

|  |
|--|
| <b>One PPW Owner, LLC v IBI Group</b>  |
| 2023 NY Slip Op 30167(U)   |
| January 13, 2023   |
| Supreme Court, New York County   |
| Docket Number: Index No. 653862/2020   |
| Judge: Andrea Masley   |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| 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 48

-----X

|                     |  |                                    |
|---------------------|--|------------------------------------|
| ONE PPW OWNER, LLC, |  | INDEX NO. <u>653862/2020</u>       |
| Plaintiff,          |  |                                    |
| - v -               |  |                                    |
| IBI GROUP,          |  | MOTION DATE _____                  |
|                     |  | 001 002 003                        |
|                     |  | 004 006 007                        |
| Defendant.          |  | MOTION SEQ. NO. <u>008 009 010</u> |

**DECISION + ORDER ON MOTION**

-----X

|            |  |                       |
|------------|--|-----------------------|
| IBI GROUP, |  | Third-Party           |
| Plaintiff, |  | Index No. 595141/2021 |
| -against-  |  |                       |

KBE-NY, LLC, WORKSTEAD, LLC, DESIGN 2147, LTD., NEW AMSTERDAM DESIGN AND ASSOCAITES, LLC, DESIMONE CONSULTING ENGINEERING, D.P.C., CONTROL POINT ASSOCIATES, INC., LUCAS JACOBSON, INC. D/B/A LJI PROJECTS, WHITE BIRCH BUILDERS, INC., SURFACE DESIGN ARCHITECTS, PLLC, AJ LABELLE & PARTNERS, LLC, OAD-ARCHITECTURE, P.C., 2L ENGINEERING, D.P.C., 2LS CONSULTING ENGINEERING, D.P.C., VDA, INC. D/B/A VAN DEUSEN & ASSOCIATES, and SURETEC INSURANCE COMPANY

Defendants.

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 85, 94, 140, 141, 142, 143, 170, 171, 172, 173, 174, 177

were read on this motion to/for \_\_\_\_\_ DISMISSAL \_\_\_\_\_

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 90, 95, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 165, 166, 175, 176

were read on this motion to/for \_\_\_\_\_ DISMISSAL \_\_\_\_\_

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 91, 96, 99, 100, 136, 137, 138, 139, 157, 169

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 154, 155, 156, 159, 160, 161, 162, 163, 164, 167, 168

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 145, 146, 147, 148, 149, 150, 151, 152, 186, 225, 226, 241, 242, 243

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 179, 180, 181, 182, 183, 184, 185, 199, 227, 228, 229, 230, 231, 239, 240

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 189, 190, 191, 192, 193, 194, 195, 196, 206, 207, 221, 222

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 223, 224, 232, 316

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 200, 201, 202, 203, 204, 205, 234, 235, 236, 237

were read on this motion to/for DISMISSAL.

Motion sequence nos. 001, 002, 003, 004, 006, 007, 008, 009, and 010 involve the third-party action filed by defendant and third-party plaintiff IBI Group – Gruzen Samton Architects Engineers Landscape Architects a NY General Partnership (IBI), an architectural firm hired to provide architectural services for a construction project (Project) at a property located at One Prospect Place, Brooklyn, New York (Property). (NYSCEF Doc. No. [NYSCEF] 13, Third-Party Complaint ¶¶ 1, 2, 16.) Plaintiff One PPW Owner, LLC (One PPW) owns the Property. (*Id.* ¶ 1.) Movants are third-party defendants KBE-NY, LLC (KBE-NY), Workstead, LLC (Workstead), Design 2147 Ltd. (Design 2147), DeSimone Consulting Engineering, D.P.C. (DeSimone), Control Point Associates, Inc. (CPA), Lucas Jacobson, Inc. d/b/a LJI Projects (LJI), Surface Design

Architects, PLLC (Surface), AJ LaBelle & Partners, LLC (AJ), OAD-Architecture, P.C. (OAD), 2L Engineering, D.P.C. (2L), 2LS Consulting Engineering, D.P.C.(2LS; 2L and 2LS, together 2L Defendants), and VDA, INC. d/b/a Van Deusen & Associates (VDA) (collectively, Design and Construction Third-Party Defendants); all were allegedly retained by One PPW, or its agent, to provide additional services for completion of the Project. (*Id.* ¶¶ 2-3, 6-8, 10-15 [Facts Common to All Counts].)

In the complaint, One PPW alleges that “IBI failed to properly and adequately manage and staff the Project; improperly and negligently prepared, submitted or approved numerous erroneous designs, drawing, plans and specifications; failed to complete the design work for the Project; and failed to supervise its own personnel and the Project work.” (NYSCEF 1, Complaint ¶ 1.) One PPW asserts claims against IBI for breach of contract, professional malpractice, and unjust enrichment. (*Id.* ¶¶ 28-47.)

