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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

NASSAU COUNTY,

Plaintiff,

INDEX NO.: 002750/2004
MOTION DATE: 3/4/2011
MOTION SEQUENCE: 13, 14 & 15

-against-

RICHARD DATTNER ARCHITECT, P.C., DORMITORY AUTHORITY OF THE STATE OF NEW YORK, EMPIRE STATE DEVELOPMENT CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, MARIANO D. MOLINA, P.C., COUNSILMAN HUNSKER & ASSOCIATES, SEVERUD ASSOCIATES, A. JAMES DEBRUIN & SONS, FEDERMAN DESIGN & CONSTRUCTION CONSULTANTS, INC., ROBERT SCHWARTZ & ASSOCIATES, ROY KAY, INC., KEYSPAN CORPORATION, ANRON HEATING AND AIR CONDITIONING, INC., DECTRON INTERNATIONALE, STONEWALL CONTRACTING CORP., NORBERTO & SONS, INC., CENTURY-MAXIM CONSTRUCTION CORP., METROPOLITAN STEEL INDUSTRIES, INC. and HATZEL & BUEHLER, INC.,

Defendant.

The following papers read on this motion:

Notice of Motion/Order to Show Cause
Answering Affidavits
Reply Affidavits
Memoranda of Law: Plaintiff's/Petitioner's
Defendant's/Respondent's

This motion by the second and third-party defendant Anron Heating and Air Conditioning, Inc. ("Anron") for an order pursuant to CPLR 3211(a)(5), (7) dismissing Tishman Construction Corporation of New York, Inc.'s ("Tishman") Second Third-Party complaint and the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and the Dormitory Authority of the State of New York's ("DASNY") Third Third-Party complaint is granted as provided herein.

This motion by the second and third-party defendants Roy Kay, Inc. and Keyspan Corporation for an order pursuant to CPLR 3211(a)(1), (5), (7) dismissing Tishman Construction Corporation of New York, Inc.'s ("Tishman") Second Third-Party complaint and the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and the Dormitory Authority of the State of New York's ("DASNY") Third Third-Party complaint is granted as provided herein.

The motion by the second and third-party defendant Stonewall Contracting Corp. for an order pursuant to CPLR 3211(a)(5), (7) dismissing Tishman Construction Corporation of New York, Inc.'s ("Tishman") Second Third-Party complaint and the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and the Dormitory Authority of the State of New York's ("DASNY") Third Third-Party complaint is granted as provided herein.

On or about July 22, 2004, the plaintiff County commenced this action seeking to recover of numerous defendants for the alleged negligent construction of its natatorium, a/k/a Aquatic Center in Eisenhower Park in East Meadow. In its original complaint, the County alleged that it had contracted with the defendant ESDC for the construction of the Aquatic Center on February 1, 1996, and that ESDC entered into a Memorandum of Understanding with the defendant DASNY which delegated the design supervisory responsibilities of the project to ESDC and the construction supervisory responsibilities of the project to DASNY. The County further alleged that ESDC retained the defendant Richard Dattner Architect, P.C. ("Dattner") to provide architectural services and the defendant Tishman to provide construction management services and that the defendant Dattner retained the defendant CSA Group NY Architecture, Engineering & Consultation, P.C. f/k/a Moriano D. Molina, P.C. ("Molina") to provide professional

engineering services for the heating, ventilation and air conditioning ("HVAC") systems; the defendant Counsilman Hunsaker & Associates ("Counsilman") to provide pool design services; the defendant Severud Associates to provide structural engineering services; the defendant Federman Design & Construction Consultants, Inc., as cost estimator; the defendant Robert Schwartz & Associates to prepare specifications; and, the defendant A. James DeBruin & Sons to provide civil engineering services. The County also alleged in its original complaint that the defendant DASNY contracted with the defendant Roy Kay allegedly now known as the defendant Keyspan to install the HVAC system; the defendant Anron to manufacture and install ductwork; the defendant Stonewall Contracting Corp. ("Stonewall") as a general contractor to install the roof system; the defendant Hatzel & Buehler, Inc. to furnish electrical work; and, the defendant Norberto to construct the pool. In its original complaint, the County alleged that the project was completed in March 1998; that it opened for special use on or about March 23, 1998; and, that it opened to the general public in the fall of 1998.

In its original complaint, the County alleged that the original plan called for Fiberglass Reinforced Plastic ("FRP") ductwork but some of the defendants on "the design team" including the defendants Dattner, Molina and Counsilman, with Tishman's endorsement, suggested substituting Grade 316 stainless steel for FRP to reduce costs. The County also alleged that some of the defendants on "the design team," again including the defendants Dattner, Molina and Counsilman, also recommended replacing the planned PoolPak SWHP-300 Server Air Handling units with Dectron Internationale equipment to further cut costs. The County alleged in its original complaint and continues to allege that these recommendations were faulty and resulted in a defectively designed Aquatic Center. The County alleged and continues to allege that the substitute air filtration system was not able to adequately cycle the air in the Aquatic Center so as to prevent corrosion of the stainless steel ductwork and that the stainless steel ductwork was not suitable for the Aquatic Center's environment on account of the corrosive effects of chlorine in the air. The County alleged and continues to allege that the defendants failed to adequately investigate these matters and to consult with a qualified metallurgist. The County alleged and continues to allege, *inter alia*, that these defects caused the hardware sections of the ductwork to fail without warning; the stainless steel support wire which held the light fixtures over the pool in

place to fail; eyebolts through which the support rods for the lighting fixtures are attached to corrode and fail; and, excessive condensation to form between the metal roof deck and the ceiling tiles, thereby causing damage to the insulation and roof, which necessitated a myriad of significant costly repairs.

In its original complaint, the County sought to recover of DASNY, ESDC, Dattner, Molina, Counsilman, Severud, Federman, Schwartz DeBruin and Tishman for breach of contract, negligence and fraud; and, as against Roy Kay, Keyspan, Anron, Hatzel & Buehler and Stonewall Contracting for breach of contract.

Via their Answer dated December 29, 2004, the defendant DASNY and ESDC cross-claimed against, *inter alia*, the co-defendants Anron, Stonewall, Roy Kay and Keyspan seeking contribution and contractual and common law indemnification.

Via its Answer dated October 27, 2004, the defendant Tishman cross-claimed against, *inter alia*, Anron and Stonewall for contribution and contractual and common law indemnification; Tishman did not cross-claim against the defendants Roy Kay now known as Keyspan.

By order dated December 2, 2008, the Appellate Division dismissed the original complaint against Keyspan finding that there were no grounds for holding it liable as a parent company of Roy Kay. See, Nassau County v Richard Dattner Architect, P.C., 57 AD3d 494 (2nd Dept. 2008).

Following extensive discovery, over the objection of the defendants/third-party plaintiffs Tishman, DASNY, ESDC, Dattner and Counsilman, the County amended its complaint on September 20, 2010 with leave of the court and eliminated A. James DeBruin & Sons, Federman Design & Construction Consultants, Inc., Robert Schwartz & Associates, Roy Kay, Inc., Anron Heating, Inc., Dectron Internationale, Inc., Stonewall Contracting Corp., Norberto & Sons, Inc., Century Maxim Construction Corp., Metropolitan Steel Industries, Inc. and Hatzel & Buehler, Inc. as defendants. In its Amended Complaint, the County seeks to recover of ESDC for breach of contract, negligent misrepresentation and specific performance and as against DASNY, Dattner, Tishman, Molina and Counsilman for breach of contract and negligent misrepresentation. Via its Third-Party Summons and Complaint, the defendant Counsilman

seeks to recover of Norberto & Sons, Inc. Via its Second Third-party Summons and Complaint dated November 12, 2010, the defendant Tishman seeks to recover of Roy Kay, Inc., Keyspan, Anron, Dectron Internationale and Stonewall for breach of contract, contribution, contractual and common law indemnification and negligent representation. Via its third third-party complaint dated November 15, 2010, the defendants DASNY and ESDC seek to recover of Roy Kay, Inc., Keyspan, Anron, Dectron Internationale, Inc., Stonewall and Norberto for breach of contract, contractual and common law indemnification and contribution premised on those third-party defendants' negligence.

Presently, the third-party defendants Anron, Stonewall, Roy Kay and Keyspan seek dismissal of the third-party complaints against them pursuant to CPLR 3211(a)(1), (5), (7) and 1007.

