CREF 546 W. 44th St., LLC v Hudson Meridian Constr. Group, LLC

2023 NY Slip Op 33757(U)

October 18, 2023

Supreme Court, New York County

Docket Number: Index No. 655672/2019

Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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INDEX NO. 655672/2019

MOTION SEQ. NO. 004

CREF 546 WEST 44TH STREET, LLC and PATRINELY GROUP, LLC,

Plaintiffs,

- v -

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC and CODE CONSULTANTS PROFESSIONAL ENGINEERS, PC,

Defendants.

DECISION + ORDER ON MOTION

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HUDSON MERIDIAN CONSTRUCTION GROUP, LLC

Plaintiff,

-against-

AMG SOLUTIONS LLC, BAY RESTORATION CORP., BLETSAS PLUMBING & HEATING CORP., CASSWAY CONTRACTING CORP., CHUTES ENTERPRISES LLC, D9, INC., HENICK-LANE, INC., LAWLER WOODWORK LLC, LET IT GROW, INCORPORATED, LIPPOLIS ELECTRIC, INC., OHANA METAL & IRON WORKS INC., and SHERIDIAN MECHANICAL CONTRACTING CORPORATION,

Defendants.

Third-Party
Index No. 595366/2022

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 108, 113, 114, 115, 126, 127, 128

were read on this motion to DISMISS.

Rich, Intelisano & Katz, LLP, New York, NY (Daniel E. Katz and Robert J. Howard of counsel), for defendant/third-party plaintiff Hudson Meridian Construction Group, LLC.
Adelman Matz P.C., New York, NY (Gary Adelman, Sarah M. Matz, and David M. Marcus of counsel), for third-party defendant AMG Solutions LLC.
No appearance for third-party defendants Bay Restoration Corp. and Chutes Enterprises LLC.

Gerald Lebovits, J.:

This action arises from a luxury residential construction project. The property owner, plaintiff CREF 546 W. 44th St., LLC, was sued by a nonparty for alleged violations of applicable

accessibility statutes. CREF then brought this action against its general contractor, defendant/third-party plaintiff Hudson Meridian Construction Group, LLC. Hudson Meridian impleaded third-party defendant AMG Solutions, LLC, and other subcontractors on the project. AMG now moves to dismiss the third-party claims and cross-claims against it. The motion is granted in part and denied in part.

BACKGROUND

In 2014, CREF entered into an agreement with Hudson to construct a building at 546 West 44th Street in New York County (the "Project"). Hudson subcontracted with AMG to provide glass, metal, and woodwork at the Project.

The relationship between Hudson and AMG later soured. AMG claimed that Hudson had failed to pay $296,000 in services and materials rendered under their subcontract. In October 2017, AMG sued Hudson and other defendants in this court for breach of contract and Lien Law trust fund diversion, and to foreclose on a mechanic's lien. (*See* Index No. 159086/2017 [Shlomo Hagler, J.]) [the *AMG* Action].) Hudson counterclaimed, alleging that AMG had failed to perform its work in a timely manner and failed to provide necessary materials, thereby requiring Hudson to incur costs to replace deficient and substandard work by AMG. Hudson has moved for summary judgment in that action to dismiss AMG's claims and for judgment in Hudson's favor on the counterclaim. That motion remains pending.

In May 2018, Stason Sutton,who uses a wheelchair and is assisted in this litigation by the Fair Housing Justice Center, sued CREF and other defendants in the U.S. District Court for the Southern District of New York, alleging that they had failed to comply with federal, state, and local disability-accommodation statutes. (*See Fair Housing Justice Ctr., Inc. v CREF 546 West 44th Street, LLC*, Dkt. No. 18-cv-2146 [the *Sutton* Action].) The action remains pending.

The *Sutton* Action led CREF to bring this action against Hudson and a design consulting firm (Code Consultants) retained by CREF in connection with the Project. CREF alleged that Hudson and Consultants (i) breached their contractual obligations to ensure that the Property complied with state and federal accessibility requirements; (ii) committed professional negligence; and (iii) breached contractual obligations to indemnify CREF for expenses arising from the *Sutton* Action. Hudson and Code Consultants moved to dismiss the claims against them. In July 2020, this court dismissed CREF's professional-negligence claims and its indemnification claims arising from liability for violations of federal law; and it denied the motion to dismiss with respect to CREF's breach-of-contract claims and its indemnification claims arising from liability for violations of state and local law. (*See CREF 546 W. 44th St., LLC v Hudson Meridian Constr. Group, LLC*, 69 Misc 3d 747 [Sup Ct, NY County 2020].)

