

**Board of Mgrs. of the A Bldg. Condominium v 13th &
14th St. Realty, LLC**

2014 NY Slip Op 33354(U)

December 18, 2014

Supreme Court, New York County

Docket Number: 100061/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE A BUILDING
CONDOMINIUM,

Index No. 100061/11

Plaintiff,

Motion seq. no. 21

-against-

DECISION & ORDER

13th & 14th STREET REALTY, LLC, *et al.*,

Defendants.

-----X
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By notice of motion and pursuant to sequence number 21, third third-party defendant Gordon H. Smith Corporation (GHSC) moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the third-party complaint of third third-party plaintiff Hudson Meridian Construction Group, LLC, s/h/a Hudson Meridian Construction Group, and all cross claims against it. Hudson Meridian, defendant/cross-claimants Crystal Curtain Wall System Corp. and Crystal Window and Door System, Ltd. (Crystal), and plaintiffs oppose.

I. PERTINENT BACKGROUND

This action arises from the allegedly defective construction of a condominium; Hudson

Meridian was the construction manager for the condominium. GHSC was retained by sponsor in 2006 to perform exterior wall consultation services, and specifically, to review architectural plans and specifications related to the facade, review Crystal's shop drawings and monitor installation of their mock-up during construction to verify conformance with the drawings, and review work in progress to verify compliance with the drawings, mock-up construction, and other monitoring criteria. However, it was agreed and understood that "monitoring by GHSC is not a certification as to whether the work is or is not free of defects, but rather to indicate whether or not the work, when observed, has been performed in a manner consistent with the agreed upon criteria." (NYSCEF 916). It is undisputed that GHSC had no contract with Hudson Meridian or with any other entity involved in the condominium construction. (NYSCEF 915).

By decision and order dated August 30, 2013, as pertinent here, I granted partial summary judgment in favor of Hudson Meridian and against plaintiffs, finding that plaintiffs' claims for common law negligence were insufficient as they sought damages solely for economic loss arising out of the alleged negligent construction, notwithstanding their claims that Hudson Meridian's negligence created an unreasonable hazard to their lives and safety. (NYSCEF 496).

In June 2014, Crystal filed cross-claims against GHSC for negligence, breach of contract, breach of warranty, contractual indemnification, common law indemnification, and contribution. (NYSCEF 914).

Hudson Meridian opposes dismissal only of its claims for negligence and contribution. (NYSCEF 1081). Crystal opposes dismissal of its contribution claim. (NYSCEF 1099).

I. CONTENTIONS

GHSC argues that it may not be held liable to Hudson Meridian for common law negligence or contribution, as there is no privity between them, nor did it owe a duty to Hudson

Meridian, as plaintiffs claims that Hudson Meridian also was negligent, and that the claims are fatally duplicative of the breach of contract claim. It also contends that the contribution claim fails as plaintiffs seek to recover solely for economic loss, as I found in the August 2013 order. Finally, it argues that the cross claims asserted by Crystal and others are identical to Hudson Meridian's claims and should be dismissed for the same reasons. (NYSCEF 917).

Hudson Meridian contends that plaintiffs seek damages for more than economic loss, relying on their bill of particulars in which they allege that they have suffered personal injuries from the condominium's defective construction, along with other documents discussing the mold that allegedly developed in the condominium. It denies that its tort claims are duplicative, as they are pleaded in the alternative, and asserts that GHSC may be held liable in tort regardless of the lack of any privity between them. (NYSCEF 1076; 1081).

Crystal argues that its contribution claim is viable because it and GHSC owed each other professional duties to act non-negligently, as Crystal followed GHSC's directions and recommendations as to the curtain wall system and made changes to the system as directed to do so by GHSC, and as it relied upon GHSC to verify and approve of its work and issue a warranty and guaranty of it, thus showing that they were, in effect, in privity. It contends that any damages allegedly caused by it were also thus caused by GHSC given their relationship and GHSC's direction of its work, and that GHSC owed it a duty, having created and exacerbated the condition at issue. Crystal also asserts that it is an intended beneficiary of GHSC's contract with Sponsor as GHSC was hired to design and implement the curtain wall system and to supervise Crystal's work in doing so. Finally, Crystal maintains that the motion should be denied until depositions of GHSC employees have been taken. (NYSCEF 1099).