The County's Amended Complaint sounds in breach of contract and negligent misrepresentation based upon design defects. It now alleges that it contracted with ESDC on February 1, 1996 to develop and construct the Aquatic Center, a world renowned natatorium; that with the goal of attracting the 1998 Goodwill Games, the State Legislature appropriated $24 million for the project; and, that it agreeing to fund any additional costs. The County alleges that "errors in conceptual design, selection of materials, architectural and engineering design and construction" were committed by ESDC and the architect, engineering consultants, project manager and construction manager resulting in numerous defects and deficiencies in the Aquatic Center. The defendants are alleged to have breached their contracts, made material negligent mis- representations with respect to the suitability of certain construction materials and caused the use of inferior materials and equipment under the guise of value engineering which has allegedly caused the County to incur millions of dollars for repair work and excessive maintenance and operational costs, as well as lost revenues on account of the reduced ability to utilize the Aquatic Center.

The County alleges that ESDC entered into a written contract with DASNY to manage the planning, design and construction of the Aquatic Center and that it was an intended third-party beneficiary of that contract. The County alleges that ESDC contracted with Dattner to provide professional architectural, engineering and construction phase services on September 21,

1995 and that it was an intended third-party beneficiary of that contract, too. The County alleges that ESDC entered into a contract with Tishman on or about January 19, 1996 whereby Tishman agreed to act as the construction manager for the design phase of the Aquatic Center which included an obligation by Tishman to "understand the functions of the ["County]" and to "advise on type and use of materials;" that on February 23, 1996, ESDC entered into an agreement with Tishman whereby Tishman agreed to act as the construction manager during the construction phase of the Aquatic Center; and, that on March 7, 1996, ESDC entered into an agreement with Tishman whereby Tishman agreed to act as construction manager for the general conditions work phase of the construction of the Aquatic Center. Those agreements all provided that ESDC intended to construct a natatorium "to be owned and operated by [the County]," thus, the County alleges that it was also an intended third-party beneficiary of those agreements.

The County alleges that on or about October 1, 1995, Dattner contracted with Molina to provide mechanical, electrical, plumbing and fire protection design services, which it was an intended third-party beneficiary of, also. And, that on or about October 1, 1995, Dattner contracted with Counsilman to design the competitive diving and spa pools and associated systems, to provide general recommendations for the HVAC design, to assist the engineers with assigning subcontractors their responsibilities and to review and critique Dattner's development plans, with particular attention to capability for operations and custodial/maintenance repair. The County alleges that it was also an intended third-party beneficiary of that contract.

The County alleges that a design team consisting of ESDC, DASNY, Dattner, Molina, Tishman and Counsilman was formed to review and approve the design of the Aquatic Center, the value engineering and the construction issues and that they knew that the County was relying on them to fulfill those responsibilities. The County also alleges that this design team knew that atmospheric conditions at the Aquatic Center had to be acceptable to governing swimming bodies such as the NCAA and USA Swimming in order to achieve the project's goals, i.e., hosting national and world class competitions.

The County alleges that construction actually began in March, 1996; that the Aquatic Center opened in March 1998 for qualifying swim meets; that the Aquatic Center hosted the Goodwill Games in the Summer of 1998; and, that it opened to the public in the Fall of 1998.

The County alleges that the design team's involvement continued through April 2002 in attempts to resolve incomplete, defective and/or deficient items, in particular corrosion of exposed ductwork and lighting fixtures, which the County alleges is still not fully resolved.

The County alleges that the ventilation system was originally designed with FRP and that the roof was designed accordingly. However, the design team, allegedly with Tishman's support, recommended grade 316 stainless steel ductwork instead of FRP to save money in costs and maintenance. The County alleges that the design team made this recommendation despite its knowledge of problems associated with stainless steel at two indoor pools because here, a different grade was being used. The County alleges that this recommendation was not adequately investigated and that a metallurgist was not consulted. The County alleges that the design team failed to take into consideration the corrosive effect of chlorine in the air in an indoor swimming facility.

The County additionally alleges that three PoolPak SWHP-300 Server Air Handling Units were originally planned but the design team substituted air handling units manufactured by Dectron Internationale to save money. It alleges that the air handling system designed by Molina and approved by the design team was not adequate to circulate the air in the center and, in fact, failed to meet standards of the American Society of Heating, Refrigeration and Air Condition Engineers and the State Building Code. The County alleges that the system was not capable of preventing the corrosion of the stainless steel ductwork and all exposed stainless steel products. In fact, the County alleges that visual discolorization became visible within two weeks after chemicals were added to the pool and the HVAC system was not able to be run 24 hours a day, seven days a week, through at least July 1998, contributing to corrosion and moisture migration. The County additionally alleges that the improper placement of the air exchanges resulted in poor air circulation at the pool level resulting in health and safety hazards. It also alleges that the HVAC system's shortcomings significantly contributed to the corrosion and caused the hardware joining the ductwork and cables and lighting fixtures to corrode and fail without warning and the air handling units to prematurely corrode internally and to fail, too. The County alleges that these conditions gave rise to stress corrosion cracking and failure without warning which could only be detected via x-ray examination and that it was forced to implement routine inspection in

order to avoid injuries. The County alleges that an emergency safety remediation program had to be employed whereby corroded and damaged stainless steel ductwork and hardware was replaced and additional supporting galvanized steel hardware was installed on the ductwork and lighting support wires. The County alleges that ultimately, after a light fixture crashed into the occupied shallow end of the pool, the Aquatic Center had to be shut down and the County was forced to contract for an engineering evaluation and the complete replacement of all stainless steel cables and hardware by E&A Restoration.

The County alleges that the deficient HVAC system has caused excessive condensation and mold to form and grow between the metal roof deck and the ceiling panels, thereby causing excessive damage to the roof and ceiling and interior/exterior walls and floors. And, the County alleges that improper roofing materials were used, too, i.e., organic strand board instead of cement board, which, coupled with the deficient HVAC system, contributed to an uncontrollable growth of mold and decay and resulted in hazardous and unsightful conditions. The County also alleges that the pool itself, the pool deck, and the bulkhead as well as the bleachers were not properly designed giving rise, *iter alia*, to serious health and safety issues which had to be temporarily remedied at a significant cost. Numerous other plumbing, air circulation, roofing, flooring problems are enumerated.

The County alleges that the HVAC system was not suitable for world class caliber diving and swimming competitions or even recreational purposes. It alleges that it has not been able to hold "marquee swimming events since 2007, resulting in a significant loss in revenue and exposure."

Tishman's and DASNY/ESDC's third-party complaints against Keyspan is dismissed, without opposition, pursuant to the doctrine of law of the case premised upon the Appellate Division's dismissal of Nassau County's complaint against Keyspan. See, Nassau County v Richard Dattner Architect, P.C., supra.

"A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences or series of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR 203(f). "This principle, termed the 'relation-back

doctrine,' permits a plaintiff to interpose a claim or cause of action which would ordinarily be time barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proved and the cause of action would have been timely interposed if asserted in the original complaint (citations omitted)." Pendleton v City of New York, 44 AD3d 733 (2nd Dept. 2007). "The sine qua non of the relation-back doctrine is notice." (Pendelton v City of New York, supra, because "notice within the limitations period is 'the "linchpin" of the relation-back doctrine' " (Flederbach v Fayman, 57 AD3d 474, 475 [2nd Dept. 2008], quoting Buran v Coupal, 87 NY2d 173 [1995]). Thus, "[w]here the allegations of the original [pleading] gave the defendants notice of the facts and occurrences giving rise to the new cause of action, the new cause of action may be asserted." Pendelton v City of New York, supra, at p. 735, citing Schutz v Finkelstin, Bruckman, Wohl, Most & Rothman, 247 AD2d 460 (2nd Dept. 1988). However, where nothing in the original pleading placed a defendant on notice of the conduct with which they are charged via the new untimely claims, those claims are not saved by the relation-back doctrine. August Bohl Contracting Co., Inc. v L.A. Swyer Co., Inc., 74 AD3d 1649, 1651 (3rd Dept. 2010). That is, where " 'pertinent underlying factual allegations' are not referred to in the original [pleading] . . . and constitute more than a mere expansion of the original . . . claim," the relation-back doctrine does not apply. August Bohl Contracting Co., Inc., supra, at p. 1651, quoting Marpe v Dolmetsch, 246 AD2d 723 (3rd Dept. 1998), citing A to Z Assoc. v Cooper, 215 AD2d 161, 162 (1st Dept. 1995); Green v Irwin, 174 AD2d 879, 880-882 (3rd Dept. 1991); Caffaro v Trayna, 35 NY2D 245, 249-251 (1974).