In May 2022, Hudson filed a third-party complaint against AMG and numerous other parties, including Chutes Enterprises LLC and Bay Restoration Corp. Hudson is asserting claims for contribution and for contractual and common-law indemnification. Chutes has cross-claimed against AMG for contribution. Bay has cross-claimed against AMG for contractual and common-law indemnification.

AMG now moves under CPLR 3211 (a) (1) (4) and (7) to dismiss Hudson's third-party claims against it, and the cross-claims brought against it by Chutes and Bay. AMG's motion with respect to Hudson's third-party claims is denied with respect to Hudson's contractual-indemnification claim and granted with respect to Hudson's common-law-indemnification and contribution claims. AMG's motion with respect to the cross-claims is granted without opposition.

DISCUSSION

I. The Branch of AMG's Motion Seeking Dismissal of Hudson's Claims for Failure to State a Cause of Action

AMG moves under CPLR 3211 (a) (7) to dismiss Hudson's claims against it for failure to state a cause of action. In considering a motion to dismiss under CPLR 3211 (a) (7), the court must accept the facts as alleged in support of the claim as true, afford the non-moving party the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Applying this standard, AMG's motion is denied with respect to Hudson's contractual-indemnification claim, and granted with respect to Hudson's common-law-indemnification and contribution claims.[1]

A. The Contractual-Indemnification Claim

The branch of AMG's motion seeking dismissal of Hudson's contractual-indemnification claim is denied. Section § 20.1 of the subcontract provides that "[t]o the fullest extent permitted by law," AMG will defend and indemnify Hudson from damages and losses (including reasonable attorney fees) arising "from the act, failure to act, omission, negligence, breach or default" by AMG "in connection with the performance of this Subcontract." (NYSCEF No. 89 at 23 [subcontract page 21].)

Hudson's third-party complaint alleges in support of the contractual-indemnification claim that, "to the extent that any negligent, deficient and defective construction work existed or exist[s] at the Project," those shortcomings do not result from Hudson's work, but instead from "negligent, improper and faulty work and/or design and/or materials performed and supplied by AMG." (NYSCEF No. 55 at ¶ 26.)

In moving to dismiss the contractual-indemnification claim, AMG argues, in effect, that this court should decline to credit this allegation. (*See* NYSCEF No. 80 at 17-19.) That is, AMG contends that it performed its work in strict compliance with the design plans it was provided, and that Hudson's potential liability does not stem from anything AMG did, but rather with defects in the plans that Hudson provided AMG. Indeed, AMG suggests, it did not perform work in the areas of the project at issue in the *Sutton* Action. (*Id.* at 18-19.) But AMG has not provided

[1] AMG also contends that Hudson's third-party complaint, taken as a whole, should be dismissed for (putative) failure to satisfy the basic pleading requirements of CPLR 3013. Given the especially liberal construction that must be given to third-party complaints (*see Corva v United Servs. Auto. Assn.*, 108 AD2d 631, 632 [1st Dept 1985]), AMG's contention is unpersuasive.

documentary evidence conclusively establishing that it performed its work in proper compliance with Hudson's plans and specifications, or that none of its work is at issue in the *Sutton* Action.[2] Absent that documentary evidence, this court may not treat the allegations of Hudson's complaint as untrue or unworthy of credit.

AMG also contends that "absent any negligence on the part of AMG, which Hudson failed to allege, AMG cannot be required to indemnify Hudson." (*Id.* at 18.) But Hudson *did* allege that AMG's work was negligent. (*See* NYSCEF No. 55 at ¶ 26.) Regardless, the terms of the indemnification clause are not limited to "negligence" or a "breach" by AMG. (*See* NYSCEF No. 89 at 23 § 20.1.) Nor would it contravene General Obligations Law § 5-322.1 to read that clause as triggered by non-negligent conduct, as AMG asserts. (*See* NYSCEF No. 80 at 18, citing *Gomez v National Ctr. for Disability Servs.*, 306 AD2d 103, 103 [1st Dept 2003].) As *Gomez* reflects, § 5-322.1 bars requiring a party to a construction contract to indemnify another party for the indemnitee's own negligence. It does not also bar requiring indemnification by a non-negligent indemnitor, as AMG argues. (*See Cackett v Gladden Props., LLC*, 183 AD3d 419, 421-422 [1st Dept 2020] ["A contractual indemnification clause may shift liability from an owner or contractor to an employer even where the employer was not negligent."].)