Plaintiffs argue that they have standing to oppose GHSC's motion, notwithstanding the

lack of a contract between them, as dismissal of GHSC from the case will detrimentally affect their claims related to the defective curtain wall system. They repeat the other parties' arguments against dismissal. (NYSCEF 1131).

In reply, GHSC reiterates its arguments in favor of dismissal of Hudson Meridian's claims and contends that plaintiffs lack standing to oppose their dismissal. It also argues, as to Crystal, that its claim for contribution is not legally cognizable. (NYSCEF 1219).

II. ANALYSIS

A. Hudson Meridian's claims

As I already found, on Hudson Meridian's own motion, that plaintiffs' injuries relate solely to economic loss, there is no basis on which GHSC may be held liable for common law contribution. (*Bd. of Educ. of Hudson City School Dist. v Sargent, et al.*, 71 NY2d 21 [1987] [no right to contribution where damages claimed are economic loss resulting from breach of contract]; *Kleinberg v 516 W. 19th LLC*, 121 AD3d 459 [1st Dept 2014] [contribution unavailable where underlying contractual claims seek purely economic damages]; *Bd. of Mgrs. of 195 Hudson St. Condominium v 195 Hudson St. Assocs., LLC*, 37 AD3d 312 [1st Dept 2007] [as damages sought by plaintiffs merely for economic loss, contribution unavailable]).

Moreover, claims based on the negligent performance of a contract are not cognizable (*Wildenstein v 5H & Co., Inc.*, 97 AD3d 488 [1st Dept 2012] [breach of contract not considered tort unless legal duty independent of contract has been violated]; *Bd. of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010] [claim for negligent performance of contract not cognizable]; *Saint Patrick's Home for the Aged and Infirm v Laticrete Intl., Inc.*, 267 AD2d 166 [1st Dept 1999] [alleging that breach of contract duty arose from lack of due care will not transform breach of contract into tort]) and, in any event, are

duplicative of a breach of contract claim (*Bd. of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506 [1st Dept 2014] [allegations of negligence based on defects in construction of condominium sound in breach of contract, not tort]; *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284 [2d Dept 2009], *lv denied* 15 NY3d 742 [2010] [negligence claim based on construction defects dismissed as duplicative of breach of contract claim]).

While a contractor may be held liable in tort to a non-contracting party in certain limited circumstances, including if, in failing to exercise reasonable care in the performance of its contractual duties, it launches a force or instrument of harm by creating or exacerbating a dangerous condition (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d, 136 [2002]), Hudson Meridian cites no authority for the proposition that GHSC's alleged failure to review and monitor Crystal's work for compliance with specifications and drawings is the equivalent of the creation or exacerbation of a hazardous condition (*see eg Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007] [failure to properly inspect vehicle did not create or exacerbate dangerous condition as no reason to believe that inspection made vehicle less safe than beforehand]; *All Am. Moving and Storage, Inc. v Andrews*, 96 AD3d 674 [1st Dept 2012] [failure by contractor to inspect sprinklers did not launch force or instrument of harm]; *Altinma v E. 72nd Garage Corp.*, 54 AD3d 978 [2d Dept 2008] [contractor's alleged negligent failure to warn defendant regarding safety inspection requirements insufficient to impose duty of care upon party not in privity of contract with injured party]). *Johnson v City of New York* is inapposite as there, the movant raised a triable issue as to whether the third party contractor negligently failed to install circuit interrupters and thereby created the allegedly hazardous condition that caused the plaintiff's injuries. (102 AD3d 746 [2d Dept 2013]).

As plaintiffs' opposition addresses only Hudson Meridian's motion, given my dismissal of Hudson Meridian's third-party claims, I need not consider it.

B. Crystal's cross claims

Plaintiffs seek only economic damages. Thus, it is irrelevant whether GHSC may be held independently liable in tort for failing to exercise reasonable care, despite Crystal's claim that plaintiffs and others also assert injuries to their property and personal injuries to third parties. (See *Structure Tone, Inc. v Univ. Svces. Group, Ltd.*, 87 AD3d 909 [1st Dept 2011] [despite contractor's attempt to cast claims in tort, claims were based on alleged breaches of express contract, there was no personal injury, and purely economic loss resulting from breach of contract does not constitute injury to property; no evidence public in danger from alleged leaks resulting from defective construction and thus party could not be liable in tort independently of contractual duties]; *Gallup v Summerset Homes, LLC*, 82 AD3d 1658 [4th Dept 2011] [home builder owed no independent duty to plaintiffs as they alleged that mold formed in home because of builder's defective workmanship and/or materials, and thus manner in which injury occurred sounded in contract, not tort]; compare *Rockefeller Univ. v Tishman Const. Corp. of New York*, 232 AD2d 155 [1st Dept 1996] [mere potential for serious physical injury or property damage insufficient to create duty independent of contract thereby authorizing recovery in tort], with *Castle Vil. Owners Corp. v Greater New York Mut. Ins. Co.*, 58 AD3d 178 [1st Dept 2008] [contribution claim not barred by economic loss doctrine as design professional may be subject to tort liability for failing to use reasonable care and damages sought by plaintiff not limited to economic loss]; see also *Bd. of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506 [1st Dept 2014] [allegations of negligence based on defects in construction of condominium sound in breach of contract, not tort]).

There is no basis for finding that plaintiffs and GHSC were in functional privity absent any allegation that plaintiffs were known to GHSC. (*See Bd. of Mgrs. of the A Bldg. Condominium v 13th & 14th St. Realty, LLC*, 121 AD3d 432 [1st Dept 2014] [dismissing malpractice claim against Crystal by board of managers and residents as parties' relationship not functional equivalent of privity as plaintiffs not known to Crystal; contract was between Sponsor and Crystal]).

And, as Crystal asserts no other viable claim against GHSC, such as negligence, malpractice, or negligent misrepresentation, it is irrelevant whether it was, in effect, in privity with GHSC. (*Greece Cent. School Dist. v Tetra Tech. Engineers*, 78 AD3d 1701 [4th Dept 2010] [whether defendant in "functional privity" with contractor irrelevant as third-party complaint failed to contain claim for negligent misrepresentation]; *see also Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311 [1st Dept 2009] [indemnification claim dismissed; while construction manager argued its relationship with architect approached one of privity, relevant only where negligent misrepresentation or similar torts alleged, and movant provided no authority to support claim in context of breach of contract action and third-party complaint contained no allegation that architect misrepresented anything negligently]; *Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85 [2d Dept 2009], *lv denied* 13 NY3d 900 [while plaintiff argued that subcontractor could be liable as their relationship approached one of privity, plaintiff's claim against it not premised on negligent misrepresentation]). *N. Star Contracting Corp. v MTA Cap. Constr. Co.*, 120 AD3d 1066 (1st Dept 2014), is not apposite as there, the subcontractor asserted a negligent misrepresentation claim against the construction manager.

Finally, there is no merit to Crystal's claim that it is an intended beneficiary of GHSC's

contract with sponsor. That sponsor allegedly hired GHSC to supervise and monitor the curtain wall installation by Crystal does not prove that the agreement was intended to benefit Crystal, and Crystal cites no authority in support thereof. (*See eg, Nanomedicon, LLC v Research Foundation of State Univ. of New York*, 112 AD3d 594 [2d Dept 2013] [party asserting rights as third-party beneficiary must establish that contract was intended for its benefit]). The specification in the agreement that “monitoring by GHSC is not a certification as to whether the work is or is not free of defects, but rather to indicate whether or not the work, when observed, has been performed in a manner consistent with the agreed upon criteria,” shows that GHSC’s purpose in monitoring Crystal’s work was to ensure that Crystal’s work complied with the plans and drawings requested by sponsor, which was intended to benefit sponsor, not Crystal.

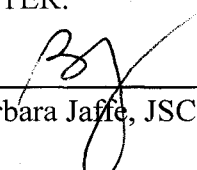
III. CONCLUSION

Accordingly, it is hereby

ORDERED, that third third-party defendant Gordon H. Smith Corporation’s motion for an order dismissing the third-party complaint of third third-party plaintiff Hudson Meridian Construction Group, LLC, s/h/a Hudson Meridian Construction Group and all cross claims against it is granted, and the third third-party complaint is dismissed with costs and disbursements to third third-party defendant Gordon H. Smith Corporation as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of this action shall continue.

ENTER:



Barbara Jaffe, JSC

DATED: December 18, 2014
New York, New York