Board of Mgrs. of the 650 Sixth Ave. Condominium v K-W 650 Assoc. LLC
2018 NY Slip Op 33050(U)
November 30, 2018
Supreme Court, New York County
Docket Number: 153801/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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BOARD OF MANAGERS OF THE 650 SIXTH AVENUE CONDOMINIUM,

Plaintiff,

- against -

K-W 650 ASSOCIATES LLC, *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 153801/2016

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

In motion sequence 002, defendants Goldstein Associates Consulting Engineers, PLLC and GACE Consulting Engineers, D.P.C. (collectively, "GACE") move pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the two cross-claims asserted by defendants K-W 650 Associates LLC, Kumkang 650 Manager Corp., Tae-Woo Kim, Keumkang Housing Co., Ltd., Westport 650 Company, LLC, Kumkang Housing NY LLC, Klaus Kretschmann, Westport 650 LLC, Keun-Hwan Bae, Kumkang Housing Co., Ltd., Livein Inc. and Westport Group, Inc. (collectively "Sponsor"). For the following reasons, the motion shall be granted as to the second cross-claim for common law indemnification only.

BACKGROUND

This case arises out of purportedly defective renovation work done on a condominium located at 650 Sixth Avenue in Manhattan (the "Building"). Specifically, plaintiff alleges that the ceilings in the majority of the units in the Building were "insufficiently anchored to the structural ceiling slab" which plaintiff became aware of on December 24, 2015, when a portion of sheetrock in one unit collapsed without warning (complaint ¶ 2). Although the complaint originally asserted claims against both GACE and Sponsor, plaintiff has since discontinued its claims against GACE (*see* NYSCEF Doc. No. 88 [stipulation of discontinuance with prejudice]). Accordingly, the only remaining claims against GACE are Sponsor's two cross-claims for contribution and contractual

and/or common law indemnification.[1] As discussed further below, Sponsor has abandoned the first of these two claims, leaving only its claim for indemnification.

GACE entered into an Engineering Services Agreement dated January 20, 2005 with non-party 650 Partners LLC to perform engineering services in relation to the Building's renovation (*see* NYSCEF Doc. No. 82 [the "ESA"]). In relevant portion, that agreement requires GACE "to indemnify and hold harmless [650 Partners LLC] from and against any and all liability . . . arising or in connection with the performance of the services furnished by Engineer or its consultants under this Agreement" (*id.* ¶ 8.1). The ESA also provides that the agreement "constitutes the entire understanding of the parties concerning the Project and supersedes all prior negotiations, statements, instructions, representations or agreements, either oral or written," and that the ESA "may be amended only by a written instrument expressly stated to be an amendment and signed by both [650 Partners LLC] and Engineer" (*id.* ¶ 15.13). The ESA further provides that 650 Partners LLC "may assign this Agreement . . . to any other company, entity or person upon thirty (30) days written notice to Engineer" (*id.* ¶ 14.2).

As relevant to this motion, GACE also issued several proposals for engineering services at the Building between January 2005 and July 2007 (*see* NYSCEF Doc. Nos. 27, 28). The first of these proposals was integrated into the ESA, with the ESA's terms governing where there was any conflict (*see* ESA ¶ 15.13, exhibit A). Each of the proposals incorporated GACE's Terms and Conditions, which provide that:

> "the Client shall indemnify and hold harmless the Engineer against all claims . . . to which the Engineer may be subjected . . . which were cause in whole or in part by any act, error or omission of the Client or any of its contractors, or anyone retained by or employed by the Client, in the performance of its work for this Project,"

(*see e.g. id.*, exhibit A at 3 ¶ 6.2).

DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit

[1] In June 2018, plaintiffs amended their complaint to add Island Acoustics as a defendant. This defendant is not involved in this motion.

of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

A. *Contractual Indemnification*

GACE contends that the terms of its proposals apply, not the ESA. Although GACE concedes that none of the proposals were signed by the Sponsor, GACE argues that the unsigned agreements are enforceable on the basis that Sponsor "manifested its intent to be bound by the . . . proposals by accepting work, making payments and requesting additional work" (NYSCEF Doc. No. 66 ["sup mem"] at 7-8, citing *e.g. Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005] [noting that "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound"]). Conversely, GACE contends the ESA does not control because 650 Partners LLC never properly assigned that agreement to Sponsor (*id.* at 8-9). To this end, GACE argues that, under paragraph 14.2 of the ESA, no assignment is valid without 30 days' written notice to GACE. In support, the Office Administrator for GACE Consulting Engineers, D.P.C. states in her affidavit that she had conducted a search of GACE's records and found no written record of any assignment (NYSCEF Doc. No. 65 ¶ 4).

In opposition, Sponsor notes that a contractual provision that an agreement which "only contain[s] a covenant not to assign, and d[oes] not provide that any assignment would be void or invalid, the assignment [i]s not void, but only gives rise to a claim for damages against [the assignor] for violation of the covenant not to assign" (NYSCEF Doc. No. 87 ["opp mem"] at 6-7, quoting *Almeida Oil Co., Inc. v Singer Holding Corp.*, 51 AD3d 604, 606 [2d Dept 2008]). Thus, Sponsor argues, since paragraph 14.2 contains no provision voiding any assignment made without notice, Sponsor contends any such assignment would still be valid. Woojin Jang, an employee of Sponsor, states in his affidavit that "650 Partners LLC assigned the ESA to K-W Associates LLC on or about October 3, 2005" and that at "all times relevant to the instant lawsuit in their dealings with GACE, [Sponsor] operated under and pursuant to the ESA" (NYSCEF Doc. No. 85 ¶¶ 4-5). Sponsor further argues that the unsigned proposals do not govern in light of paragraph 15.13 of the ESA.

In reply, GACE contends this court should disregard Jang's affidavit since he does not claim to have any personal knowledge of the assignment (NYSCEF Doc. No. ["reply mem"] at 3). GACE further argues that the caselaw Sponsor relies on to establish the assignment's validity is inapposite because, the ESA does not contain a covenant not to assign. Instead, "the ESA provides that it is freely assignable by Sponsor, as long as a single condition is met, to wit: 30 days' notice to GACE" (*id.* at 4). GACE does not provide any further explanation as to how a provision stating that assignment must be made with notice is different than a covenant against assignment without notice.

GACE further argues that, even if the ESA applied, paragraph 15.13 does not invalidate any proposals other than the single proposal that was included as an exhibit to the ESA (*id.* at 5). This argument does not address that paragraph's provision that the ESA "may be amended only by a written instrument expressly stated to be an amendment and signed by both Owner and Engineer."

The motion shall be denied. As stated in *Sullivan v Intl. Fid. Ins. Co.* (96 AD2d 555, 556 [2d Dept 1983]), "it has been consistently held that assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments" but "where the language employed constitutes merely a personal covenant against assignments, an assignment made in violation of such covenant gives rise only to a claim for damages against the assignor for violation of the covenant." In that case, the court found that under this principle, an assignment was not void, even where it was made in contravention to a covenant prohibiting assignments without defendant's written consent. The same holding applies with greater force here, where at best the relevant clause operated as a covenant against assignments without notice to GACE. GACE's attempt to distinguish between a covenant against assignments made without written notice and a provision allowing for assignments with written notice is equivocal and must fail. Additionally, the fact that Jang's affidavit does not assert personal knowledge of the assignment is not fatal to Sponsor's opposition, since at this stage, Sponsor need not make an evidentiary showing to support its claim (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976] ["unless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint"]).

B. *Common Law Indemnification*

To the extent Sponsor's second cross-claim is based on common law indemnification, GACE argues that the claim should be dismissed since the direct claims do not seek to hold Sponsor vicariously liable for GACE's wrongdoing, but rather allege Sponsor was the actual wrongdoer (sup mem at 9-10). GACE notes that "[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated in the wrongdoing cannot receive the benefit of this doctrine" (*id.* quoting *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003]). GACE also notes that plaintiff has brought, among others, a breach of contract claim against Sponsor which alleges that Sponsor breached its obligation to "ensure that the Building was constructed in accordance with its Plans and Specifications" (*id.* at 9, quoting complaint ¶ 57).

In opposition, Sponsor argues simply that its claim for common law indemnification should not be dismissed because, at this stage in the litigation, there has been no finding of wrongdoing against Sponsor (opp mem at 8-9). Sponsor also argues that, under section 2.7 of the ESA, GACE and not Sponsor is responsible for ensuring that work on the Project was being performed in accordance with the Construction Documents. However, although that section describes GACE's supervisory responsibilities during the construction phase, it does not speak to Sponsor's obligations to plaintiff.

In reply, GACE notes that the viability of a claim for common law indemnification is determined by the allegations in the complaint, not by later findings of fault (reply mem at 6, citing *Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 AD3d 419, 420 [1st Dept 2017] [affirming dismissal of common-law indemnification claim where plaintiff sought recovery from [defendant] because of the latter's alleged wrongdoing—breach of contract—and not vicariously because of any negligence on the part of [counter-claim defendant]; *see also Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 912 [1st Dept 2011] [plaintiff "seeks recovery from [defendant] solely because of [defendant's] alleged wrongdoing. Thus, the motion court properly dismissed [defendant's] third-party claims for common-law indemnification"]). Additionally, GACE notes that paragraph 2.7.1 of the ESA provides that GACE "will not be required to make exhaustive or continuous onsite inspections to check the quality or quantity of

the work" and that GACE "is not responsible for the contractor's failure to perform the work in accordance with the requirements set forth in the Construction Documents."

As GACE correctly notes, common-law indemnification is unavailable where the direct claims against a defendant seek recovery for defendant's own wrongdoing (*see Chatham Towers, Inc.*, 151 AD3d at 420). The motion must be granted dismissing the second cross-claim as against GACE.

C. *Abandoned Contribution Claim*

GACE argues that Sponsor's cross-claim for contribution fails because it is based on a purely economic loss, and a "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute" (sup mem at 5-6, quoting *Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). Sponsor's opposition fails to address, and thus abandons, this claim (*see e.g. Musillo v Marist Coll.*, 306 AD2d 782, 784 [3d Dept 2003] [plaintiff abandoned claim by failing to address it in his brief]). This cross-claim shall be dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendants Goldstein Associates Consulting Engineers, PLLC and GACE Consulting Engineers, DPC (together "GACE") is GRANTED to the extent of dismissing the Second Cross-Claim and the claim for contribution of the Sponsor defendants as to GACE and is otherwise DENIED; and it is further

ORDERED that defendants who have not yet done so shall file answers within twenty (20) days of the date of this Decision and Order; and it is further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, January 8, 2019 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: November 30, 2018

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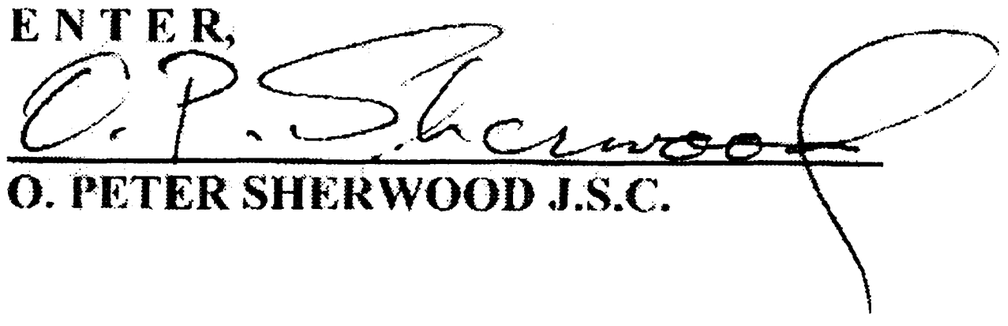

O. PETER SHERWOOD J.S.C.