On February 17, 2021, IBI filed its third-party complaint asserting claims for common law indemnification (Count I), contribution (Count II), contractual indemnification (Count III), and breach of insurance obligations (Count IV) against the Design and Construction Third-Party Defendants.<sup>1</sup> (NYSCEF 13, Third-Party Complaint.)

In its third-party complaint, IBI alleges that it entered into a contract with One PPW whereby IBI was to be paid \$662,000 in exchange for its services on the Project

---

<sup>1</sup> Counts I-IV are also asserted against third-party defendants New Amsterdam Design and Associates and White Birch Builders. IBI obtained a default judgment against New Amsterdam Design and Associates and White Birch Builders. (NYSCEF 322, Decision and Order [seq. no. 011].) Counts V (Foreclosure of Mechanic’s Lien) and VI (Payment Under Surety Bond), asserted against third-party defendant Suretec Insurance Company only, were voluntarily discontinued. (NYSCEF 35.)

(IBI Contract). (*Id.* ¶¶ 16-17 [Facts Common to All Counts].) IBI commenced work on the Project on July 20, 2017. (*Id.* ¶ 18.) On October 18, 2019, One PPW demanded that IBI cure certain alleged deficiencies in the services it had provided. (*Id.* ¶ 45.) IBI alleges that the deficiencies were related to work performed by the Design and Construction Third-Party Defendants. (*Id.* ¶ 46.) “IBI responded to each purported deficiency and directed One PPW to the likely culpable party;” nevertheless, One PPW terminated the IBI Contract. (*Id.* ¶¶ 47-48.)

## Discussion

### Legal Standard of Review

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court accepts the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) “At the same time, however, allegations consisting of bare legal conclusions ... are not entitled to any such consideration. Dismissal of the complaint is warranted under CPLR 3211 (a) (7) if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks and citations omitted].) Dismissal is warranted under CPLR 3211(a) (1) “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-39 [1st Dept 2019], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].)

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Where this showing is made, the burden shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action. (*Id.*) The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]); however, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Motion Sequence No. 001 – DeSimone and VDA’s Motion to Dismiss

In motion sequence no. 001, DeSimone and VDA move, pursuant to CPLR 3211 (a) (1) and (7) to dismiss the third-party complaint.

1. Common Law Indemnification

“The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party.” (*Stewart Family LLC v Stewart*, 184 AD3d 487, 493 [1st Dept 2020] [internal quotation marks and citation omitted].) “However, a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [of indemnification]. Thus, to be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.”

(*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999] [internal quotation marks and citations omitted].)

Here, IBI alleges that its negligence, if any, was “merely constructive, technical, imputed, or vicarious” and One PPW’s damages arose from the direct negligence and actions of the Design and Construction Third-Party Defendants. (NYSCEF 13, Third-Party Complaint ¶ 59.) It goes on to further allege that, “given the relationships that exist between One PPW and the Design and Construction Third-Party Defendants, the Design and Construction Third-Party Defendants are obligated by operation of law and otherwise to indemnify and hold harmless IBI from all claims, which are the subject of this lawsuit.” (*Id.* ¶ 60.)

Fatal to this claim is IBI’s failure to allege that it “delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.” (*17 Vista Fee Assoc.*, 259 AD2d at 80.) IBI fails to allege a relationship between it and DeSimone and VDA that would even imply that IBI delegated exclusive responsibility to DeSimone and VDA perform the duties that One PPW alleges IBI failed to perform.

In the underlying action, One PPW alleges that IBI breached the IBI Contract by failing to “provide proper drawing, specification and plans, failing to provide drawings and plans that complied with applicable laws, failing to coordinate consultants, and failing to properly staff the project.” (NYSCEF 1, Complaint ¶ 31.) One PPW specifically lists numerous alleged deficiencies and errors in IBI’s work, including but

limited to, preparing “an incorrect REVIT model<sup>2</sup> showing windows in the wrong location and having incorrect and inaccurate heights for the beams and floors;” failing “to coordinate the interior design with the construction documents leading to numerous revisions to framing, plumbing, sheetrock, and mechanical designs and plans;” providing “an incorrect stud size and numerous issues arose at each and every floor as a result of plans that were not drawn to incorporate the larger stud size;” providing drawings and specifications that did not meet the requirements of the NYC Department of Buildings Building Code, as well as other laws and regulations; providing drawings that were deficient and incorrect; “failing to staff the Project;” and “failing to properly supervise design staff.” (*Id.* ¶¶ 13[a], [b], [d], [j]; 16; 17 [a], [b], [h].) One PPW also alleges that IBI breached the standard of professional care exercised by architects by failing to supervise employees and staff and to exercise the proper judgment and skill when it performed its services. (*Id.* ¶¶ 36-37, 39.) Although it is unclear to the court how IBI could even effectively delegate these duties to DeSimone and VDA, non-architects, nevertheless, the third-party complaint is devoid of such allegations.

