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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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NORTHSIDE TOWER REALTY, LLC,

Plaintiff,

- against -

FREDERICK GOLDBERG ARCHITECT P.C., and FREDERICK GOLDBERG,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 016886-08
Motion Seq. No: 1
Submission Date: 10/21/10

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support,
Affidavits in Support (2) and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition, Affidavit in Opposition and Exhibit.....x
Memorandum of law in Opposition.....x
Reply Affirmation, Reply Affidavits (2) and Exhibits.....x

This matter is before the Court for decision on the motion filed by Plaintiff on March 2, 2010 and submitted on October 21, 2010. [1] For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff Northside Tower Realty, LLC ("Northside" or "Plaintiff") moves, pursuant to CPLR § 3212, for an Order granting Plaintiff summary judgment on the Fourth Cause of Action

[1] This matter was stayed from March 29, 2010 to August 18, 2010 due to a related bankruptcy proceeding.

declaring void and striking the exculpatory clause from the contract between the parties.

Defendants Frederick Goldberg Architect P.C. and Frederick Goldberg (collectively "Goldberg" or "Defendants") oppose Plaintiff's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. B to Graff. Aff. in Supp.) reflects that this action involves a dispute regarding the creation of an interior parking garage ("Garage") at property located at 142 North 6th Street, Brooklyn, New York ("Premises"). Plaintiff retained Goldberg, a licensed architect, to provide Plaintiff with plans for the construction of the Garage. The parties entered into a written agreement on or about September 12, 2005 ("Contract") (Ex. A to Graff Aff. in Supp.). Plaintiff alleges that, as a result of Goldberg's allegedly defective design, Plaintiff incurred damages. Plaintiff alleges architect malpractice, breach of contract and gross negligence. In addition, in the Fourth Cause of Action, Plaintiff seeks a declaratory judgment that the indemnity provision ("Indemnity Provision") in the Contract is illegal and unenforceable as against public policy.

The Indemnity Provision provides as follows:

> Any resubmissions due to acts or omissions by [Goldberg] will not result in additional charges. [Goldberg] will indemnify the Owner for acts or omissions up to the amount of fees paid.

In his Affidavit in Support, Paul A. Vallario ("Vallario") affirms as follows:

Vallario is one of two managing members of Northside. On or about September 12, 2005, Northside retained Goldberg to provide professional architectural services relating to the construction of the Garage. Defendants drafted the Contract which Plaintiff executed "without negotiation or making any changes to its terms or provisions" (Vallario Aff. at ¶ 3). Vallario asserts that the Defendants were grossly negligent, and engaged in malpractice, in failing to design the plans for the Garage in conformance with the New York City Building Code ("Building Code") resulting in damages to Plaintiff in the sum of $570,000. Vallario submits that it would be unreasonable and against public policy to limit Northside's recovery to $30,000, the sum that Plaintiff paid to Defendants.

In his Affidavit in Support, Anthony F. Ciuffo ("Ciuffo") affirms as follows:

Ciuffo is the second managing member of Northwise. In or about May of 2008, Blue Diamond Group ("Blue Diamond"), Plaintiff's former general contractor, began construction of the Garage as designed by Goldberg. The Garage did not comply with the Building Code because the slope was too steep and the Garage did not include a staging area. To cure the alleged defects ("Defects"), Plaintiff paid Blue Diamond $420,000 as reflected by documentation from Blue Diamond (Ex. D to Ciuffo Aff.).

In addition, Plaintiff had to amend its lease agreement ("Amendment") with Prestige Car Park, LLC ("Prestige") to reduce the yearly lease payments due to the Plainitiff by $10,000 for the 15 year term of the lease. The cost of that amendment was $150,000. The Amendment was necessitated when Prestige determined that the Garage was more difficult to operate and sought a reduction in the lease payments.

In addition, as a result of the Defects, construction of the Garage was delayed by at least six (6) weeks while Northside hired a new architect who drafted new plans. This delay added to Northside's carrying costs for the Premises. Ciuffo also submits that it would be unreasonable and against public policy to limit Northside's damages to the $30,000 that it has paid Goldberg.

In his Affirmation in Opposition, Frederick I. Goldberg ("Frederick") affirms as follows:

The Contract expressly provides that Goldberg would indemnify Northside for its acts and omissions up to the amount of fees paid by Northside to Goldberg. The Contract provides, further, that it constitutes the entire agreement between the parties and cannot be changed "unless consented to and agreed to in writing" (Contract at p.3). Neither Ciuffo nor Vallario expressed any concerns regarding the terms of the Contract or requested that it be modified in any way. The Indemnity Provision was an essential provision of the Contract.

After Goldberg was retained, Frederick viewed the Premises and recommended that the ramp be constructed on the North 5th Street side of the Premises. He also advised Northside that constructing the ramp on the North 6th Street side would require a longer ramp which would have to be steeper, as well as curved. Northside rejected Frederick's recommendation and advised Frederick that it wanted the ramp to be located on the North 6th Street side. Northside also rejected, for financial reasons, Goldberg's recommendation that an elevator, rather than a ramp,

be installed.

Goldberg prepared layout plans consistent with Northside's directions which were incorporated into the plans prepared by the project's architect. Those plans were filed and approved by the Department of Buildings ("DOB"). At the beginning stage of construction, Frederick was advised by the contractor that the DOB believed that the proposed ramp was too steep. Frederick met with the Brooklyn Commissioner of the DOB who said that similarly sloped ramps had been permitted in other boroughs. Although the DOB did not issue a violation with respect to the ramp, it stated that it wanted the ramp modified. Northside advised Frederick that it would advise Frederick how it wished to proceed, but never did. Frederick submits that the parties voluntarily entered into the Contract, including the Indemnity Provision at issue, and opposes Plaintiff's motion to void the Indemnity Provision.

In their Reply Affidavits, Ciuffo and Vallario, *inter alia*, 1) dispute Frederick's assertion that Northside insisted that it wanted the entrance to the Garage on the North 6th side of the Premises; Ciuffo concedes that the architect told Northside that the entrance needed to be on the North 5th Street side, not on the North 6th Street side as suggested by Northside, but submits that Northside "was not in a position to reject the architect's recommendation" (Ciuffo Reply Aff. at ¶ 10); and 2) dispute Frederick's claim that Goldberg advised Northside that the DOB wanted the ramp to be modified and affirms that it was Blue Diamond who advised Northside that the DOB would not approve the ramp as proposed.

In his Reply Affirmation, counsel for Plaintiff provides additional exhibits, including 1) applicable provisions of the Building Code, and 2) a reproduction of the layout of the Garage.

C. The Parties' Positions

Plaintiff submits that an architect may not limit his liability for damages arising from liability for bodily injury or damage to property cause by or arising out of defects in plans or designs. Plaintiff contends, further, that a professional may not limit liability for gross negligence and, where attempting to limit liability for acts of negligence, should include explicit language to that effect.

Defendants oppose Plaintiff's motion. Defendants submit that, while Plaintiff has not identified the statute(s) on which it relies, Plaintiff is apparently relying on General Obligations

Law § 5-324 which provides that certain indemnification agreements caused by or arising out of defects in maps, plans, designs and specifications are void and unenforceable. Defendants submit that the Indemnification Provision at issue is enforceable because architects and engineers may enter into contracts containing provisions limiting their exposure to specific damages. Moreover, Plaintiff has failed to offer sufficient evidence to establish malpractice or gross negligence by Goldberg.

In reply, Plaintiff, *inter alia*, 1) reiterates its position that the Indemnification Provision is illegal; 2) argues that certain cases cited by Defendants are distinguishable from the matter at bar because the cited cases involve home inspections; and 3) submits that the evidence supports its assertion that the Defendants acted in a grossly negligent manner by designing the Garage in contravention of the Building Code, including provisions regulating the slope of ramps and defining frontage space.

RULING OF THE COURT

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Applicable Law

As a general rule, a contractual provision absolving a party from its own negligence or limiting its liability is enforceable. *Goldstein v. Carnell Associates, Inc.*, 74 A.D.3d 745, 746 (2d Dept. 2010). The public policy of New York, however, dictates that a party may not insulate itself from damages caused by grossly negligent conduct. *Id.*, quoting *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554 (1992). Gross negligence differs in kind, not only degree, from claims of ordinary negligence. *Id.*, quoting *Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81

N.Y.2d 821, 823 (1993). To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others. *Id.* at 746-747, citing *Sommer*, *supra*, at 554, quoting *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 385 (1983), *remitt. den.*, 60 N.Y.2d 645 (1983).

General Obligations Law ("GOL") § 5-324 provides as follows:

> Every covenant, agreement or understanding in, or in connection with any contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect, engineer, surveyor or their agents, servants or employees are indemnified for damages arising from liability for bodily injury to persons or damage to property caused by or arising out of defects in maps, plans, designs or specifications, prepared, acquired or used by such architect, engineer, surveyor or their agents, servants or employees shall be deemed void as against public policy and wholly [unenforceable].

GOL §§ 5-322.1 and 5-324 apply only where a party seeks to protect itself from claims for personal injury and physical damage to property, as opposed to damages for economic loss. *Sear-Brown Group v. Jay Builders, Inc.*, 244 A.D.2d 966, 966 (4th Dept. 1997). A party, however, may not rely on a limitation of liability clause to insulate itself from damages caused by gross negligence. *Id.* at 967 citing, *inter alia*, *Colnaghi*, *supra*. *See also Perotto Dev. Corp. v. Sear-Brown Group*, 269 A.D.2d 749 (4th Dept. 2000) (clause purporting to limit liability of defendant-architect/engineer to lesser of $500,000 or amount of fee enforceable unless plaintiffs establish that defendant grossly negligent in performance of duties).

C. Application of these Principles to the Instant Action

In light of the Court's conclusion that Plaintiff has not demonstrated, as a matter of law, that Defendants were grossly negligent in the performance of their duties, the Court denies Plaintiff's motion for summary judgment on the Fourth Cause of Action in the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on January 10, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 14, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.