"An amendment which merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation clearly does not conflict with these policies." Duffy v Horton Memorial Hospital, supra, at p. 477, citing Cerrato v Crown Co., 58 AD2d 721 (3rd Dept. 1977); Henegar v Freudenheim, 40 AD2d 825 (2nd Dept. 1972). "A party is likely to have collected and preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action." See, Duffy v Horton Memorial Hospital, supra, at p. 477, citing Caffaro v Trayna, 35 NY2d 245 (1974); Owens v Palm Tree Nurisng Home, 50 AD2d 865 (2nd Dept. 1975); Watso v City of New York, 39 AD2d 960 (2nd Dept. 1974); James & Hazard, Civil Procedure *op. cit.*, § 3.16).

"[W]here, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations." Duffy v Horton Memorial Hospital, supra at p. 477, citing Boyd v United States Mtg. & Trust Co., 187 NY 262, 270 (1907); Williams v United States, 405 F2d 234, 236-237 (1968).

If the Statute of Limitations for the claims being advanced by the third-party plaintiffs in their third-party complaints has expired, they must demonstrate that those claims relate back to a timely filed pleading. Duffy v Horton Memorial Hospital, 66 NY2d 473 (1985); Rodriguez v Paramount Development Associates, LLC, 67 AD3d 767 (2nd Dept. 2009); Tyz v Integrity Real Estate and Development, Inc., 43 AD3d 1038 (2nd Dept. 2007); Cooley v Urban, 6 AD3d 1007 (4th Dept. 2004).

Breach of Contract

The third-party plaintiffs Tishman, DASNY and ESDC all seek to recover of the third-party defendants Anron, Stonewall and Roy Kay for breach of contract. DASNY was actually the party to the contracts with Anron, Stonewall and Roy Kay: Tishman and ESDC seek to recover for breach of contract as third-party beneficiaries. The Statute of Limitations for breach of contract is six years. CPLR 213. With construction contracts, a cause of action for breach accrues upon substantial completion of the work. Superb General Contracting Co. v City of New York, et al, 39 AD3d 204 (1st Dept. 2007), lv dism., 10 NY3d 800 (2008), citing Phillips Constr. Co., Inc. v City of New York, 61 NY2d 949 (1983), citing State v Lundin, 60 NY2d 987 (1983). Remedial work does not extend the accrual date of a breach of contract claim. Barnard College v Tishman Const. Corp of New York, 261 AD2d 193 (1st Dept. 1999); see also, Cabrini Medical Center v Desina, 64 NY2d 1059 (1985), citing Phillips Constr. Co., Inc. v City of New York, supra; State v Lundin, supra.

It appears that the third-party defendants' work at the Aquatic Center was substantially completed no later than the Fall of 1998 when it opened to the general public. Anron's punch list was completed on or about February 12, 1999. The "Code Compliance Certificate" issued by DASNY indicates that the "physical completion date" of the HVAC installation performed by

Roy Kay was March 13, 1998. Additional remedial work done by any of the third-party defendants did not extend the Statute of Limitations. Accordingly, the third-party breach of contract claims are all untimely unless they relate back a timely filed claim. See, Cabrini Medical Center v Desina, 64 NY2d 1059 (1985).

In their original Answers with Cross-claims, Tishman, DASNY and ESDC sought to recover of Anron, Stonewall and/or Roy Kay for contribution and contractual and common law indemnification: None of the defendant/third-party plaintiffs sought via their original cross-claims to recover of Anron, Stonewall or Roy Kay for breach of contract. The breach of contract claims against Anron, Stonewall and Roy Kay were first advanced by Tishman in its Second Third-Party Complaint dated November 12, 2010 and by DASNY and ESDC in its Third Third-Party Complaint dated November 15, 2010. Nevertheless, the County advanced breach of contract claims against Anron, Stonewall and Roy Kay. In fact, the breach of contract claims presently advanced by the defendants/third-party plaintiffs against these third-party defendants mirror those previously timely advanced by the County. The third-party plaintiffs are not required to demonstrate that Anron, Stonewall and Roy Kay are united in interest with them since the record clearly indicates that they were already defendants who had actual notice of the breach of contract claims being advanced by DASNY, ESDC and Tishman now. Accordingly, the third-party plaintiffs DASNY, ESDC and Tishman's third-party breach of contract claims are not barred by the Statute of Limitations.

