

Board of Mgrs. of the St. Tropez Condominium v. JMA Consultants, Inc.

Supreme Court of New York, New York County

March 29, 2022, Decided

INDEX NO. 656079/2018, Third-Party Index No. 596075/2019

Reporter

2022 N.Y. Misc. LEXIS 1581 *; 2022 NY Slip Op 31045(U) **

[1]** BOARD OF MANAGERS OF THE ST. TROPEZ CONDOMINIUM, Plaintiff, - v - JMA CONSULTANTS, INC. D/B/A JMA OF NEW JERSEY IN NEW YORK, JMA CONSULTANTS, INC. D/B/A JMA OF NEW JERSEY, JMA CONSULTANTS AND ENGINEERS, P.C., EUGENE FERRARA, JOSEPH CANTON, Defendant. JMA CONSULTANTS, INC. D/B/A JMA OF NEW JERSEY, JMA CONSULTANTS AND ENGINEERS, P.C., Plaintiff, -against- JOSEPH K. BLUM CO., LLP, NOVA RESTORATIONS OF NY INC., BRAXTON ENGINEERING, P.C., CHARLES MARINO, STEEL INDUSTRIES INC. OF NY, COMPANIES A THROUGH ZZ, JOHN/JANE DOES 31 THROUGH 40, QUALITY BUILDING CONSTRUCTION LLC, ZOLO SERVICE CORP., MAJOR BUILDING CONSULTING, LLC, SITE SAFETY, LLC, THE ST. TROPEZ CONDOMINIUM, BARRY SCHNEIDER, CHRISTOPHER KLEIN, SYLVIE DURHAM, JOHN/JANE DOES 1 THROUGH 30, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

indemnification, third-party, motion to dismiss, intended beneficiary, contractual, damages, breach of contract, cross claim, indemnify, expenses, facade, losses, costs

Case Summary

Overview

HOLDINGS: [1]-Defendant's claims for breach of contract and contractual indemnification against the third-party were sufficient to survive the third-party's motion to dismiss because there was no dispute the contract was valid and defendant was an intended beneficiary of the insurance and indemnification clauses of the contract.

Outcome

Motion to dismiss granted in part and denied in part.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Inferences & Presumptions > Inferences

[HN1](#) [Download Icon] Motions to Dismiss, Failure to State Claim

On a motion to dismiss, the pleading is afforded a liberal construction, the facts as alleged are accepted as true, and the court must determine whether the facts as alleged fit any cognizable legal theory, according the plaintiff the benefit of every possible favorable inference. When a motion is made pursuant to *CPLR 3211(a)(7)*, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

[HN2](#) [Download Icon] Types of Third Party Beneficiaries, Intended Beneficiaries

An intended beneficiary of a contract may maintain a third-party action against a contracting party by establishing (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental.

Torts > Procedural Matters > Multiple
Defendants > Distinct & Divisible Harms

[HN3](#) **Multiple Defendants, Distinct & Divisible Harms**

[CPLR 1401](#) was not intended for the apportionment of liability arising solely from breach of contract.

Civil Procedure > ... > Pleadings > Amendment of
Pleadings > Leave of Court

[HN4](#) **Amendment of Pleadings, Leave of Court**

[CPLR 3025](#) requires a proposed amended pleading to be submitted in connection with any such request.

Judges: [*1] HON. **ANDREW BORROK**, J.S.C.

Opinion by: ANDREW BORROK

Opinion

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

Upon the foregoing documents, third party defendant Quality Building Construction's (**QBC**) motion to dismiss the third-party complaint and all cross claims against it is granted in part.

[**2] The portions of QBC's motion seeking to dismiss the third-party claims for breach of contract and contractual indemnification are denied because the language in QBC's contract with the St. Tropez Condominium (the **Condo**) is clear that JMA was an intended beneficiary of the contract ([Dominion Financial Corp. v Asset Indem. Brokerage Corp.](#), 60 AD3d 461, 462, 874 N.Y.S.2d 115 [1st Dept 2009]; *Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.*, 108 AD3d 634, 970 N.Y.S.2d 47 [2nd Dept 2013]). QBC's motion to dismiss JMA's contribution claim is granted because the economic loss doctrine prevents JMA from seeking contribution on the sole remaining claim against it, breach of contract ([Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.](#), 71 NY2d 599, 602-603, 523 N.E.2d 803, 528 N.Y.S.2d 516 [1988]; [Board of Ed. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley](#), 71 NY2d 21, 28-29, 517

