

Board of Mgrs. of the 51 Jay St. Condominium v. 201 Water St. LLC

Supreme Court of New York, Kings County

September 18, 2024, Decided

Index No. 500191/20

Reporter

2024 N.Y. Misc. LEXIS 8247 *; 2024 NY Slip Op 33415(U) **

[1]** **BOARD** OF MANAGERS OF THE 51 JAY STREET **CONDOMINIUM**, Plaintiff, -against- 201 WATER STREET LLC, et al., Defendants. 201 WATER STREET LLC, et al., Third-Party Plaintiffs, -against- DCHM, a Joint Venture Between DANYA CEBUS, CONSTRUCTION, LLC and HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, et al., Third-Party Defendants. 201 WATER STREET LLC, et al., Second Third-Party Plaintiffs, -against- NETT PROJECT, LLC, et al., Second Third-Party Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Judges: **[*1]** PRESENT: HON. LARRY D. MARTIN, Justice.

Opinion by: LARRY D. MARTIN

Opinion

[2]** Upon the foregoing papers, defendants/third-party plaintiffs/second third-party plaintiffs 201 Water Street, LLC (201 Water), Adam America LLC d/b/a Adam America Real Estate (Adam America), Slate Property Group LLC (Slate), 201 Water Street Holdings II LLC (201 Water II), 201 Water Street MM LLC (201 Water MM), Martin Nussbaum (Nussbaum), Paul Fruchthandler (Fruchthandler), Dvir Hoshen Cohen (Cohen), Omri Sachs (Sachs), David Schwartz (Schwartz) and Tomer Yogev (Yogev) (collectively, Sponsor Defendants) move for an order, pursuant to [CPLR 3212](#), granting summary judgment on their third-party contractual indemnification claims asserted against third-party defendants DCHM, A Joint Venture Between Danya Cebus Construction, LLC and Hudson Meridian Construction Group, LLC (DCHM), Danya Cebus Construction, LLC (Danya), Hudson Meridian Construction Group, LLC (Hudson Meridian)

(collectively, General Contractor Defendants), Versatile Mechanical Services Corporation (Versatile), Countrywide Stone & Marble, Inc. (Countrywide), VIS Industries (VIS), Access Plumbing, Inc. (Access), Bay Restoration Corp. (s/h/a Day Restoration Corp.) (Bay), FSM Electrical **[*2]** Corp. (FSM), Daylite Window Repair Services, Inc., (Daylite), Red Hook Construction Group II, LLC (Red Hook) and J.H. Flooring, Inc. (J.H.) (collectively, Subcontractor Defendants).

[3]** Plaintiff, the **board** of managers of the subject **condominium** located at 51 Jay Street in Brooklyn, commenced this action against the Sponsor Defendants to recover damages resulting from allegedly defective construction, renovation and/or repairs to the building and individual units. In its complaint, plaintiff set forth causes of action against 201 Water for breach of contract (first cause of action), against the remaining the Sponsor Defendants for fraud in the inducement (second cause of action), against the Sponsor's initial **board** members- Nussbaum, Cohen, and Schwartz- for breach of fiduciary duty (third cause of action) and against all defendants for constructive fraudulent conveyances while insolvent (fourth cause of action), constructive fraudulent conveyances causing unreasonably small capital (fifth cause of action) and intentional fraudulent conveyance (sixth cause of action). On May 4, 2020, Sponsor Defendants moved, pursuant to [CPLR 3211 \(a\) \(7\)](#), to dismiss the second through sixth causes of action. By order **[*3]** dated May 11, 2021, the court (Joseph, J.) granted the Sponsor Defendants' motion to the extent that the third, fourth, fifth and sixth causes of action were dismissed. That part of the Sponsor Defendants' motion to dismiss the second cause of action was denied. As a result, the only claims presently interposed by plaintiff against the Sponsor Defendants are breach of contract and fraud, which claims are based upon the failure of the Sponsor Defendants to deliver the premises free of defects.

On December 2, 2022, the Sponsor Defendants filed a third-party complaint against the General Contractor Defendants and Subcontractor Defendants setting forth causes of action which included a claim (encompassed

within their first cause of action for breach of contract) for contractual indemnification. As to the General Contractor **[**4]** Defendants, the Sponsor Defendants rely on the following provision contained in 201 Water's General Contract with DCHM:

3.18 INDEMNIFICATION

§3.18.1 To the fullest extent permitted by law the Contactor shall indemnify and hold harmless, at Contractor's insurance carrier's expense, and if not available, at its sole expense, the Owner and Owner's lender and the shareholders, **[*4]** officers, directors, members, managers, representatives, agents (excluding licensed professionals) and employees of [sic] any of them from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent covered by the insurance policies purchased by Owner for Contractor for this Project and caused by the negligent or intentional acts or omissions of the Contractor, a Subcontractor engaged by Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18. The indemnification and hold harmless shall survive the completion of the **[*5]** Work subject to applicable statutes of limitations.