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (quotations omitted)." East Hampton Union Free School Dist. v Sandpebble Builders, Inc., 66 AD3d 122, 125 (2nd Dept. 2009), aff'd, 16 NY3d 775 (2011), quoting Breytman v Olinville Realty, LLC, 54 AD3d 703, 703-704 (2nd Dept. 2008) lv dism., 12 NY3d 378 (2009), citing Leon v Martinez, 84 NY2d 83, 87 (1994); Smith v Meridian Technologies, Inc., 52 AD3d 685, 686 (2nd Dept. 2008). "Thus, a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint

states in some recognizable form any cause of action known to our law (quotations omitted)." East Hampton Union Free School Dist. v Sandpebble Builders, Inc., supra, at p. 125, quoting Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 (2nd Dept. 2006); Leon v Martinez, supra, at p. 87-88; Fisher v DiPietro, 54 AD3d 892, 894 (2nd Dept. 2008); Clement v Delaney Realty Corp., 45 AD3d 519, 521 (2nd Dept. 2007).

Generally, construction contracts which do not express an intention to benefit third parties do not give rise to third parties' rights to enforce them. See, Port Chester Elec.Const. Co. v Atlas, 40 NY2d 652 (1976); Perron v Hendrickson/ Scalamandre/Posillico (TV), 283 AD2d 627 (2nd Dept. 2001). "In order to recover as third-party beneficiaries to a contract, plaintiffs 'must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for their benefit, and (3) that the benefit to them is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost.' " Saratoga Schenectady Gastroenterology Associates, P.C. v Bette & Cring, LLC, 2011 WL 1406720 (3rd Dept. 2011), quoting Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 (2011), citing IMS Engrs.-Architects, P.C. v State of New York 51 AD3d 1355, 1357 (3rd Dept. 2008), lv den. 11 NY3d 706 (2008).

Anron, Stonewall and Roy Kay erroneously rely on a provision of their contracts as barring third-party claims against them. Their contracts with DASNY in fact provided:

> "No Third Party Rights: Nothing in the Contract shall create or give to third parties any claim or right of action against the Owner, the State of New York, the client, and the Construction Manager, or any Institution at which the Work is being carried out beyond such as may legally exist irrespective of the Contract."

DASNY was the "owner" and Tishman was the "Construction Manager." The "client" is defined as "the entity for whom the [DASNY] is performing services, including subsidiaries, agents, related corporations or fiduciaries." This definition clearly includes ESDC. This provision does not bar third-party actions by the third-party plaintiffs DASNY, ESDC or Tishman nor does it bar them against Anron, Stonewall and/or Roy Kay. Anron, Stonewall and Roy Kay's liability "risks which arise from faulty designs" was specifically excluded in their agreements. Anron, Stonewall and Roy Kay's contracts with DASNY limited the risks assumed

by them to:

> 1. The risk of loss or damage, including direct or indirect damage or loss, of whatever nature to the Work or to any plant, equipment, tools, materials or property furnished, used, installed or received by the Owner, the Construction Manager, the Contractor or any Subcontractor, materialmen or workmen performing services or furnishing materials for the Work. The Contractor shall bear said risk of loss or damage until construction completion. . . . In the event of said loss or damage, the Contractor immediately shall repair, replace or make good any said loss or damage.
>
> 2. The risk of claims, just or unjust, by third persons against the Contractor or the Owner, the Client and the Construction Manager on account of . . . property damage, direct or consequential, loss or damage of any kind whatsoever arising or alleged to arise out of or as a result of or in connection with the performance by the Contractor of the Work, whether actually caused by or resulting from the performance of the Work, or out of or in connection with the Contractor's operations or presence at or in the vicinity of the Site. The Contractor shall bear the risk for all deaths, injuries, damages or losses sustained or alleged to have been sustained prior to the construction completion of the Work. The Contractor shall bear the risk sustained resulting from the Contractor's negligence or alleged negligence which is discovered, appears, or is manifested after acceptance by the Owner.

The contract also limited the risks assumed by the moving third-party defendants as to the "the risk of loss or damage until construction completion or until completion or removal of said plant, equipment, tools materials, or property from the site or vicinity thereof. . .."

