2014], *affd sub nom.* 150 AD3d 1063 [2d Dept 2017]).

With respect to common law indemnification, it "may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the

plaintiff' (*Chatham Towers, Inc. v Castle Restoration & Const., Inc.,* 151 AD3d 419, 420 [1st Dept 2017]). Indemnification is not available between joint tortfeasors. Instead "where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent" (*D'Ambrosio v City of New York,* 55 NY2d 454, 462 [1982]). Relevant here, "in the construction context, a party may seek common-law indemnification from a construction professional where 'the [party] itself was compelled to discharge a duty that it had delegated fully to, and that should have been discharged by, the [professional], whose negligence was the actual cause of the loss'" (*Bd. of Managers of Porter House Condominium v Delshah 60 Ninth LLC*, 192 AD3d 415, 415 [1st Dept 2021] *quoting 17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am.,* 259 A.D.2d 75, 78, 693 N.Y.S.2d 554 [1st Dept. 1999]).

Dismissal of SLCE's common law indemnification is warranted for two reasons. *First*, if SLCE breached its contract with G-Z, as alleged in G-Z's Complaint, it may not look to FP to indemnify that breach at common law. *Second*, the Third Party Complaint does not allege that SLCE fully delegated any task to FP and the contract appears to prohibit such a delegation. Instead, the Third Party Complaint seeks indemnification only if SLCE is found liable for a breach of the Contract (TPC ¶¶36-37).

The plain language of the contract documents annexed to the TPC, in particular the Matrix of Responsibilities, establishes that SLCE did not fully delegate any task to FP – including the materials to be incorporated into the bathrooms. The documentary evidence submitted by SLCE utterly refutes a claim of common law indemnification. As set forth above, the documents annexed to the Glas Affidavit show that SLCE had an active role vis-à-vis the bathrooms including but not limited to directing corrections.

In light of the foregoing, SLCE's potential liability to G-Z is not "purely vicarious" as necessary to sustain a common law indemnification claim (*Bd. of Managers of Olive Park Condominium v Maspeth Properties, LLC,* 170 AD3d 645, 647 [2d Dept 2019] *citing Balladares v Southgate Owners Corp*., 40 AD3d 667, 671 [2d Dept 2007] [other citations omitted]). The contract documents and other evidentiary submissions made by SLCE demonstrate that there was not a complete delegation of responsibility to FP (or that SLCE was even contractually permitted to make such a delegation) requiring that the claim be dismissed (*Board of Managers of 125 North 10th Condominium*, supra at *9).

Contribution

CPLR 1401 provides, in relevant part, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." New York law does not provide for contribution where the only underlying claim is for economic loss relating to a breach of contract (*Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 24 [1987] ["The issue presented on this appeal is whether CPLR 1401 permits contribution between two parties whose potential liability to a third party is for economic loss resulting only from a breach of contract"]). The foregoing rule has been applied in the context of construction contracts (*Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 AD3d 419, 420 [1st Dept 2017] *citing id.* ["because Chatham sought only to enforce the benefit of its bargain with Castle, its damages were for purely economic loss, and does not constitute an injury to property under CPLR 1401, which governs claims for contribution"]). The cases cited by

SLCE do not warrant a departure from the rule. Accordingly, the claim for contribution is dismissed.

Additional Discovery Is Not Warranted

In light of the foregoing, SLCE's argument that it requires further discovery does not warrant denial of the motion or a continuance (*Ravenna v Christie's Inc.*, 289 AD2d 15, 16 [1st Dept 2001] ["Plaintiff's claim that it was improper to dismiss the complaint without permitting him discovery is without merit. The mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action"]).

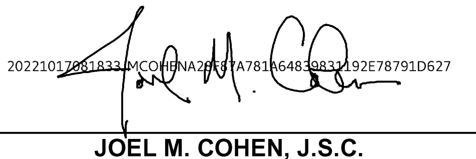
* * * *

Accordingly, it is

ORDERED that Third-Party Defendant Foster Plus Partners, Inc. d/b/a Foster + Partners' motion to dismiss the Third-Party Complaint is **GRANTED**; it is further

ORDERED that SLCE may move to replead within twenty (20) days of the completion of FP's deposition (NYSCEF 118), if it can demonstrate that it has grounds to plead one or more viable third-party claims; it is further

ORDERED that the parties should be prepared to address the issues raised in the Rule 14 letters (NYSCEF 115-116) at the October 18, 2022, conference.



10/17/2022		JOEL M. COHEN, J.S.C.
DATE		

CHECK ONE:	[ ] CASE DISPOSED			[X] NON-FINAL DISPOSITION		
APPLICATION:	[X] GRANTED	[ ] DENIED		[ ] GRANTED IN PART	[ ] OTHER	
	[ ] SETTLE ORDER			[ ] SUBMIT ORDER		
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