IBI argues that it is entitled to common-law indemnity because its relationship with DeSimone and VDA was so close as to approach that of privity, citing *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 539 NE2d 91, 541 NYS2d 335 (1989). The court notes that the third-party complaint is devoid of allegations supporting this theory.

---

<sup>2</sup> REVIT is building information modeling software sold by developer Autodesk. It is used by architecture, engineering, and construction teams to “create high-quality buildings and infrastructure” (<https://www.autodesk.com/products/revit/overview>).

In *Ossining*, plaintiff school district initiated a structural evaluation of its buildings and entered into a contract with an architectural firm; in turn, the architectural firm retained two engineering firms to assist with the work. Neither engineering firm had a contract with the plaintiff school district. The school district sued the architectural firm and two engineering firms, asserting claims for negligence and malpractice. A breach of contract claim was asserted against the architectural firm. The engineering firms move to the dismiss the negligence and malpractice claims asserting that they could not be sustained in the absence of contractual privity. The Court held that “recovery may be had for pecuniary loss arising from negligent representations where there is actual privity of contract between the parties or a relationship so close as to approach that of privity.” (73 NY2d at 424.) This case does not involve common-law indemnification. Rather, it appears that IBI’s reference to *Ossining* comes from *Bd. of Managers of 141 Fifth Ave. Condominium v 141 Acquisition Assoc. LLC*, 71 Misc 3d 1210(A) [Sup Ct 2021], where Judge Borrok referenced *Ossining* with regard to J Construction’s cross claim for professional negligence in a paragraph following a paragraph denying a motion to dismiss common law indemnification. IBI’s reliance on *Ossining* appears to be misplaced. In fact, the whole premise of common-law indemnification is to provide a remedy to

“one who has been held legally liable for the personal neglect of another ... no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.”

(*Oceanic Steam Nav. Co. v Cia. Transatlantica Espanola*, 134 NY 461, 467-468 [1892] [emphasis added].)

Finally, since One PPW alleges only that IBI is at fault for the alleged wrongdoing that caused the deficiencies, it is proper to dismiss this claim for that reason as well. (See *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 912 [1st Dept 2011] [holding dismissal of third-party claims for common-law indemnification proper where plaintiff in underlying action sought recovery from defendant/third-party plaintiff solely because of defendant/third-party plaintiff's alleged wrongdoing].)

Thus, this claim is dismissed.

## 2. Contribution

“Claims for contribution are governed by CPLR 1401 and apply to damages for personal injury, injury to property or wrongful death. ... and a purely economic loss resulting from a breach of contract does not constitute an ‘injury to property’ within the meaning of CPLR 1401” (*Id.* at 911 [citations omitted].) “Although contribution under CPLR 1401 is not available where the damages sought by the plaintiff are exclusively for breach of contract,” here there is also a professional malpractice claim alleged against IBI in the main action, “and professionals may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.” (*Tower Bldg. Restoration, Inc. v 20 E. 9th St. Apt. Corp.*, 295 AD2d 229, 229-230 [1st Dept 2002] [internal quotation marks and citations omitted].). Thus, as the tort claim against IBI is still pending, “the necessary predicate tort liability for a contribution action remains in the case.” (*Id.* at 230 [internal quotation marks and citation omitted].)

The motion to dismiss this claim is denied.

### 3. Contractual Indemnification and Breach of Insurance Obligations

As a preliminary matter, IBI asserts that this court cannot consider the affirmation of DeSimone and VDA's counsel and the attached exhibits on the grounds that they are admissible as counsel has no personal knowledge and the contracts attached are not authenticated as required by CPLR 4518(a). In reply, DeSimone and VDA submit the affidavits of Mark Plechaty, DeSimone's Principal, and Rick Sayah, VDA's Senior Vice President. (See NYSCEF 170, Plechaty aff; NYSCEF 171, Sayah aff.) IBI submits a sur reply objecting to these new submissions.

IBI is correct that "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Azzopardi v Am. Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993] [internal quotation marks and citation omitted].) However, the submission of these affidavits to authenticate the contracts submitted with the moving papers does not raise a new argument. DeSimone and VDA submitted the contracts in support of their motion, and in opposition, IBI raised the issue of authentication. In response to this argument, DeSimone and VDA submitted the affidavits. Nevertheless, the court accepts IBI's sur reply so there is no prejudice as it has a chance to respond to and address these submissions. This reasoning applies throughout this decision where other Design and Construction Third-Party Defendants presented documentary evidence in the same fashion and submitted supporting affidavits on reply.

In the third-party complaint, IBI alleges that the Design and Construction Third-Party Defendants "entered into contracts (Contracts) for the performance of work and

services at the Project,” “IBI is an express and/or third-party beneficiary of the Contracts,” and “[p]ursuant to the Contracts, the Design and Construction Third-Party Defendants have an obligation to defend, indemnify and hold harmless IBI from the claims asserted by One PPW in this action.” (NYSCEF 13, Third-Party Complaint ¶¶ 65-67.) DeSimone and VDA assert that these allegations are utterly refuted by the respective agreements they entered into with New Amsterdam Design Associates (NADA).

DeSimone’s agreement with NADA provides,

“Should any claim be brought against DESIMONE by [NADA] or by any third party, including without limitation any contractor or insurer asserting subrogation rights, relating to services under this AGREEMENT, [NADA] shall, to the fullest extent permitted by law, indemnify DESIMONE for all legal fees, consulting fees, including those of DESIMONE, and other costs of defense reasonably incurred by DESIMONE in relation to such claim, except to the extent such claim is found by a court or other tribunal of competent jurisdiction to be attributable to the professional negligence of DESIMONE.”

(NYSCEF 59, DeSimone Agreement ¶ I [Indemnification].)

VDA’s Agreement with NADA provides,

“A.[VDA] shall be responsible only for the work performed directly by its employees or those persons retained by [VDA] to perform work in conjunction with this project and shall defend, indemnify and hold harmless [NADA] against claims, damages, actual out-of-pocket costs or actual out-of-pocket expenses (including, without limitation reasonable attorney fees) arising out of such performance.

B. [VDA] shall not be responsible for the acts or emissions of [NADA] or any of the NADA’s other consultants contractor(s), sub-consultant(s), their agents or employees, or other persons performing any of the work, and NADA shall defend, indemnify and hold harmless the [VDA] against claims, damages, actual out of pocket costs or actual out of pocket expenses (including, without limitation, reasonable attorney fees) arising out of any of the foregoing.”

(NYSCEF 61, VDA Agreement VI [A], [B].)

In opposition, IBI argues that it would be premature to dismiss the contractual indemnification claim. IBI refers the court to the “Standard Form Agreement Between Owner and Construction Manager as Constructor” which was submitted by KBE-NY in support of its summary judgment motion. IBI asserts that this document implies that it is likely that DeSimone and VDA entered into a similar contract which contains an obligation to indemnify IBI. IBI further asserts that the documentary evidence submitted by DeSimone and VDA are proposals, implying that they are not the actual contract. The court finds this argument without merit.

First, the DeSimone proposal is executed by both parties and attached to the proposal is the DeSimone Consulting Engineers Standard Terms and Conditions, which clearly identifies it as an agreement between the parties with detailed terms,

“The following terms and conditions are a material part of the letter agreement (AGREEMENT) between DeSimone Consulting Engineers (DESIMONE) and New Amsterdam Design Associates (CLIENT), dated December 15, 2016 for One Prospect Square West Conversion (PROJECT) and are incorporated into the AGREEMENT as if fully set forth therein.”

(NYSCEF 59, DeSimone Agreement at 7.)

The VDA proposal also clearly identifies it as an agreement between the parties and contains detailed terms - “Based on our discussions, the following represents the agreement (‘the Agreement’) by and between VDA® (Van Deusen & Associates, Inc.), (‘Consultant’) and NADA, (the ‘Client).” (NYSCEF 60, VDA Agreement at 3.) “[D]efiniteness as to material matters is of the very essence of contract law.” (*Express Indus. & Term. Corp. v NY State DOT*, 93 NY2d 584, 590 [1999] [internal quotation and citation omitted].)

Second, both agreements contain language indicating that these are the operative agreements and there is no intention to enter into a more formal agreement as IBI suggest. (See NYSCEF 59, DeSimone Agreement ¶ L [This AGREEMENT comprises a final and complete repository of understanding between [NADA] and DESIMONE and supersedes all prior or contemporaneous communications, representations, or agreement, whether oral or written, with respect to the subject matter of this AGREEMENT"]; NYSCEF 60, VDA Agreement V [D] ["This writing constitutes the sole intention of the parties"]; *also see* NYSCEF 60, VDA Letter at 1 [indicating no further documents are to be executed - "Upon receipt of an executed agreement, VDA® (Van Deusen & Associates, Inc.) will issue an invoice with banking information to expedite payment of the mobilization fee."].)

Finally, IBI's argument that the existence of the KBE-NY Agreement, which attaches a subcontractor contract form, indicates that DeSimone and VDA entered into similar agreements is speculative. (*See Severino v Brookset Hous. Dev. Fund Corp.*, 71 AD3d 607, 608 [1st Dept 2010] [denying motion based on the speculative theory]; *see also Smith v Xaverian High School*, 270 AD2d 246, 248 [2d Dept 2000] [affirming dismissal of contractual indemnification claim where movant presented evidence that no contract existed and respondent's contention that further discovery might show contract's existence lacked merit].)

Nevertheless, the IBI contractual indemnification claim is also insufficiently pled.

"In the context of a third-party beneficiary claim, the plaintiff must establish: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the

benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost"

(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted].) Here, IBI simply alleges that it is an express and/or third-party beneficiary of the contracts entered into by Design and Construction Third-Party Defendants. Like in *Mandarin*, IBI "only offers conclusory allegations without pleading the pertinent terms of the purported agreement." (*Id.*) IBI relies on similar conclusory allegations in support of its claim for breach of insurance obligations. Thus, these claims are not sufficiently pled, and thus, both of these claims are dismissed.

#### Motion Sequence No. 002 – CPA's Motion to Dismiss

CPA moves to dismiss the four causes of action IBI asserted against it in its third-party complaint, pursuant to CPLR 3211(a)(1) and (a)(7).<sup>3</sup>

##### 1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against CPA.

##### 2. Contribution

For the reasons stated above, this claim is sustained.

##### 3. Contractual Indemnification and Breach of Contract to Procure Insurance

CPA contends that IBI's causes of action for contractual indemnification and breach of contract to procure insurance must be dismissed because no contract exists that requires CPA to indemnify IBI. It further contends that IBI's assertion that it is a

---

<sup>3</sup> CPA also moves to dismiss any cross claims asserted against it but fails to identify any such cross claims and fails to offer evidence or argument to support this facet of its motion. KBE-NY and ODA do the same in their motions in sequence numbers 004 and 006. Accordingly, these parts of their motions are denied.

third-party beneficiary of the contracts that CPA and the other Design and Construction Third-Party Defendants entered for the performance of work and services at the Project has no basis in fact because CPA's contracts with NADA and KBE-NY do not permit third-party claims.

In support of its arguments, CPA submits the contract and five addenda it entered into with NADA (NYSCEF 67, CPA/NADA Agreement and Addenda at 6-35) and a letter of intent and contract with KBE-NY (*id.* at 36-43) regarding certain land surveying services it performed for NADA and KBE-NY on the Project. IBI asserts that this documentary evidence actually creates an issue of fact instead of utterly refuting the allegations in the third-party complaint. IBI focuses on the March 13, 2018 letter of intent between CPA and KBE-NY, which states that “[t]his letter will confirm our intention to issue a contract between KBE-NY and [CPA] for the Surveying Scope.” (NYSCEF 67, Letter of Intent at 37.) IBI asserts that this language evidences that it was merely a precursor to the actual documents.

However, also on March 13, 2018, CPA and KBE-NY entered into a contract. (*See id.*, CPA Contract at 40.) The contract clearly provides that it is a complete agreement and completely expresses the parties' entire agreement. (*Id.* at 43, [¶ XV Entire Agreement Provision].) It also contains a provision, stating “[n]othing contained in this document and/or the Contract shall create a contractual relationship with or cause of action in favor of any third party against the Firm, The Firm Parties, or the Client.” (*Id.* [¶ XIII Third Parties Provision].) Although IBI does not specifically address the contract between CPA and NADA, it too contains an identical Third Party provision.

(See *id.* at 26 [¶ XIII Third Parties Provision].) These agreements utterly refute IBI's allegation that it is express and/or third-party beneficiary.

IBI also argues that the construction manager agreement between One PPW and KBE-NY contains a form subcontract requiring subcontractors to indemnify IBI and to procure IBI certain insurance coverage. Again, this argument is speculative. (See *WiAV Solutions Inc. v HTC Corp.*, 2016 NY Slip Op 30915 [U], \*12 [Sup Ct, NY County, May 16, 2016], *affd* 148 AD3d 587 [1st Dept 2017] ["A motion to dismiss a breach of contract claim will be granted where the plaintiff fails to identify the contract that forms the basis for the claim, and, instead, merely speculates that further discovery may reveal such a contract"] [citation omitted].)

In addition, these claims are also insufficiently pled as discussed above. (*Mandarin Trading Ltd.*, 16 NY3d at 182.)

The claims for contractual indemnification and breach of insurance obligations are dismissed. (*Smith*, 270 AD2d at 248.)

#### Motion Sequence No. 003 – Workstead's Motion to Dismiss

Third-party defendant Workstead moves to dismiss the third-party complaint and cross claims by the 2L Defendants. Workstead also filed a cross motion to dismiss LJI's cross claims; this cross motion was withdrawn. (NYSCEF 157, Notice of Withdrawal.)

##### 1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against Workstead.

##### 2. Contribution

For the reasons stated above, this claim is sustained.

##### 3. Contractual Indemnification and Breach of Contract to Procure Insurance

In support of its motion to dismiss this claim, Workstead submits two contracts, with amendments, that it entered into with One PPW for its work on the Project. (See NYSCEF 78-81.) IBI advances the same argument it made in opposition to motion sequence nos. 001 and 002 – dismissal is premature and refers to the contract between KBE-NY and One PPW with the subcontract form. For the same reasons, as stated above, this argument is speculative at best. (See *WiAV Solutions Inc. v HTC Corp.*, 2016 NY Slip Op 30915 [U], \*12.) Further, the March 2018 contract specifically identifies the parties to which Workstead was to procure insurance for and IBI is not one of them. (NYSCEF 80, March 2018 Workstead Contract ¶ 10.)

In addition, these claims are also insufficiently pled as discussed above. (*Mandarin Trading Ltd.*, 16 NY3d at 182.)

The claims for contractual indemnification and breach of insurance obligations are dismissed. (*Smith*, 270 AD2d at 248.) The 2L Defendants did not oppose the motion to dismiss their cross claims, and thus, those cross claims are dismissed.

#### Motion Sequence No. 004 – KBE-NY’s Motion for Partial Summary Judgment

In motion sequence no. 004, KBE-NY moves for partial summary judgment, pursuant to CPLR 3212, seeking dismissal of IBI’s claims for contractual indemnification and breach of insurance obligations on IBI’s behalf.

Like the other Design and Construction Third-Party Defendants, KBE-NY argues that it has no contract or relationship of privity with IBI, and thus, IBI’s third-party claims for contractual indemnification and breach of insurance obligation must be dismissed. In support of its motion, KBE-NY submits the affidavit of Bruno Guarini, its Executive

Vice President (NYSCEF 104 and 124.)<sup>4</sup> Guarini attests that he held his current position with KBE=NY at the time it entered in an agreement with One PPW to undertake the Project (KBE-NY Agreement). (*Id.* ¶ 1.)

Article 12 of the KBE-NY Agreement, states, in pertinent part,

“§12.1 This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by a written instrument signed by both the Owner and Construction Manager.

§12.2 The following documents comprise the Agreement:

1. AIA Document A134-2009, Standard for of Agreement Between Owner and Construction Manager as Constructor . . . , *as modified*.
2. AIA Document A201-2007, General Conditions of the Contract for Construction, *as modified ...*.”

(NYSCEF 105, KBE-NY Agreement at 59 [§§12.1, 12.2]).<sup>5</sup> Section 1.1.2

provides,

“The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. *The Contract Documents shall not be construed to create a contractual relation of any kind (1) between the Contractor and the Architect or the Architect’s consultants; (2) between the Owner and a Subcontractor or a Sub-subcontractor; (3) between the Owner and the Architect or the Architect’s consultants or (4) between any persons or entities other than the Owner and the Contractor.*”

<sup>4</sup> KBE-NY e-filed Guarini’s affidavit twice. The first e-filing occurred on August 2, 2021 (NYSCEF 104), the day before e-filing its notice of motion and supporting papers in sequence number 004 (NYSCEF 115 *et seq.*) and was accompanied by a copy of the construction management agreement KBE-NY entered with One PPW, dated March 8, 2017 (NYSCEF 105.) The Guarini affidavit was e-filed a second time with the motion papers as exhibit F (NYSCEF 124) to the supporting affirmation of Russ M. Patane, Esq., executed August 3, 2021 (NYSCEF 116) without a copy of the KBE-NY Agreement.

<sup>5</sup> The KBE-NY Agreement also includes, as exhibit E thereto, the “Form of Subcontract” discussed above.

(*Id.* at 32 [§ 1.1.2] [emphasis added].)

Guarini affirms that the KBE-NY Agreement was with One PPW only and that at no time after its execution was it amended or modified in any way that would have expanded or otherwise altered its contractual obligations, including duties to provide contractual indemnification or to procure insurance coverage, to include IBI. (NYSCEF 124, Guarini aff ¶¶ 8 to 13.) Guarini also attests that KBE-NY never became party to the separate agreement IBI entered with One PPW relating to the Project. (*Id.* ¶ 14). In his reply affidavit, Michael Kolakowski, KBE-NY's President and Chief Executive Officer (NYSCEF Doc No. 159), corroborates Guarini's assertions.

KBE-NY argues that IBI has no right, as either an incidental or an intended third-party beneficiary, to enforce the KBENY Agreement, citing *Dormitory Auth. v Samson Constr. Co.* (30 NY3d 704, 710 [2018] ["[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts"] [internal quotation marks and citation omitted].) The Court of Appeals has "previously sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was an intent to permit enforcement by the third party." (*Id.* [internal quotation marks and citation omitted].)

In opposition, IBI argues that KBE-NY's motion must be denied because the form AIA Document A201-2007, the terms of which it alleges are incorporated into the KBE-NY Agreement, has provisions mandating that the contractor provide contractual

indemnity to the designated architect and procure it certain insurance coverage.

However, this is not true. The document on which IBI relies (NYSCEF 156) is not the AIA Document A201-2007 incorporated into the KBE-NY Agreement. The document IBI offers is the standard industry form in blank. The KBE-NY Agreement “is comprised of a modified AIA Standard Form Documents A134-2009 and A201-2007... .” (NYSCEF 159, Kolakowski reply aff ¶ 11.)

Indeed, Section 12.2.2 of the KBE-NY Agreement states that “the following documents comprise the Agreement: .2 AIA Document A201-2007, General Conditions of the Contract for Construction, as modified. References to the AIA Document A201-2007 in the Contract Documents are to the AIA Document A201-2007, General Conditions of the Contract for Construction as modified.” (NYSCEF 105, KBE-NY Agreement at 21 [§12.2.2]). While Section 3.18 of the AIA Standard Form Documents A201-2007 states that the contractor shall indemnify the architect, the modified A201-2007 incorporated into the KBE-NY Agreement was modified, stating

“To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless the Owner, One PPW Residences, LLC, Sugar Hill Capital Partners, LLC, New Amsterdam Design and Associates, LLC, New Holland Residences, LLC, NHR Human Resources, LLC, Sugar Hill Property Fund III, LLC, Sugar Fund Hill Property Fund IV, LLC, Sugar Hill Offshore One PPW Holdings, Inc., LoanCore Capital Credit REIT LLC and their respective consultants, agents, officers, directors, principals, partners, members, owners, employees, subsidiaries, affiliates, representatives, and servants, successors and assigns (hereinafter, ‘Indemnitees’)... .”

(Compare NYSCEF 159, AIA Standard Form Documents A201-2007 at 16

[§3.18] with NYSCEF 105, Modified AIA Standard Form Documents A201-2007

at 43 [§3.18].)

Considering the above, and IBI's failure to raise a triable issue of fact as to whether it should be considered a third-party beneficiary of the KBENY Agreement, KBENY's motion for summary judgment, dismissing IBI's claims against it for contractual indemnity and breach of agreement to procure insurance, must be granted.

Motion Sequence No 006 – ODA's Motion to Dismiss

In motion sequence 006, third-party defendant ODA moves to dismiss IBI's third-party complaint and any cross claims asserted against it pursuant to CPLR 3211(a)(1) and (a)(7).

As a preliminary matter, IBI contends that ODA's motion to dismiss under CPLR 3211(a)(1), on the ground that a defense is founded upon documentary evidence, should be denied because, ODA electronically served its answer to the third-party complaint on June 24, 2021 (see CPLR 2103[b][7]; NYSCEF 87, Answer) and filed its motion to dismiss pursuant to CPLR 3211(a)(1) and (7) on August 19, 2021 (NYSCEF 145 *et seq.*).

CPLR 3211(e) provides, in relevant part,

"At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) of this rule may be made at any subsequent time or in a later pleading, if one is permitted."

Thus, ODA's motion under subdivision (a)(1) is untimely. However, this court is permitted to convert a motion such as this into one for summary judgment pursuant to CPLR 3211(c). Although this typically requires notice to the parties, in this instance, "[t]his case contains no factual disputes, and by submitting before the Supreme Court

every relevant piece of documentary evidence, along with affidavits of representatives of both parties discussing the application of such evidence, the parties have charted a course for summary judgment.” (*Frydman v Fid. Natl. Tit. Ins. Co.*, 68 AD3d 622, 624 [1st Dept 2009] [affirming lower court’s CPLR 3211[c] conversion without notice.]

1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against ODA.

2. Contribution

For the reasons stated above, this claim is sustained.

3. Contractual Indemnification and Breach of Contract to Procure Insurance

In support of its motion, ODA submits an executed proposed between itself and NADA. (NYSCEF 152, ODA Agreement.) The ODA Agreement contains an indemnification provision applying only to Sugar Hill Capital Partners and ODA. (*Id.* at 8.) It also contains an insurance provision requiring ODA to obtain insurance. This provision states that “ODA shall add the names of the owner, lender, and such other entities affiliated with the project, subject to change, as additional insureds under the terms of the ODA’s general liability and excess insurance coverage and policies in accordance with the current list of required Additional Insureds in Exhibit A.” (*Id.*) Exhibit A is blank. (*Id.* at 10.).

IBI contends that ODA’s motion must be denied with respect to IBI’s causes of action relating to contract because the ODA Contract with NADA raises questions of fact. Specifically, IBI points to the insurance provision to the ODA contract, arguing that it is a blank cover page. In response, Francois Blehaut, ODA’s Director of Landscape Design, affirms that “the insurance clause was never filled out. NADA never requested

of our company that insurance be provided to any other entity involved in the project.” (NYSCEF 242, Blehaut aff ¶ 5.) IBI counsel’s speculative assertion that ODA only attached the cover page for Exhibit A is insufficient to raise an issue of fact. IBI also fails to raise an issue of fact as to whether ODA had a contractual obligation indemnify it.

Further, even if this court did not convert the motion to one for summary judgment, ODA’s motion to dismiss on (a)(7) grounds would be granted as these claims are also insufficiently pled as discussed above. (*Mandarin Trading Ltd.*, 16 NY3d at 182.)

Thus, ODA’s motion is granted in part.

Motion Sequence No. 007 – Surface and AJ’s Motion to Dismiss

Surface and AJ move to dismiss, pursuant to CPLR 3211(a)(7) and any other applicable provision of 3211.

1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against Surface and AJ.

2. Contribution

For the reasons stated above, this claim is sustained.

3. Contractual Indemnification and Breach of Contract to Procure Insurance

In support of their motion, Surface and AJ submit an executed proposal with additional terms and exclusions (NYSCEF 182) and two change orders (NYSCEF 183 and 184.) Once again, IBI asserts that granting this motion would be premature. For reasons previously stated, this argument is speculative. (See *WiAV Solutions Inc. v HTC Corp.*, 2016 NY Slip Op 30915 [U], \*12.) IBI also asserts that it has third-party

beneficiary status because Surface and AJ “were required to review and comment on architectural documents, prepare design documents to be relied on and incorporated into architectural plans by others, and assist the architect on the design development and prepare initial submissions including specifications. (NYSCEF 231, Memo in Opp at 10 [internal quotation marks and citation omitted].) However, IBI fails to support this argument with law.

In addition, these claims are also insufficiently pled as discussed above. (*Mandarin Trading Ltd.*, 16 NY3d at 182.) Thus, these claims are dismissed.

Motion Sequence No. 008 – LJI’s Motion to Dismiss

LJI moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (7). For the reasons stated above, LJI’s motion pursuant to (a)(1) is untimely, but again the court will convert it to a summary judgment motion pursuant to CPLR 3211(c).

1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against LJI.

2. Contribution

For the reasons stated above, this claim is sustained.

3. Contractual Indemnification and Breach of Contract to Procure Insurance

IBI argues that the contract submitted by LJI is admissible, repeating the argument it made in opposition to DeSimone and VDA’s motion to dismiss. In response, LJI submits the affidavit of its President and owner, Lucas Jacobson. For the same reasons, stated above, the court finds the contract admissible. This is the only argument IBI makes in regard to these causes of action.

Further, even if this court did not convert the motion to one for summary judgment, ODA's motion to dismiss on (a)(7) grounds would be granted as these claims are also insufficiently pled as discussed above. (*Mandarin Trading Ltd.*, 16 NY3d at 182.)

Thus, the motion is granted in part.

Motion Sequence No. 009 – Design 2147's Motion to Dismiss

Design 2147 moves, pursuant to CPLR 3211(a)(7) to dismiss the third-party complaint.

1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against Design 2147.

2. Contribution

For the reasons stated above, this claim is sustained.

3. Contractual Indemnification and Breach of Contract to Procure Insurance

Again, IBI's claims for contractual indemnification and breach of contract to procure insurance are insufficiently pled. (*Mandarin Trading Ltd.*, 16 NY3d at 182 [internal quotation marks and citation omitted].)

Motion Sequence No. 010 – 2L Defendants' Motion to Dismiss

In motion sequence number 010, third-party defendants 2LS move to dismiss IBI's third-party complaint as asserted against them, pursuant to CPLR 3211(a)(7).

1. Common-Law Indemnification

For the reasons stated above, this claim is dismissed against Design 2147.

2. Contribution

For the reasons stated above, this claim is sustained.

3. Contractual Indemnification and Breach of Contract to Procure Insurance

Again, IBI's claims for contractual indemnification and breach of contract to procure insurance are insufficiently pled. (*Mandarin Trading Ltd.*, 16 NY3d at 182 [internal quotation marks and citation omitted].)

Accordingly, it is

ORDERED that motion sequence no. 001 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further

ORDERED that motion sequence no. 002 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further

ORDERED that motion sequence no. 003 is granted in part, and the first, third and fourth causes of action of the third-party complaint as well as the cross claims asserted against it are dismissed; and it is further

ORDERED motion sequence number 004 for partial summary judgment dismissing the causes of action for contractual indemnity and breach of contract to procure insurance asserted against it is granted; and it is further

ORDERED that motion sequence no. 006 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further

ORDERED that motion sequence no. 007 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further

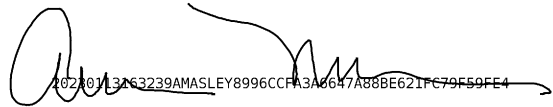
ORDERED that motion sequence no. 008 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further

ORDERED that motion sequence no. 009 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further

ORDERED that motion sequence number 010 is granted in part, and the first, third and fourth causes of action of the third-party complaint are dismissed; and it is further;

ORDERED that any third-party defendant who has not yet answered is directed to serve an answer to the third-party complaint within 20 days after a copy of this order is filed on NYSCEF by the court; and it is further

ORDERED that the parties shall submit a proposed Preliminary Conference Order within 30 days after a copy of this order is filed on NYSCEF by the court (e-file and e-mail to [SFC-Part48@nycourts.gov](mailto:SFC-Part48@nycourts.gov)).



1/13/2023

DATE

ANDREA MASLEY, 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