ESDC and Tishman fail to identify any provisions to DASNY's contract with Anron, Stonewall or Roy Kay that "contains language evincing an intent to benefit [them] beyond [their] status as incidental beneficiar[ies]" IMS Engineers-Architects, P.C. v State, supra, at p. 1357, citing Fourth Ocean Pitnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 44 (1985); Aymes v Gateway Demolition, Inc., 30 AD3d 196 (1st Dept. 2006). Neither Tishman nor ESDC are third-party beneficiaries to DASNY's contract with Anron, Stonewall or ESDC. The privity required has not been established. That ESDC was copied on DASNY's acceptance letter of Anron's bid hardly makes it a third-party beneficiary of that agreement. The third-party plaintiffs ESDC and

Tishman's breach of contract claim is dismissed pursuant to CPLR 3211(a)(7).

Via its third cause of action in its third-party complaint, Tishman seeks to recover of Anron, Stonewall and Roy Kay for negligent representation. The six year Statute of Limitations set forth at CPLR 213(1) renders this claim untimely unless it relates back to a timely advanced pleading. Tishman's original Answer with cross-claims did not give Anron, Stonewall or Roy Kay notice of facts giving rise to a claim of negligent misrepresentation by it nor did the County's complaint. It is dismissed pursuant to CPLR 3211(a)(5) as untimely.

In any event, Tishman's claim against Anron, Stonewall and Roy Kay for negligent misrepresentation fails under CPLR 3211(a)(7). The elements of negligence representation are (1) a relationship approaching privity, (2) incorrect information and (3) reasonable reliance. J.A.O. Acquisition Corp. v Stravitsky, 8 NY3d 144, 148 (2007); see also, Prudential Ins. Co. of America v Dewey, Ballastine, Bushby, Palmer & Wood, 80 NY2d 377, 384 (1992), rearg den., 81 NY2d 955 (1993). Tishman had no special or privity-like relationship with Aaron, Stonewall or Roy Kay obligating any of them to impart correct information to it. Finally, Tishman cannot demonstrate reasonable reliance on information provided by Aaron, Stonewall or Roy Kay.

Contribution

Contribution is available under CPLR 1401 where "two or more persons . . . are subject to liability for damages for the same personal injury, injury to property or wrongful death." "[A] defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party" and "even when the contributor has no duty to the injured plaintiff (citations omitted)." Racquet & Braun, 90 NY2d 177, 182 (1997); see also, Klinger v Dudley, 41 NY2d 362 (1977); Sommer v Federal Signal Corp., 79 NY2d 540, 559 (1992). A contribution claim may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable (citations omitted). Racquet & Braun, supra, at p, 182; see also, Guzman v Haven Plaza Housing Development Fund Co., Inc., 69 NY2d 559, 568, n.5 (1987). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." Racquet & Braun, supra, at p, 182-183, quoting Nassau Roofing & Sheet Metal Co. v Facilities Development Corp., 71 NY2d 599, 603 (1988).

When analyzing the propriety of the defendant/third-party plaintiffs' contribution and indemnification claims, the County's Amended Complaint supersedes its original complaint leaving the original complaint of "no legal affect." Mendrzycki v Cricchia, 58 AD3d 171, 173 (2nd Dept. 2008). Thus, in fashioning their third-party contribution/indemnification claims, the third-party plaintiffs may not rely on the County's allegations in its original complaint nor may they rely on the County's 2006 Bill of Particulars which identified specific acts of alleged negligence by the former defendants who are now the third-party defendants: That Bill of Particulars amplified a complaint which is now a nullity and has accordingly become a nullity itself. See, Hawley v Travelers Indem. Company, 90 AD2d 684 (3rd Dept. 1982).

"[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of" CPLR 1401. Board of Educ. of Hudson City School Dist. v Sargent, Webster, Creashak & Foley, 71 NY2d 21, 26 (1987). Furthermore, "[t]ort language [in the plaintiff's complaint] notwithstanding . . . absent some form of tort liability, contribution is unavailable." Rockefeller University v Tishman Const. Corp of New York, 232 AD2d 155 (1st Dept. 1996) lv den., 89 NY2d 811 (1997), citing Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.), 84 NY2d 685 (1995); Board of Educ. v Sargent, Webster, Creashak & Foley, supra; see also, Trump Village Section 3, Inc. v New York State Housing Finance Agency, 307 AD2d 891 (1st Dept. 2003), lv den., 1 NY 3d 504 (2003). In fact, "the mere potential for serious physical injury or property damages is not enough to create a duty independent of the contract thereby authorizing recovery in tort." Rockefeller University v Tishman Const. Corp. of New York, supra, at p. 155, citing Sommer & Federal Signal Corp., supra. "Where a plaintiff's direct claims . . . seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable." Trump Village Section 3, Inc. v New York State Housing Finance Agency, supra, at p. 897, citing Rothberg v Reichelt, 270 AD2d 760, 762 (3rd Dept. 2000); Rockefeller University v Tishman Constr. Corp., supra, at p. 155.

It is clear that the County is seeking the benefit of its contractual bargain from the defendants, in particular Tishman, DASNY and ESDC. That the County seeks damages to "maintain, repair, replace or otherwise remediate the Aquatic Center" hardly transposes its claim against the defendants/third-party plaintiffs to a tort claim. The County's damages are sought

pursuant to a contractual duty only. Accordingly, third-party plaintiffs Tishman, DASNY and ESDC may not seek contribution from Aaron, Stonewall or Roy Kay. The third-party plaintiffs Tishman, DASNY and ESDC's third -party claims for contribution against the third-party defendants Aaron, Stonewall and Roy Kay are dismissed.

Indemnification

"[I]n idemnity, the party held legally liable shifts the entire loss to another." Rosado v Practor & Schwartz, Inc., 66 NY2d 21, 24 (1995), citing D'Ambrosio v City of New York, 55 NY2d 454, 460-461 (1982); McDermott v City of New York, 50 NY2d 211, 216-217 (1980), rearg den., 50 NY2d 1059 (1980). It "arises out of a contract which may be express or may be implied in law 'to prevent a result which is regarded as unjust or unsatisfactory (citations omitted).' " Rosado v Practor & Schwartz, Inc., supra at p. 24, quoting Prosser and Keaton, Torts § 51 at p. 341 (5th Ed.). Indemnity only lies where one who has done no wrong is nevertheless held liable solely due to another's negligence. Glazer v M. Fortunoff of Westbury, Corp., 71 NY2d 643, 646 (1988). "Since 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 to some degree in the wrongdoing cannot receive the benefit of the doctrine.' " Trump Village Section 3, Inc. v New York State Housing Finance Agency, supra, at p. 895, quoting Trustees of Colombia University in City of N.Y. v Mitchell/Giurgola Associates, 109 AD2d 449, 453 (1st Dept. 1985); see also, Broyhill Furniture Industries, Inc. v Hudson Furniture Galleries, LLC, 61 AD3d 554 (1st Dept. 2009).

In light of the County's allegations against Tishman, DASNY and ESDC, i.e., that they have caused the County's damages by breach of contract and negligent misrepresentation, their liability cannot possibly be predicated solely upon the negligence or wrongdoing of others: Accordingly, vicarious liability by the third-party defendants is not possible. Tishman, DASNY and ESDC's claims for indemnification fail and are also dismissed. See, Village of Palmyra v Hub Langie Paving, Inc., 81 AD3d 1352 (4th Dept. 2011), citing Glazer v M. Fortunoff of Westbury, Corp, supra; Brickel v Buffalo Mun. Housing Authority, 280 AD2d 985 (4th Dept. 2001); Colyer v K Mart Corp., 273 AD2d 809 (4th Dept. 2000).

Negligence

DASNY and ESDC have also attempted to advance a claim for negligence against third-party defendants Anron, Stonewall and Roy Kay. That claim, however, is untimely and does not relate back to DASNY and ESDC's original Answer with counterclaims. Furthermore, once again, dismissal pursuant to CPLR 3211(a)(7) would lie. A negligence claim cannot be coupled with a breach of contract claim absent an independent duty which springs from circumstances extraneous to and not dependent upon the contract, which is not present here. Clark-Fitzpatrick, Inc., v Long Island R. Co., 70 NY2d 382, 389 (1987); Sommer v Federal Signal Corp., supra.

In conclusion, the third-party defendants' motions to dismiss the second third-party plaintiff Tishman and the third third-party plaintiffs DASNY and ESDC's third-party complaints pursuant to CPLR 3211(a)(1),(5),(7) are granted to the extent that Tishman and ESDC's third-party complaints are dismissed and with the exception of its claim for breach of contract, DASNY's third-party complaint is also dismissed.

Dated: May 23, 2011

Ira S Warshawsky

J.S.C.

HON. IRA B. WARSHAWSKY

ENTERED

MAY 31 2011

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