To the extent AMG is arguing instead that the indemnification clause is unenforceable absent negligence by AMG because, in that scenario, any loss would necessarily stem from *Hudson's* negligence, that argument is unpersuasive. AMG has not established that absence of negligence on its part necessarily implies 100% negligence on Hudson's part. This lack of proof is particularly significant given the indemnification clause's "as permitted by law" proviso. That proviso, consistent with § 5-322.1, limits the scope of any indemnity obligation owed by AMG to that portion of Hudson's losses that does not stem from Hudson's own negligence. (*See Brooks v Judlau*, 11 NY3d 204, 208-210 [2008].)

B. The Common-Law-Indemnification Claim

The branch of AMG's motion seeking dismissal of Hudson's claim for common-law indemnification is granted. Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary." (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dep't 2006] [internal quotations and citations omitted].) A party cannot, however, obtain common-law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part." (*Id.*)

AMG argues that Hudson's common-law-indemnification claim should be dismissed because Hudson was not merely vicariously responsible for any conduct by subcontractors like AMG. Rather, AMG says, Hudson was responsible for building the Project and for approving the work of each of those subcontractors. (*See* NYSCEF No. 80 at 19-20.) This court agrees.

[2] Nor does this court see a basis to afford judicial-estoppel effect to the arguments that Hudson has made—and not made—in the *AMG* Action about AMG's work on the project, as AMG now proposes. (*See* NYSCEF No. 80 at 19.)

Hudson's own third-party complaint concedes that under its construction contract with CREF, Hudson was responsible for "construction administration, coordination, management and supervision services at the project." (NYSCEF No. 55 at 20.) Hudson claims it is nonetheless entitled to common-law indemnification from AMG on the ground that it exclusively delegated responsibility to AMG for the work underlying the losses at issue. (*See* NYSCEF No. 113 at 15-17.) But that is not what the third-party complaint says.

Hudson's complaint alleges only that it retained the third-party defendants, including AMG, "to perform work, labor and services at the Project" (NYSCEF No. 55 at ¶ 21), and that any damages for which Hudson are responsible stemmed from "the sole, primary and affirmative negligence of AMG, without any negligence on the part of Hudson contributing thereto" (*Id.* at ¶ 31). The third-party complaint does not also allege that Hudson relinquished its supervisory responsibilities over the Project work at issue by exclusively delegating all responsibility for that work to AMG. Nor does Hudson identify a case in which the Court of Appeals or Appellate Division has held that the allegations limited to those made in Hudson's complaint, standing alone, state a cause of action for common-law indemnification.

C. The Contribution Claim

The branch of AMG's motion seeking to dismiss Hudson's claim for contribution is granted.

New York's contribution statute, CPLR 1401, allows for apportionment of liability among joint tortfeasors who owed a duty to an injured plaintiff, in cases of "personal injury, injury to property or wrongful death." The statute does not permit contribution claims among parties whose liability to the plaintiff is solely contractual. (*See SSDW Co. v Feldman-Misthopoulos Assoc.*, 151 AD2d 293, 295 [1st Dep't 1989].)

AMG argues that Hudson's contribution claim against AMG is subject to dismissal because it seeks to enforce a purely contractual obligation for indemnification. This court agrees. Although Hudson is correct that a defendant may maintain a third-party contribution claim where a tort claim for injury to property remains live in the main action (*see Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349, 1350 [2d Dept 2011]), Hudson has not identified a live tort claim here that could give rise to damages for injury to property. To the contrary, this court dismissed CREF's tort claim against Hudson sounding in professional negligence. (*See CREF 546 W. 44th St.*, 69 Misc 3d at 756-757.) Hudson may not obtain contribution from AMG for any liability that it ultimately incurs in contract to CREF.

II. The Branch of AMG's Motion Seeking to Dismiss Hudson's Remaining Claims in Light of the Prior *AMG* Action

In addition to seeking dismissal of Hudson's claims for failure to state a cause of action, AMG also moves to dismiss Hudson's third-party complaint under CPLR 3211 (a) (4) as duplicative of Hudson's counterclaims in the first-filed *AMG* Action. This branch of AMG's motion is denied.

CPLR 3211 (a) (4) permits dismissal of a claim where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." It is undisputed here that the *AMG* Action was filed first, and that a substantial identity of parties exists between that action and the current third-party action. The question is whether the two suits involve "the same cause of action" for CPLR 3211 (a) (4) purposes. They do not.

To answer this question, courts must consider whether the causes of action at issue "arise out of the same subject matter or series of alleged wrongs," and whether the "nature of the relief sought" is the same or substantially similar. (*Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975].) This consideration should be undertaken at a relatively low level of generality. (*See Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013] [holding dismissal warranted under CPLR 3211 (a) (4) when both actions "arise out of the same transaction, involve the same allegations concerning Bear Stearns's and EMC's concerted actions in the 'mortgage-loan securitization chain' and seek the same recovery for the same alleged injuries—that is, recovery of "claims payments made and to be made" under the policy"]; *Equestrian Assocs. v Freidus*, 192 AD2d 572, 574 [2d Dept 1993] [denying dismissal when, though "all of the claims generally arose from the venture agreement, the claims asserted in [the second] action allege new violations of the agreement and seek different remedies"].)

Applying this standard, Hudson's current third-party claims against AMG do not involve the same cause of action as Hudson's counterclaims in the *AMG* Action. Hudson's prior counterclaim sought the costs to Hudson of completing contract items that AMG had allegedly failed to complete properly between 2014 and 2016 and that AMG had failed in 2016 to remediate after being notified that those items were not satisfactorily completed under the contract. (*See AMG Solutions LLC v Hudson Meridian Construction Group, LLC*, Index No. 159086/2017, NYSCEF No. 55 at ¶¶ 86-94 [counterclaim allegations]; *see also id.*, NYSCEF No. 142, at 9 [Hudson mem. of law in support of summary judgment on the counterclaim, describing the claimed items of work that Hudson paid to complete, and those items' costs].) The current third-party complaint seeks to recoup from AMG damages and defense costs paid by Hudson in connection with CREF's 2019 complaint in this action, based on what Hudson alleges to be AMG's failure to ensure that its work would be completed consistent with federal, state, and local laws concerning accessibility. The two sets of claims thus differ both in the nature of the damages sought and in the alleged breaches by AMG that assertedly caused those damages.

Further, Hudson's counterclaim in the *AMG* Action was filed at the beginning of March 2019—more than six months before CREF sued Hudson in this action in late-September 2019. (*Compare* Index No. 159086/2017, NYSCEF No. 55 [Hudson answer with counterclaims], *with* Index No. 655672/2019, NYSCEF No. 2 [CREF complaint].) Hudson could not have raised its current third-party claims at the time it answered/counterclaimed in the *AMG* Action.[3] And

[3] AMG appears to suggest that for purposes of the claim-preclusion dimension of the CPLR 3211 (a) (4) inquiry, Hudson should be treated as having had an opportunity to litigate its current third-party claims in the prior action, because the note of issue in the prior action was filed two years after CREF commenced this action. (*See* NYSCEF No. 128 at 3.) But the Appellate Division, First Department, has held in the claim-preclusion context that where claims in the

because the two sets of claims rest on different facts and seek different damages, a judgment for Hudson against AMG in this action would not necessarily be inconsistent with a judgment for AMG dismissing Hudson's counterclaim in the prior action, as AMG would have it. (*See* NYSCEF No. 128 at 2-3).

III. The Branch of AMG's Motion Seeking to Dismiss the Cross-Claims Asserted Against It

AMG also moves under CPLR 3211 to dismiss the cross-claims asserted against it by Chutes and Bay. Chutes and Bay have not opposed the motion. This branch of AMG's motion is granted.

Accordingly, it is

ORDERED that the branch of AMG's motion seeking dismissal of Hudson's third-party claim against AMG for contractual indemnification is denied; and it is further

ORDERED that the branches of AMG's motion seeking dismissal of Hudson's third-party claims against AMG for common-law indemnification and for contribution are granted, and those claims are dismissed; and it is further

ORDERED that the branches of AMG's motion seeking dismissal of the cross-claims brought against it by third-party defendants Chutes Enterprises and Bay Restoration are granted, and those cross-claims are dismissed; and it is further

ORDERED that the balance of the claims and cross-claims asserted in the third-party action are severed and shall continue.

10/18/2023
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

later action "rely on conduct alleged to have occurred after the commencement of the prior action, such claims should be allowed." (*UBS Secs. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 476 [1st Dept 2011]; *accord UBS Secs. LLC v Highland Capital Mgt., L.P.*, 159 AD3d 512, 513-514 [1st Dept 2018] [reaffirming that holding].) For present purposes, therefore, the relevant date is not the filing of the note of issue in the prior action in December 2021, but the filing there of the answer/counterclaim in March 2019.