

**Ocean Harbor Cas. Ins. Co. v Affinity Contr. Corp.**

2025 NY Slip Op 30942(U)

March 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 510379/2023

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 20<sup>th</sup> day of March 2025.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

-----X  
OCEAN HARBOR CASUALTY INSURANCE COMPANY a/s/o  
CLIFFORD MARTIN OUEDRAOGO,

Plaintiff,  
-against-

**DECISION  
and  
ORDER**

AFFINITY CONTRACTING CORP.,

Defendant.

Index No.: 510379/2023  
Mot. Seq. No.: 4-5  
Cal. Nos. 33-34

-----X  
AFFINITY CONTRACTING CORP.,

Third-Party Plaintiff,

-against-

PROSTEEL INC. and GIDICH & SEPULVEDA  
ARCHITECTURE LLC,

Third-Party Defendants.  
-----X

2025 MAR 24 A 9:00  
KINGS COUNTY CLERK  
FILED

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Defendant/Third-Party Plaintiff's Notice of Motion/Affidavits/Affirmations/Exhibits (MS#4).....	72-84
Defendant/Third-Party Plaintiff's Notice of Motion/Affidavits/Affirmations/Exhibits (MS#5).....	87-104
Third-Party Defendant Gidich & Sepulveda Architecture LLC's Answering Affirmation//Exhibit (MS#5).....	118-122
Defendant/Third-Party Plaintiff's Reply Affirmation.....	129
Other.....	

MONTELIONE, RICHARD J., J.

*OCEAN HARBOR CASUALTY INSURANCE COMPANY, etc. v. AFFINITY CONTRACTING CORP.,*  
Index No. 510379/2023

This action was commenced by summons with notice on April 5, 2023. A complaint was filed on May 22, 2023. This is a subrogation action wherein plaintiff alleges that due to the negligence and breach of contract of Affinity Contracting Corp., a general contractor hired by plaintiff's subrogee, plaintiff's subrogee suffered damages on July 10, 2020, due to a brick masonry wall collapse because of, inter alia, improper bracing. This action only seeks contractual damages. Issue was joined by defendant Affinity Contracting Corp. (Affinity) by service of an answer with crossclaims and counterclaims on July 25, 2023. An answer to counterclaims of defendant Affinity was filed on October 31, 2023. A third-party action was commenced by filing the third-party complaint on November 7, 2023, alleging that third-party defendant Gidich & Seupulveda Architecture LLC (G&S) was negligent.

Third-party defendant G&S previously brought a pre-answer motion to dismiss which was granted by short form order dated July 24, 2024 (NYSCEF #70), for reasons stated on the record and because defendant/third-party plaintiffs' failure to allege facts to support causes of action for contribution, common law indemnification, and contractual indemnification and dismissed the third-party complaint "with prejudice" as to G&S. The court granted third-party G&S's pre-answer motion to dismiss and now defendant third-party plaintiff Affinity moves to reargue (MS#5). Defendant third-party plaintiff Affinity also moves for default judgment against third-party defendant Prosteel Inc. which is unopposed.

The rationale found in the record follows (NYSCEF #103, Transcript p. 10:9-22):

THE COURT: All right. I'm going to grant it. I don't see any basis. You haven't given me any reasons or any legal basis to bring the lawsuit. And I'm not—you know, I'm not sure whether I adopt your argument only because I haven't looked it up, I haven't looked at the cases. I'm confident that they are correct, but there's a more basic problem here.

You don't have any—I know with the motion to dismiss, you know, it's the four corners if you have an allegation. But also if there's no—if you can't give me facts that support any theory. You always need to state a cause of action, some legal theory, and you haven't been able to do that. So the motion to dismiss is granted. Short form order.

NYSCEF #103, T. 12:6-8:

THE COURT: I've just read the complaint. I mean, you're going to have to tell me one fact within this complaint that shows negligence.

NYSCEF #103, T. 13:3-15:

OCEAN HARBOR CASUALTY INSURANCE COMPANY, etc. v AFFINITY CONTRACTING CORP.,  
Index No. 510379/2023

THE COURT: The complaint has got to make some allegation of negligence. It has got to say based on plans that we reviewed, we did the demolition in a way that caused the wall to collapse, something. There's no language like that in here. You have to state some cause of action. It's not enough to say the defendant was negligent. You've got to give some facts,

I'm looking at the four corners. I also looked at the affidavit submitted on behalf of your client. Neither one of them fills in the gaps that are required to make this, the four corners of this complaint viable. I find that there's no viable cause of action that's been stated.

After hearing oral argument, the court will grant the motion to reargue and upon reargument will expand upon its rationale for granting third-party defendant's pre-answer motion to dismiss.

The standard to apply when considering a motion to dismiss is found in *Held v Kaufman*, 238 AD2d 546, 547-48, 657 NYS2d 82, 83, 1997 WL 208773 [2d Dept 1997], *affd as mod*, 91 NY2d 425, 694 NE2d 430, 671 NYS2d 429, 1998 NY Slip Op 03246, 1998 WL 159477 [1998]:

Normally, where the defendants have made a pre-answer motion to dismiss a complaint pursuant to CPLR 3211, an opposing affidavit from the plaintiff will be considered only for the limited purpose of remedying defects in the complaint. However, where, as here, the plaintiff's submissions 'conclusively establish that he has no cause of action', the complaint should be dismissed (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314, 357 N.E.2d 970; *SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 517 N.Y.S.2d 741).

The complaint against third-party defendant claims negligence and breach of contract. The only damages sought are economic damages by way of breach of contract. The Court in *Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26, [1987], was faced with the following pertinent facts: an architectural firm was hired by a school district and entered into a contract to prepare plans and specifications for a building and supervise its construction. A general contractor was also hired. The architect issued its final certificate of completion for the building, but thereafter the roof began to leak. The architect commenced a third-party action against the general contractor seeking contribution or indemnification. The general contractor moved to dismiss for failure to state a cause of action. The Court found that the third-party action was properly dismissed and "(t)hat purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute (which) is made plain by the legislative history of CPLR 1401 (L.1974, ch. 742, § 1)," *see Bd. of Educ. of Hudson City School Dist. v Sargent*,

*OCEAN HARBOR CASUALTY INSURANCE COMPANY, etc. v AFFINITY CONTRACTING CORP.,*  
Index No. 510379/2023

*Webster, Crenshaw & Folley*, 71 NY2d 21, 26, 517 NE2d 1360, 1363, 523 NYS2d 475, 477, 44 Ed Law Rep 552, 1987 WL 260 [1987]. The Court held that CPLR 1401 does not permit “contribution between two parties whose potential liability to a third party is for economic loss resulting only from a breach of contract.” *Id* at 475. In short, the Court in *Bd. of Educ. of Hudson City School Dist.* found that the general contractor should not be held liable in contribution for contractual obligations made by the architectural firm. Here, there is no question of fact there is a contract between the owner and the general contractor. There is no question of fact there is no contract between defendant third-party plaintiff Affinity and third-party defendant G&S. In short, there is no common law right of contribution and “ ‘[m]erely charging a breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim,’ ” (citations omitted), *see Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 29 (1987).

The defendant third-party plaintiff’s arguments that the motion is premature is rejected as there is no dispute as to the pertinent facts: a contract exists between plaintiff and defendant third-party plaintiff; and no contract exists between the defendant third-party plaintiff and third-party defendant. The proposed amended complaint does not change the pertinent facts. There is no indication of how further discovery will lead to any other facts that would affect the court’s determination as to whether a cause of action has been stated or exists.


Based on the foregoing, it is

ORDERED that defendant/third-party plaintiff Affinity Contracting Corp.’s motion for default judgment against third-party defendant Prosteel, Inc. is GRANTED without opposition (MS#4); and it is further

ORDERED that the defendant/third-party plaintiff Affinity Contracting Corp.’s motion to reargue is GRANTED (MS#5) and upon reargument of the court’s decision and order dated July 24, 2024, the court adheres to its original decision and order GRANTING third-party defendant Gidich & Sepulveda Architecture LLC’s motion to dismiss, with prejudice; and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.

  
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Hon. Richard J. Montelione

2025 MAR 24 A 9:00  
KINGS COUNTY CLERK  
FILED