The Sponsor Defendants further claim indemnification is owed by the Subcontractor Defendants under the following provision contained in each of their Subcontracts with DCHM:

ARTICLE 20 - INDEMNITY

20.1 To the fullest extent permitted by law, Subcontractor will defend, indemnify and save Contractor and Owner their **[**5]** officers, directors, agents, representatives and employees harmless from and against any and all claims, liens, judgments, damages, losses and expenses, including reasonable attorneys' fees and legal costs, arising in whole or in part and in any manner from the act, failure to act, omission, negligence,

breach or default by Subcontractor and/or its officers, directors, agents, employees, subcontractors and suppliers in connection with the performance of this Subcontract.

20.2 The indemnity obligations herein shall not be affected by the types and amounts of insurance maintained by Subcontractor and shall survive the completion or termination of this Subcontract.

On June 23, 2023, the Sponsor Defendants brought the instant motion for summary judgment against the General Contractor Defendants and Subcontractor Defendants based **[*6]** on the aforesaid contractual indemnification provisions.

A party moving for summary judgment bears the burden of making a prima facie showing that he or she is entitled to judgment as a matter of law, by submitting sufficient evidence to demonstrate the absence of a material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, and by other available proof, such as depositions and written admissions" (*Poon v Nisanov*, 162 AD3d 804, 806, 79 N.Y.S.3d 227 [2d Dept 2018]).

The right to contractual indemnification "depends upon the specific language of the contract" between the parties (*Sovereign Bank v Biagioni*, 115 AD3d 847, 848, 982 N.Y.S.2d 322 [2d **[**6]** Dept 2014]; see *Valente v Dave & Buster's of N.Y., Inc.*, 132 AD3d 973, 974, 19 N.Y.S.3d 533 [2d Dept 2015]) and indemnification provisions are "strictly construed" (*Davis v Catsimatidis*, 129 AD3d 766, 768, 12 N.Y.S.3d 141 [2d Dept 2015]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999-1000, 47 N.Y.S.3d 121 [2d Dept 2017][internal quotation marks omitted]; see *Gurewitz v City of New York*, 175 AD3d 658, 664, 109 N.Y.S.3d 167 [2d Dept 2019]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491, 548 N.E.2d 903, 549 N.Y.S.2d 365 [1989] **[*7]**). Thus, "[t]he language of an indemnity

provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" ([Niagra Frontier Trans. Auth. v Tri-Delta Constr. Corp.](#), 107 AD2d 450, 453, 487 N.Y.S.2d 428 [4th Dept], affd 65 NY2d 1038, 484 N.E.2d 1047, 494 N.Y.S.2d 695 [1985]).

A plain reading of the indemnification provision in the General Contract shows that any duty of the General Contractor Defendants to indemnify the Sponsor Defendants arises only where the claims, damages, losses or expenses are "caused by **the negligent or intentional acts or omissions** of the Contractor, a Subcontractor engaged by Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (emphasis added). Similarly, under the clear language of their **[**7]** Subcontracts with DCHM, indemnification from the Subcontractor Defendants lies only where the relevant claims, liens, judgments, damages, losses and expenses arose from "the act, failure to act, omission, negligence, breach or default by Subcontractor and/or its officers, directors, agents, employees, sub-contractors **[*8]** and suppliers."

Here, Sponsor Defendants do not present sufficient proof at this juncture demonstrating, prima facie, negligent or intentional acts of the General Contractor Defendants or that the alleged claims or damages arose from an act, failure to act, omission, negligence, breach or default of any of the Subcontractor Defendants (see [Shaughnessy](#), 147 AD3d at 1000). The only affidavit presented on the Sponsor Defendants' motion is an affidavit from Nussbaum which simply identifies the motion exhibits containing the General Contract and Subcontracts.

The court finds [Rodriguez v City of New York](#) (31 NY3d 312, 76 N.Y.S.3d 898, 101 N.E.3d 366 [2018]), the primary case cited in support of the Sponsor Defendants' motion, inapposite. In [Rodriguez](#), a negligence case which did not involve a claim for contractual indemnification, the Court of Appeals held that partial summary judgment in favor of the plaintiff on liability is not precluded merely because the plaintiff had not eliminated all questions of fact as to his comparative fault. Under [Rodriguez](#), while a plaintiff need not meet the "double burden" of establishing, prima facie, that he or she was free of fault in order to be entitled to summary judgment on liability ([Rodriguez](#), 31 NY3d at

[324-325](#)), he or she is still obligated to establish as a matter of law that the defendant was negligent. **[*9]** In the instant case, there has yet to be any showing of liability on the part of the General Contractor Defendants or Subcontractor Defendants under the relevant contractual **[**8]** indemnification provisions, i.e., a demonstration through admissible proof that the relevant claims or damages arose from the negligence, intentional acts or omissions on the part of the General Contractor Defendants or that the alleged claims, damages, losses or expenses arose from any act, failure to act, omission, negligence, breach or default of any of the Subcontractor Defendants.

Accordingly, defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

ENTER,

/s/ Larry D. Martin

J. S. C.

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