[N.E.2d 1360](#), 523 N.Y.S.2d 475 [1987]). QBC's motion to dismiss JMA's common law indemnification claim is granted as duplicative of the contractual indemnification claim ([Niagara Falls Water Bd. v City of Niagara Falls](#), 64 AD3d 1142, 881 N.Y.S.2d 763 [4th Dept 2009]). QBC's motion to dismiss the cross claims asserted against it is denied because it failed to assert any arguments in support of that relief. Finally, JMA's request for leave to replead is denied because they failed to submit a proposed second amended third-party complaint to the Court for its review ([Janssen v Incorporated Vil. of Rockville Ctr.](#), 59 AD3d 15, 27, 869 N.Y.S.2d 572 [2nd Dept 2008]).

Relevant [*2] Facts and Procedural History

The main and third-party actions in this matter arise from the collapse of the facade from the south side of the Condo, located at 340 East 65th Street, New York, New York, on December 7, 2015. Third party plaintiffs JMA Consultants, Inc. and JMA Consultants and Engineers, P.C. (collectively **JMA**) were hired by the Board of Managers of the St. Tropez Condominium (the **[**3] Board**) to perform consulting and engineering services in connection with a restoration project pursuant to letter agreements executed in 2014.

QBC was retained by the Board to complete 8th cycle mortar repair of the masonry facade of the building in accordance with Rule 11 of the New York City Department of Buildings (**DOB**). QBC entered directly into contract with the Condo, which identified and defined QBC as the "Contractor" and JMA as the "Architect/Engineer" on the project [NYSCEF Doc. No. 300, the **Contract**]. The Rider to the Contract (the **Rider**) required QBC to obtain "for the protection and benefit of the Owner, the Architect and the Contractor" insurance policies which afforded coverage for JMA [NYSCEF Doc. No 300, Rider, ¶ 28]. Section 22 of the Rider also provided that QBC would indemnify the Condo **[*3]** and JMA

...against any and all suits, claims, damages, costs, expenses or losses, including the costs and expense of litigation and attorney's fees, for bodily injury, property damage, other than to the Work itself, and to the extent such claims, damages, costs, expenses or losses are not covered by insurance purchased pursuant to this Contract, that may arise from the performance of the Work to the extent such claims, damages, costs, expenses, or losses are caused by the negligence of the Contractor, any of its subcontractors, or material

suppliers arising out of the acts or omissions of the Contractor, any of its subcontractors, or material suppliers, anyone directly or indirectly employed by any of them, or any entity or anyone for which the Contractor or any of its subcontractors or material suppliers may be liable regardless of whether such claims, damages, costs, expenses, or losses are caused in part by a party indemnified hereunder. The obligations set forth in this provision shall not be construed to negate, limit, abridge or reduce any other rights or obligations of indemnity which would otherwise exist as to an entity or person described in this provision.

[NYSCEF Doc. No. [*4] 300, Rider, ¶ 22.1]. The Board filed a complaint against JMA, alleging breach of contract and negligence, and seeking damages relating to the property destruction as a result of the facade collapse. The First Department dismissed the Board's negligence claim as duplicative of the breach of contract claim [NYSCEF Doc. No. 307].

[*4] JMA's amended third party complaint [NYSCEF Doc. No. 103] alleged causes of action for contractual and common-law indemnification, breach of contract, and contribution against QBC. JMA alleged that QBC performed work on the portion of the facade that ultimately collapsed, and that QBC's work on and near the facade caused the collapse. QBC, the Condo and other third-party defendants Braxton Engineering, P.C. (Braxton), Charles E. Marino, P.E., Major Building Consulting LLC (Major Building) and Site Safety, LLC (Site Safety) asserted cross claims against each other for contribution and indemnity.

Discussion

[HN1](#)[↑] On a motion to dismiss, the pleading is afforded a liberal construction, the facts as alleged are accepted as true, and the court must determine whether the facts as alleged fit any cognizable legal theory, according the plaintiff the benefit of every possible [*5] favorable inference ([Leon v Martinez](#), 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). When a motion is made pursuant to CPLR § 3211(a)(7), a court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" ([Rovello v Orofino Realty Co.](#), 40 NY2d 633, 636, 357 N.E.2d 970, 389 N.Y.S.2d 314 [1976]).

Breach of Contract and Contractual Indemnification

Although QBC did not enter into a contract with JMA, JMA asserts breach of contract and contractual indemnification claims against QBC as an intended beneficiary of the Contract with the Board.

[*5] [HN2](#)[↑] It is well settled that an intended beneficiary of a contract may maintain a third-party action against a contracting party "by establishing (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental" ([Burns Jackson Miller Summit & Spitzer v Lindner](#), 59 NY2d 314, 336, 451 N.E.2d 459, 464 N.Y.S.2d 712 [1983]; [Alicia v City of New York](#), 145 AD2d 315, 534 N.Y.S.2d 983 [1st Dept 1988]).

QBC's assertion that JMA was not an intended beneficiary of the Contract is not true. The language in the Rider with regard to both QBC's obligation to maintain insurance coverage on behalf of JMA and indemnify JMA makes it very clear that JMA was an intended beneficiary of the Contract (see [Dominion Financial Corp. v Asset Indem. Brokerage Corp.](#), 60 AD3d 461, 462, 874 N.Y.S.2d 115 [1st Dept 2009]; [Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.](#), 108 AD3d 634, 970 N.Y.S.2d 47 [2nd Dept 2013]). Specifically, the requirements [*6] that QBC (1) maintain an insurance policy "for the protection and benefit... of the Architect" and (2) indemnify the Architect "regardless of whether such claims, damages, costs, expenses, or losses are caused in part by a party indemnified hereunder" unequivocally express that JMA was an intended beneficiary of the Contract (NYSCEF Doc. No. 300, Rider, IN 22.1, 28). As pled in the amended third-party complaint, JMA's claims for breach of contract and contractual indemnification are sufficient to survive QBC's motion to dismiss because there is no dispute that the Contract was valid, and JMA was an intended beneficiary of the insurance and indemnification clauses of the Contract.

Contribution

JMA's contribution claim must be dismissed because the predicate for any such contribution claim is the Board's breach of contract claim [NYSCEF Doc. No. 307]. This is plainly improper.

[**6] [HN3](#) It is well established that [CPLR 1401](#) was not intended for the apportionment of liability arising solely from breach of contract ([Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp., 71 NY2d 599, 602-603, 523 N.E.2d 803, 528 N.Y.S.2d 516 \[1988\]; Board of Ed. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 28-29, 517 N.E.2d 1360, 523 N.Y.S.2d 475 \[1987\]](#)). Accordingly, JMA's claim for contribution must be dismissed.

for a status conference on April 7, 2022 at 11:30 a.m.

3/29/2022

DATE

/s/ Andrew Borrok

ANDREW [*8] BORROK, J.S.C.

End of Document

Common Law Indemnification

The common law indemnification must also be dismissed as duplicative. A valid binding agreement exists [*7] between QBC and the Condo. The agreement provides for indemnification. Thus, JMA's common law claim is duplicative and must be dismissed ([Niagara Falls Water Bd. v City of Niagara Falls, 64 AD3d 1142, 881 N.Y.S.2d 763 \[4th Dept 2009\]](#)).

Cross Claims for Contribution and Indemnification

The branch of QBC's motion seeking dismissal of the co-defendant's cross claims must be denied because QBC fails to make any compelling arguments in support of its request that such cross-claims be dismissed.

Leave to Amend Pleadings

The branch of JMA's motion seeking leave to amend its pleadings must be denied. [HN4](#) [CPLR § 3025](#) requires a proposed amended pleading to be submitted in connection with any such request ([Janssen v Incorporated Vil. of Rockville Ctr., 59 AD3d 15, 27, 869 N.Y.S.2d 572 \[2nd Dept 2008\]](#)). Failure to submit any such proposed amended pleading requires denial of this request.

[**7] Accordingly, it is

ORDERED that QBC's motion to dismiss is granted in part. JMA's third party claims for contribution and common law indemnification are dismissed. The remaining portions of QBC's motion to dismiss the third-party complaint against it are denied; and it is further

ORDERED that JMA's request to replead the amended third-party complaint is denied; and it is further

ORDERED that the parties appear via Microsoft Teams