

85 Jane Realty, LLC v Xhema of N.Y., Inc.
2022 NY Slip Op 33838(U)
November 10, 2022
Supreme Court, New York County
Docket Number: Index No. 650660/2022
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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85 JANE REALTY, LLC,	INDEX NO.	<u>650660/2022</u>
Plaintiff,	MOTION DATE	<u>07/15/2022</u>
- v -	MOTION SEQ. NO.	<u>001</u>
XHEMA OF NEW YORK, INC., TECTONIC ENGINEERING & SURVEYING CONSULTANTS, P.C.,	DECISION + ORDER ON MOTION	
Defendant.		

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 42

were read on this motion to/for DISMISS.

Upon the foregoing documents and for reasons set forth on the record (11.9.22), Tectonic Engineering & Survey Consultants, P.C.'s (**Tectonic**) motion to dismiss is granted solely to the extent that Xhema of New York, Inc.'s (**Xhema**) crossclaim for indemnification (first crossclaim) and contribution (second crossclaim) are dismissed.

The Relevant Facts and Circumstances

85 Jane Realty, LLC (**85 Jane**) is the residential property developer for a project located at 85-89 Jane Street, New York, New York (the **Project**). Pursuant to a certain Construction Management Agreement (the **CM Agreement**; NYSCEF Doc. No. 3), dated July 13, 2017, by and between 85 Jane and Xhema, 85 Jane retained Xhema as its construction manager to perform construction work for the Project. Pursuant to a certain Professional Services Agreement (the **Professional Services Agreement**; NYSCEF Doc. No. 29), dated March 10, 2017, by and

between 85 Jane and Tectonic, 85 Jane employed Tectonic as its special inspector for various inspections of the construction at the Project. In short, the Project did not go as planned. To wit, according to the complaint, the pile foundation system for the new building did not conform to the plans and specification set forth in the CM Agreement. In order to try to resolve their dispute, 85 Jane and Xhema entered into a Settlement Agreement, dated as of February 6, 2020 (the **Settlement Agreement**; NYSCEF Doc. No. 4).

Ultimately, 85 Jane sued Xhema for breach of both the CM Agreement and the Settlement Agreement because, among other things, Xhema refused to continue performing work on the Project (NYSCEF Doc. No. 2 ¶¶21-82). 85 Jane also sued Tectonic, alleging that Tectonic breached the Professional Services Agreement by providing inadequate inspection and reporting services on the allegedly non-conforming piles.

As relevant to the instant motion, in its answer with affirmative defenses, counterclaims and first amended crossclaims (NYSCEF Doc. No. 18), Xhema levels claims against Tectonic for indemnification (first crossclaim), contribution (second crossclaim), professional negligence (third crossclaim), and negligent representation (fourth crossclaim).

Discussion

On a motion to dismiss, the pleading is to be afforded a liberal construction and the Court must accept the facts as alleged as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

I. Xhema's first crossclaim of common-law indemnification must be dismissed

Tectonic argues that the common-law indemnification crossclaim must be dismissed because common-law indemnification is unavailable to a party that is being sued for its own breach of contract. In their opposition papers, Xhema argues that because they allege that the incidents giving rise to 85 Jane's alleged damages were caused by the culpable conduct of Tectonic, dismissal is unwarranted. Xhema is not correct.

In the construction context, a party may seek common-law indemnification from a construction professional where it delegated to another professional the duty it was obligated to discharge and such duty was the actual cause of the loss (*Bd. of Managers of Porter House Condo. v. Delshah 60 Ninth LLC*, 192 AD3d 415, 415 [1st Dept 2021] [internal citations omitted]). However, Xhema's duty to comply with the plans and specifications set forth in the CM Agreement was not delegated to Tectonic. Tectonic's role was that of special inspector. This arrangement therefore can not form the basis for a common-law indemnification claim. Thus, Xhema's common-law indemnification crossclaim must be dismissed.

II. Xhema's second crossclaim of contribution must be dismissed

Tectonic argues that the crossclaim sounding in contribution must be dismissed because the underlying liability asserted against Xhema is for breach of contract. In their opposition papers, Xhema argues that contribution is proper pursuant to CPLR Article 14 because the incidents that give rise to 85 Jane's damages were caused by Tectonic.

CPLR 1401 provides:

[T]wo 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.

However, contribution is not available where the liability upon which the contribution claim is based derives solely from breach of contract (*Bd. of Educ. of Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28 [1987]). Here, as discussed above, 85 Jane's claim against Xhema are for breach of contract – not negligence. Thus, contribution is not available and this crossclaim must also be dismissed.

III. Xhema's third crossclaim of professional negligence is not dismissed

Tectonic argues that the professional negligence crossclaim must be dismissed because there is no privity between Xhema and Tectonic, and Xhema is not an intended third-party beneficiary of Tectonic's services provided pursuant to the Professional Services Agreement. In their opposition papers, Xhema argues that although there is no express contractual relationship between Xhema and Tectonic, a near privity relationship exists because (i) Tectonic knew that Xhema would rely on Tectonic's engineering judgment as special inspector, (ii) Xhema actually relied on Tectonic's reports, and (iii) Tectonic was aware of such reliance. On the record (11.9.22), Xhema also cited 2022 New York City Building Codes 1704.1.1.2 (6) as to the special inspection agency's responsibility pertaining to reports as a predicate to this special privity like relationship.

2022 New York City Building Codes 1704.1.1.2 (6) provides:

Reports. The special inspection agency shall prepare reports of its inspections and tests, and such reports shall indicate that work inspected was or was not performed in conformance with approved construction documents.

...

6.2 Discrepancies. Discrepancies shall be brought to the immediate attention of the contractor and, when applicable, to the attention of the superintendent of construction, for correction. The discrepancies shall also be brought to the attention of the owner, and the registered design professional of record in a timely manner to allow for correction of the discrepancies.

It is well settled that a cause of action stemming from professional negligence shall be dismissed when no privity of contract, or the functional equivalent thereof, exists between the parties (*see Walker v. Chiauzzi*, 57 AD3d 1353, 1354 [3d Dept 2008] [internal citations omitted]). In finding professional negligence where no privity of contract existed, the Court of Appeals held an accountant liable for a non-client when there is (i) a particular purpose for the accountants' report, (ii) a known relying party, and (iii) some conduct on the part of the accountants linking them to that party (*Credit All. Corp. v. Arthur Andersen & Co.*, 65 NY2d 536, 553 [1985]). This case is instructive to the matter at hand.

The allegations in this case include that Tectonic delivered regular reports to Xhema. Pursuant to the building code, Tectonic had a duty to inform the contractor when there are discrepancies between the inspected work and the approved construction documents. At this stage of the litigation, this is enough to establish a privity like relationship to ground a claim for negligence. Accordingly, Xhema's crossclaim for professional negligence is not dismissed.

IV. Xhema's fourth crossclaim of negligent misrepresentation is not dismissed

Tectonic argues that the negligent misrepresentation crossclaim must also be dismissed due to lack of privity. As discussed above, this argument fails at this stage of the litigation.

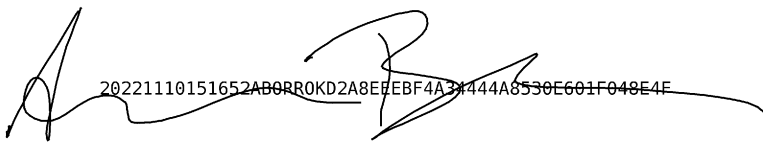
In New York, “[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [internal citations omitted]).

Xhema alleges that Tectonic owes a duty of care to Xhema to ensure work on the Project conformed with the plans and specifications pursuant to the building code. Tectonic allegedly delivered daily reports to Xhema and the daily reports failed to identify the non-compliance of the friction piles (NYSCEF Doc. No. 18 ¶¶230-232). Reliance on the reports was reasonable under the circumstances given Tectonic’s regulatory obligation. Thus, Xhema’s crossclaim for negligent misrepresentation must not be dismissed at this stage.

Accordingly, it is hereby

ORDERED that Tectonic’s motion to dismiss Xhema’s crossclaims is granted to the extent that Xhema’s crossclaims for indemnification (first crossclaim) and contribution (second crossclaim) are dismissed; and it is further

ORDERED that counsel are directed to appear for a status conference on January 10, 2023, at 12 PM (parties shall provide a deposition schedule (names and dates)).


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11/10/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE