

373-375 Broadway, LLC v Broadway 371, LLC

2026 NY Slip Op 31432(U)

April 1, 2026

Supreme Court, New York County

Docket Number: Index No. 156959/2016

Judge: Leslie A. Stroth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

-----X

373-375 BROADWAY, LLC, EMFT, LLC,

Plaintiff,

- v -

BROADWAY 371, LLC, ELAD GROUP PROPERTIES LLC, THE BOARD OF DIRECTORS OF THE FRANKLIN PLACE CONDOMINIUM,

Defendant.

-----X

BROADWAY 371, LLC, THE BOARD OF DIRECTORS OF THE FRANKLIN PLACE CONDOMINIUM

Plaintiff,

-against-

786 IRON WORKS CORP., CERTIFIED SCAFFOLDING & HOISTING, INC., CHAMP CONSTRUCTION CORP., DESIGN CONSTRUCT INTERNATIONAL, INC., DESIGN CONSTRUCT INT'L OF NEW YORK, LLC, FNA ASSOCIATES, INC., GEOTECHNICAL SOLUTIONS CORP., GILSANZ.MURRAY.STEFICEK, INC., GILSANZ.MURRAY.STEFICEK, LLP., GZA GEOENVIRONMENTAL, INC., GOLDBERG ZOINO ASSOCIATES OF NEW YORK, PC, HYDRO TECH ENVIRONMENTAL, CORP., HYDRO TECH ENVIRONMENTAL ENGINEERING AND GEOLOGY, D.P.C., JOHN S. DEERKOSKI, P.E., AND ASSOCIATES,, DEERKOSKI ENGINEERING, P.C., P-GOOM PLATFORM AND SCAFFOLDING, INC., P-GOOM, INC.

Defendant.

-----X

BROADWAY 371, LLC, THE BOARD OF DIRECTORS OF THE FRANKLIN PLACE CONDOMINIUM, ELAD GROUP PROPERTIES LLC

Plaintiff,

-against-

ROBINSON RESTORATION LLC, SMITH RESTORATION INC.

Defendant.

-----X

INDEX NO. 156959/2016

MOTION DATE 04/24/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Third-Party Index No. 595055/2020

Second Third-Party Index No. 595009/2023

The following e-filed documents, listed by NYSCEF document number (Motion 004) 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 327, 328, 329, 330, 331, 332, 333, 334, 335, 352

were read on this motion to/for

JUDGMENT - SUMMARY

The instant action arises out of damage allegedly caused to a building, located at 365 Broadway, New York, New York, during the construction of a neighboring luxury condominium complex on the adjoining property, located at 371 Broadway, New York, New York (the “Project”). EMFT LLC (“Plaintiff”)¹, the owner of the building that was allegedly damaged, filed this lawsuit against Broadway 371, LLC (“Broadway 371”), the owner of the adjoining property, Elad Group Properties, LLC (“Elad”), the developer of the Project, and the Board of Directors of the Franklin Place Condominium (“BOD”), the governing body of the luxury condominium complex. Plaintiff alleges that its roof and chimney were damaged by falling scaffolding planks, that there are cracks throughout the building, that doors shifted and could not close, and that the HVAC system was damaged from splattered cement (NYSCEF Doc. No. 329, Plaintiff’s Deposition). The complaint seeks damages, *inter alia*, for defendants’ “breach of their duty by failing to perform their construction and related activities so as to adequately protect Plaintiff’s Building” (NYSCEF Doc. No. 288, Complaint).

Broadway 371 and BOD (together, “Third-Party Plaintiffs”) filed a third-party complaint against, *inter alia*, John S. Deerkoski, P.E. and Associates and Deerkoski Engineering, PC (together, “Deerkoski”), who were hired to provide engineering services for the Project, specifically to perform inspection, testing and consultant services. The third-party complaint asserts six causes of action against Deerkoski: (1) breach of contract, (2) negligence, (3) common

¹ The action commenced by Plaintiff 373-375 Broadway LLC was discontinued (NYSCEF Doc. No. 261).

law indemnification, (4) common law contribution, (5) contractual indemnification, and (6) contractual contribution. Deerkoski now moves for summary judgment, pursuant to CPLR 3212, seeking to dismiss the third-party complaint against it in its entirety.

LEGAL STANDARD

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*see Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, [1st Dept 1990]).

DISCUSSION

A. Breach of Contract and Negligence Claims

As to the breach of contract and negligence claims, Deerkoski asserts that the claims are time-barred by the three-year statute of limitations for professional malpractice claims, pursuant to CPLR 214(6). Deerkoski asserts that it substantially completed its engineering services for the Project on February 27, 2013, at which time the statute of limitations for these causes of action began to run, but the third-party complaint was not filed until nearly seven years later, on January 14, 2020.

In opposition, Third-Party Plaintiffs do not dispute that Deerkoski's work was completed on February 27, 2013. Instead, they argue that the statute of limitation has not yet run because third-party and indemnification claims do not begin to accrue until the indemnitee has made payment to the injured party. Additionally, Third-Party Plaintiffs assert that the third-party complaint asserts a claim for general negligence, not professional malpractice.

CPLR 214(6) provides that "an action to recover damages for malpractice other than medical dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" must be commenced within three years." "To the extent that the complaint alleges negligent performance of professional duties, the three-year statute of limitation applies. . ." (*New York State Workers' Compensation Bd. V SGRisk, LLC*, 116 AD3d 1148, 1150 [3d Dept 2014]; see also *Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co, Inc.]*, 3 NY3d 538, 542 [2004] ["The pertinent inquiry is thus whether the claim is essentially a malpractice claim"]). "In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance" (*City School Dist. of City of Newburgh v Stubbin & Assoc.*, 85 NY2d 535, 538 [1995]).

Here, the first and second causes of action are breach of contract and negligence, not indemnification. The third-party complaint alleges that Deerkoski "defectively, improperly, incompetently, and negligently" performed the engineering services which it was hired to complete. As the Third-Party Complaint alleges the negligent performance of professional duties, the three-year statute of limitation applies to this action.

Additionally, the emails from Deerkoski show that it was told that it was no longer authorized to work on the Project on January 16, 2013, and Deerkoski's billing records show that it stopped billing for the Project on February 27, 2013 (NYSCEF Doc. Nos. 317, 322).

Therefore, the evidence demonstrates that Deerkoski's services were completed by February 27, 2013, at the latest. Third-Party Plaintiffs do not contest this fact. With the three year statute of limitation, the claims for breach of contract negligence must have been asserted by February 27, 2016, which they were not. Therefore, the claims for breach of contract and negligence are time barred by CPLR 214(6) and these causes of action are dismissed.

B. Common-Law Indemnification and Contractual Indemnification

It is well-established that a party cannot be indemnified for their own negligence, and contractual indemnification clauses are to be enforced only when the "intention to indemnify can be clearly implied from the language and purpose of the entire agreement, and the surrounding facts and circumstances" (*See Masciotta v Morse Diesel Int'l, Inc.*, 303 A.D.2d 309 (1st Dept 2003)). In contractual indemnity, a party seeking indemnity must show that it is free from negligence but need not show that the proposed indemnitor is negligent (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]). "Common-law indemnification may be pursued by parties who have been held vicariously liable for the party that actually cause the negligence that injured the plaintiff" (*Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 AD3d 419, 420 [1st Dept 2017]). "Common-law indemnification is predicated on vicarious liability without actual fault, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006]).

Deerkoski argues that the common-law and contractual indemnification claims must be dismissed because Third-Party Plaintiffs are alleged to have committed independent acts of wrongdoing, so they are precluded from seeking indemnification.

In opposition, Third-Party Plaintiffs assert that the contractual indemnification claim cannot be dismissed because Broadway 371 and Deerkoski had a contract with a broad indemnification provision, which stated:

“To the fullest extent permitted by law, the Consultant shall indemnify and hold harmless the Owner and its parent company, corporations, subsidiary and affiliated companies . . . from and against all liability, lawsuits claims, causes of action, damages, losses, interest, judgments, liens, and expenses . . . for personal or bodily injury, sickness, disease or death or injury to or destruction of tangible property including loss of use arising from, or in connection with the performance of services by the Consultant under this Agreement. This indemnification shall survive completion of the Project.”

(NYSCEF Doc. No. 332 at 6). Third-Party Plaintiffs also argue there are issues of material fact as to whether the alleged damages arose from Deerkoski’s work, and that Deerkoski has presented no evidence that Third-Party Plaintiffs participated in any wrongdoing.

Here, the complaint alleges, *inter alia*, that the “Defendants breached their obligations by failing and refusing to extend [Plaintiff]’s Chimneys upward despite demand,” that “Defendants breached their duty by failing to perform their construction and related activities so as to adequately protect Plaintiff’s Building,” and that Defendants have refused to “remove the dissembled scaffolding, protection and debris” from the roof of Plaintiff’s building (NYSCEF Doc. No. 1, ¶¶43, 46, 51-52). Because the complaint alleges the Defendants are actual wrongdoers, not that they are responsible for wrongdoings committed by Deerkoski, or another subcontractor, the Third-Party claims for indemnity must be dismissed.

C. Common-Law Contribution

“Contribution is generally available as a remedy when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person” (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003] [internal citation omitted]). “In contribution, the tort-feasors responsible for plaintiff’s loss

share liability for it . . . [T]heir common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss” (*Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 [1990] [internal citation omitted]).

Deerkoski argues that the claim for common-law contribution must be dismissed because there is no material issue of fact that Deerkoski was not responsible for any damage to Plaintiff’s building. Specifically, Deerkoski argues that it finished providing engineering services on February 27, 2013, but that damage to Plaintiff’s building did not occur until after July 1, 2013, when the construction of the new building began, and most of the damage occurred in October 2015. Deerkoski asserts it had no involvement in the construction of the new building, and that it was only involved with the demolition of the old building, so it cannot be liable for any damage to Plaintiff’s building.

Third-Party Plaintiffs argue that Deerkoski was contracted to perform work that was “integral to the foundation, underpinning, testing, crack testing, load distribution and vault design” of the Third-Party Plaintiffs’ building, and that more discovery is needed to determine the extent to which Deerkoski’s work contributed to the alleged damage. Third-Party Plaintiffs point to Deerkoski’s billing records, which indicate Deerkoski had meetings regarding the building’s underpinnings and stability (NYSCEF Doc. No. 318, Deerkoski’s October Invoice).

In reply, Deerkoski argues that there were discussions regarding Deerkoski performing work on the underpinnings, but that work never happened.

While Deerkoski’s work on the project concluded before damage occurred to Plaintiff’s building, there are still questions of fact as to whether Deerkoski’s engineering work caused some of the damage. The alleged damage to the building includes allegations of cracking, which may relate to the Deerkoski’s work related to the foundation of the building, crack testing, and

load distribution contributed to the alleged damage. Accordingly, Deerkoski's motion regarding common-law contribution is denied.

D. Contractual Contribution

Deerkoski asserts that the sixth claim for contractual contribution must be dismissed because their contract with Broadway 371 did not contain a provision regarding contribution. Third-Party Plaintiffs do not oppose this argument and moreover, they do not acknowledge that they asserted a claim for contractual contribution in their opposition.² Accordingly, Deerkoski's motion for summary judgment with respect to the sixth claim for contractual indemnification is dismissed.

E. Cross-Claims

Deerkoski asserts that all cross-claims for contractual indemnity must be dismissed because the only party that Deerkoski had a contract with was Broadway 371. Additionally, Deerkoski argues that all cross-claims for common-law indemnity must be dismissed because all of the parties asserting the cross-claims are alleged to have breached a contract or to be liable for their own negligence. Lastly, Deerkoski asserts that the cross-claims for contribution must be dismissed because there is no competent evidence that the services it provided caused damage to Plaintiff's building.

None of the parties are alleged to be vicariously liable for Deerkoski's actions. None of the third-party defendants submitted opposition to Deerkoski's motion. Therefore, Deerkoski's motion with respect to the cross-claims for contractual indemnification, common-law indemnification, and contribution is granted and these claims are dismissed.

² The opposition states that "Defendants brought five causes of action against Deerkoski including Breach of Contract, Negligence, Common-Law Indemnification, Contractual Indemnification, and Common-Law Contribution" (NYSCEF Doc. No. 327, ¶75).

Accordingly, it is

ORDERED that Deerkoski's motion for summary judgment is granted, in part, with respect to the third-party claims for breach of contract, negligence, common-law indemnification, contractual indemnification, and contractual contribution, and the cross-claims for contractual indemnification, common-law indemnification, and contribution, and these claims are dismissed; and it is further

ORDERED that Deerkoski's motion for summary judgment is denied with respect to common-law contribution; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

4/1/2026
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE