

Pacific Indem. Co. v Piano I, LLC

2023 NY Slip Op 33221(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 154943/2017

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

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PACIFIC INDEMNITY COMPANY, CHUBB INDEMNITY
INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 154943/2017

MOTION DATE 06/07/2023

MOTION SEQ. NO. 004

- v -

PIANO I, LLC, TAOCON, INC., ALBA SERVICES, INC.,
J.A.G. & H.E. CONSTRUCTION, INC., DAVID BAE
ARCHITECT, PLLC, ANASTOS ENGINEERING
ASSOCIATES, BRONZINO ENGINEERING P.C.,
RICHMOND TESTING LAB, INC., CARLIN-SIMPSON &
ASSOCIATES, GEOCOMP ENGINEERING, PC, AJ & GA
CONSTRUCTION,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356

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

By notice of motion, third-party defendant V. DiSalvo Contracting Co., Inc. (DiSalvo) moves pursuant to CPLR 3212 for an order dismissing the third-party complaint filed by defendant/third-party plaintiff Taocon, Inc. in the consolidated actions as well as any cross-claims asserted against it. Defendants Taocon, Piano I, LLC (Piano), and Geocomp, P.C., f/k/a Geocomp Engineering, PC (Geocomp) oppose the motion.

I. PERTINENT BACKGROUND

A. Undisputed facts

Based on the parties' statements of material facts (NYSCEF 321, 346), the following facts are undisputed:

During the relevant period, plaintiffs' subrogors, Mid-Century LLC and Holzer, owned premises located at 41 East 65th Street in Manhattan, New York, at which Holzer resided. Defendant Piano owned the adjacent premises located at 45 East 65th Street in Manhattan. The two properties share a common wall.

Sometime before February 2016, Piano entered into an agreement with Taocon for Taocon to serve as general contractor for the renovation of its premises. While Piano's premises was undergoing renovation, Taocon was notified on February 17, 2016 that the second-floor front ceiling of Holzer's premises was sagging, and it therefore installed scaffolding below the ceiling to try to prevent a collapse. The next day, the ceiling collapsed.

After the collapse, DiSalvo was hired by plaintiff Chubb Indemnity Insurance Company (Chubb) to repair and restore Holzer's premises.

B. Procedural background

This action was commenced in May 2017 (NYSCEF 1, 2). Defendants answered and some asserted cross-claims.

By stipulation dated December 13, 2017, plaintiffs' claims against Piano were dismissed, any cross-claims against Piano were converted into third-party claims, and plaintiffs were permitted to file an amended complaint substituting one defendant for a new one (NYSCEF 95).

In December 2017, plaintiffs filed an amended complaint (NYSCEF 96). Thereafter, the parties engaged in discovery.

Sometime in 2017, Holzer and Mid-Century commenced their own action in this court against defendants (NYSCEF 328).

By stipulation so-ordered on March 9, 2018, the parties in both actions agreed to their consolidation for joint discovery and trial (*id.*).

In May 2019, Taocon filed a third-party complaint against DiSalvo and another defendant (NYSCEF 203); the third-party claims against the other defendant were discontinued in June 2019 (NYSCEF 216).

In September 2019, Taocon filed a second third-party complaint against another entity (NYSCEF 242).

C. Relevant evidence

1. Holzer deposition testimony (NYSCEF 330, 331)

Holzer testified at her first deposition, as pertinent here, that she and her son own Mid-Century, and Mid-Century is the owner of her premises at issue. Before the ceiling collapse, she was unaware of any conditions that could impact the ceilings in her residence.

After Piano bought the adjacent building and started renovating it, Taocon's work caused excessive noise and vibrations, which caused some damage to Holzer's premises.

The day before the ceiling collapse, Holzer's live-in employee observed that the top part of the chandelier hanging on the second floor had fallen down. When he examined the ceiling, he saw that the ceiling had started to sag, and notified Holzer about it.

Holzer asked Taocon to install scaffolding below the ceiling, so it would not collapse onto the first-floor ceiling, and it was installed that day. The next day, the ceiling collapsed.

Holzer notified her insurance company, Chubb, and Chubb hired DiSalvo and other contractors to repair the damage. Holzer also hired an engineer to inspect all the ceilings in the premises for any unsafe conditions, and the engineer determined that the first-floor ceiling had to be replaced as well. DiSalvo was thus hired to replace all of the ceilings, among other work.

Holzer believed that DiSalvo damaged the first-floor ceiling by its work on it, and as a result of incompetent work performed by DiSalvo and other contractors, Holzer was delayed a year and half to two years from moving back into the premises.

In her second deposition, taken approximately eight months after the first one, Holzer testified that DiSalvo was hired to work on the first and second floor ceilings and the roof, but not the ceiling that had collapsed already. When asked whether she believed that DiSalvo contributed to any damage in the area where the ceiling had collapsed, Holzer said no.

In performing its work, DiSalvo cut out a large panel from both the first and second floor ceilings, in order to test the ceilings' integrity, but did not repair or replace the missing panels. DiSalvo also ordered mockups for the ceilings, which required the removal of pieces of existing plaster in the ceiling in order to make a copy of it for the new ceilings. When Holzer testified that DiSalvo "trashed" the ceiling, she was referring to the panel cutouts.

Other than the cutouts, Holzer did not believe that DiSalvo caused any other damage to the ceilings. Nor did she observe scuffs, scratches or other damage to her home as a result of the manner in which DiSalvo performed its work.

However, DiSalvo repaired a leak on the roof related to the common wall, but within a year after its work, Holzer observed leaks in the interior of the residence.

Holzer eventually fired DiSalvo in 2017 because the casts for the ceilings did not match the original plaster, despite DiSalvo's subcontractor making three different casts over several months. DiSalvo never performed any work on the ceilings.

2. Deposition of Chubb (NYSCEF 334)

Chubb's assistant vice president and executive general adjuster testified that removal of the debris from the premises did not begin for a year and half after the ceiling collapsed because

Holzer's artwork needed to be removed first. After it was removed, the debris removal began, and DiSalvo was hired to perform the ceiling repairs. At some point thereafter, DiSalvo was replaced on the job by Cyprus Construction because it was determined that the ceilings could be conserved to an artistic, historical degree, and DiSalvo did not have the experience to do that kind of work.

3. Deposition of DiSalvo (NYSCEF 335)

DiSalvo's site supervisor, Michael Dunkel, testified on DiSalvo's behalf. Although DiSalvo's job proposal for the premises involved repairing and replacing the collapsed ceiling and two other ceilings, and repairing and replacing millwork damaged from the ceiling collapse, it did not end up performing that work as it was terminated by Holzer. Instead, it only waterproofed an area of the roof, and provided Holzer, through DiSalvo's subcontractors, with mockups of the moldings. In order to do the mockups, one piece of existing plaster was removed by DiSalvo's subcontractor. According to Dunkel, he was never advised that there was any issue with the waterproofing work on the roof.

II. ANALYSIS

A. Contentions

DiSalvo contends that there is no evidence that any work it performed caused or contributed to plaintiffs' damages, as Holzer's premises was damaged by work performed next door at Piano's premises, and both Chubb and Holzer testified that DiSalvo did not cause any damage by its work. Thus, any claims for common law indemnity and contribution have no factual basis, and must be dismissed. Moreover, Taocon, as Piano's general contractor and agent, may be found strictly liable for negligence by causing the ceiling collapse, thereby

mooting its claim for indemnity against DiSalvo, as a party seeking common-law indemnification from another must be free of its own negligence (NYSCEF 322).

Taocon argues that Holzer's testimony establishes that DiSalvo damaged two ceilings in Holzer's premises which had not been damaged by Taocon's work next door, and that DiSalvo's improper waterproofing work on the roof resulted in new and additional damages. It also asserts that Holzer testified that DiSalvo's incompetent work delayed her return to the premises for almost two years, that Chubb paid Holzer for her damages associated with the delay, and that Chubb seeks to recover that amount from Taocon. Should Taocon be found liable for negligence related to Holzer's premises, it maintains that it would be entitled to show that DiSalvo should also be held liable, and it therefore has a viable contribution claim against DiSalvo. Moreover, as plaintiffs are suing Taocon for absolute liability under the New York City Administrative Code, Taocon may seek common-law indemnity against DiSalvo, even if Taocon is also found to have been negligent (NYSCEF 345).

Piano submitted a letter in opposition to DiSalvo's motion which, even if considered as proper opposition (*see* CPLR 2214[b] [answering affidavits must be filed in opposition to motion]; [c] ["only papers served in accordance with the provisions of this rule shall be read . . . in opposition to, the motion, unless the court for good cause shall otherwise direct"]), it merely contains its argument that DiSalvo's motion is premature as the parties agreed to a deadline of January 24, 2024 to file dispositive motions, and it otherwise joins in Taocon's arguments against DiSalvo (NYSCEF 352). Geocomp also joined in Taocon's opposition (NYSCEF 353).

In reply, DiSalvo observes that Geocomp and Piano's opposition papers were filed late and asks that they be disregarded. DiSalvo also asserts that Holzer's testimony is vague and ambiguous, and that there is no dispute that it never performed any repair work on the ceilings

and that the mockups required that pieces of the ceiling be cut-out, which Holzer knew and approved. Moreover, as the ceilings were going to be replaced, any damage caused by the cut-outs would have been nullified by the new ceiling replacement. DiSalvo further argues that any delay in restoring Holzer to possession of the premises resulted in the long time it took to remove all of Holzer's artwork, as testified to by the Chubb witness, and had nothing to do with DiSalvo's work. Finally, DiSalvo relies on Holzer's testimony that DiSalvo did not damage the ceilings and on the fact that none of the plaintiffs opposed its motion to dismiss (NYSCEF 354).

B. Discussion

It is well settled that a party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [*citations omitted*]). In considering such a motion, the court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the movant fails to meet this burden, the motion must be denied despite the sufficiency of the opposing papers. If the movant meets its burden, it becomes incumbent on the non-moving party to raise a material issue of fact (*See, Vega, supra*). "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]).

The primary evidence relied on by the parties related to DiSalvo's work at Holzer's premises is Holzer's deposition testimony, which establishes that the following facts are undisputed:

- (1) DiSalvo did not cause or contribute or take any action that resulted in the ceiling collapse;
- (2) DiSalvo never repaired or restored any of the ceilings in the premises as it was terminated from the job before it could do so;
- (3) In order to replace the ceilings, mockups had to be ordered, which required that pieces of the ceiling be cut-out and removed in order to make casts; and
- (4) DiSalvo did not work on the ceilings other than removing pieces of them to make mockups.

Moreover, Holzer testified that she fired DiSalvo based on her dissatisfaction with the quality of the mockups, and not due to any work it had performed on the ceilings.

No party submits evidence reflecting that DiSalvo's work in cutting out the panels to create mockups was improper or unsafe or negligent, nor is there evidence that DiSalvo's work caused a delay in repairing the ceilings. Rather, the evidence reflects that the delay was caused by the decision and need to remove Holzer's artwork for the premises, an undertaking that took much time and effort due to the number of artworks and their high value. Moreover, as it is undisputed that the ceilings needed to be replaced, DiSalvo's removal of plaster pieces to make mockups would have had no bearing on the ceilings' replacement, and no party submits evidence indicating otherwise.

There is also no evidence that DiSalvo's alleged defective waterproofing work on the roof caused or contributed to the damage caused by Taocon's renovation of Piano's premises, or that the work caused or contributed to any delay in restoring Holzer to the premises. Holzer's testimony about the delay is vague and ambiguous and unsupported by any other testimony or evidence in this matter.

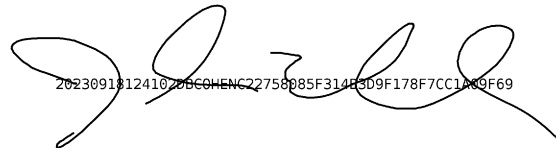
In sum, DiSalvo establishes that it did not act negligently in relation to any damage caused in Holzer’s premises or any work it performed for Holzer, and that, therefore, it cannot be held liable to defendants for common-law indemnity or contribution. No defendant raises a triable issue in opposition.

That the parties had stipulated to the filing of summary judgment motions in January 2024 did not preclude DiSalvo from filing its motion earlier, and Piano does not submit any authority to the contrary.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion by third-party defendant V. DiSalvo Contracting Co., Inc. for an order dismissing the third-party complaint filed by defendant/third-party plaintiff Taocon, Inc. in the consolidated actions as well as any cross-claims asserted against it is granted, and the third-party complaint and all cross-claims against it are severed and dismissed, and the clerk is directed to enter judgment accordingly.



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DAVID B. COHEN, J.S.C.

9/18/2023

DATE

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