

11 Essex St .Corp. v Tower Ins. Co. of N.Y.

2010 NY Slip Op 31904(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 0600176/2004

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 600176/2004
11 ESSEX STREET CORP.
VS.
TOWER INS. CO. OF NY
SEQUENCE NUMBER : 011
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided as*

attached

FILED

JUL 13 2010

FILED

JUL 13 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/10

[Signature]
EMILY JANE GOODMAN *JSC*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

11 ESSEX STREET CORP.,

Plaintiff,

-against-

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

Index No. 600176/04

FILED
JUL 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

-----X

11 ESSEX STREET CORP.,

Plaintiff,

-against-

7 ESSEX STREET, LLC, c/o VESTA
DEVELOPMENT GROUP, DeSIMONE CONSULTING
ENGINEERS, JEFFREY M. BROWN ASSOCIATES,
INC., BERZAK GOLD, P.C., and BIG APPLE
WRECKING AND CONSTRUCTION CORP.,

Defendants.

Index No. 110019/04

-----X

7 ESSEX STREET CORP.,

Plaintiff,

-against-

11 ESSEX STREET CORP., SION MISRAHI,

Defendants.

Index No. 101984/05

-----X

JEFFREY M. BROWN ASSOCIATES, INC.,

Third-Party Plaintiff,

-against-

Index No. 590172/06

CASINO DEVELOPMENT GROUP, INC.,
CASINO DEVELOPMENT CORP.,
CASINO DEVELOPMENT CORP., f/k/a DANNA
CONSTRUCTION COMPANY AND WILLIAM
CHARON,

Third-Party Defendants.

-----X
BIG APPLE WRECKING AND CONSULTING CORP.,

Second Third-Party Plaintiff,

Index No. 590479/06

-against-

SAFEWAY ENVIRONMENTAL CORP.,

Second Third-Party Defendant.

-----X
TOWER INSURANCE COMPANY OF NEW YORK,

Third Third-Party Plaintiff,

Index No. 590879/06

-against-

7 ESSEX STREET, L.L.C., c/o VESTA
DEVELOPMENT GROUP, JEFFREY M. BROWN
ASSOCIATES, INC., DeSIMONE CONSULTING
ENGINEERS, BERZAK GOLD, P.C., BIG APPLE
WRECKING AND CONSTRUCTION CORP., CASINO
DEVELOPMENT GROUP, INC., CASINO
DEVELOPMENT CORP., f/k/a DANNA
CONSTRUCTION COMPANY, WILLIAM CHARON,
and SAFEWAY ENVIRONMENTAL CORP.,

Third Third-Party Defendants.

-----X
CASINO DEVELOPMENT GROUP, INC., CASINO
DEVELOPMENT CORP., and WILLIAM CHARON,

Fourth Third-Party Plaintiffs,

Index No. 590972/06

-against-

DANNA CONSTRUCTION CORP., DANNA EQUIPMENT
CORP., and MICHAEL DANNA,

Fourth Third-Party Defendants.

-----X
7 ESSEX STREET LLC,

Fifth Third-Party Plaintiff,

Index No. 590456/09

-against-

FRANKE, GOTTESGEN, COX ARCHITECTS,

Fifth Third-Party Defendants.

-----X
Emily Jane Goodman, J.:

In these multiple actions arising from property damage to a building owned by plaintiff 11 Essex Street Corp. (11 Essex), fifth third-party defendant Franke, Gottsegen, Cox Architects (Franke) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the fifth third-party complaint, and all cross claims brought against it.

These actions have been visited by the court on several motions to date. Details are therefore set forth as necessary.

11 Essex claims that its building suffered structural damage as result of the construction of a 10-story building next door, at 7 Essex Street (the Project). The owner of 7 Essex Street is fifth third-party plaintiff 7 Essex Street LLC (7 Essex). 7

Essex hired Franke as architects for the Project. Franke subcontracted with DeSimone Consulting Engineers, PLLC (DeSimone) to do structural engineering design services for the Project.

7 Essex hired Jeffery M. Brown Associates, Inc. (JMB) as construction manager. JMB hired Danna Construction Corp. (Danna) to perform the underpinning work for 11 Essex's building. Danna, in turn, hired Berzak Gold, P.C. (Berzak) to design the underpinning. Danna performed the underpinning pursuant to Berzak's designs. 11 Essex claims that the damage to its building was a result of improper underpinning.

Extended litigation ensued, ending in the present fifth third-party complaint by 7 Essex against Franke, in which 7 Essex blames Franke's alleged faulty designs as the cause of the damage to 11 Essex Street.

Franke, on this motion, maintains that the fifth third-party complaint raises causes of action for (1) negligence; (2) malpractice; and (3) breach of contract. Based on the date of the substantial completion of Franke's work on the Project, as well as other relevant points in time, Franke claims, on this motion, that all of those causes of action are barred by the applicable statutes of limitations.¹

¹Franke's motion is really based on CPLR 3211 (a) (5), a section Franke does not set forth in his notice of motion. However, 11 Essex has responded to the cross motion as presented by Franke, and has not been prejudiced by Franke's failure to cite the correct CPLR section.

Opposition to the motion is brought by named parties Berzak, JMB, 11 Essex and Sion Misrahi, Casino Development Group, Casino Development Corp. (allegedly improperly sued as Casino Development Corp. f/k/a Danna Construction Company) and William Charon, as well as by 7 Essex.

The gist of the opposition by all of the above parties is that 7 Essex is bringing claims against Franke sounding in indemnification, however characterized in the fifth third-party complaint, and so, the claims are not barred by the statute of limitations.

The statute of limitations for both negligence and malpractice is three years. CPLR 214 (4), (6). That for breach of contract is six years. CPLR 213 (2). According to Franke, its work on the Project was "substantially complete with regard to the scope of work" on October 3, 2003 (Franke Memorandum of Law, at 2), and that a certificate of occupancy was issued for the property on October 8, 2003. According to Franke, since the main action was brought over five years ago, and the action for professional malpractice and negligence were brought against Franke on or about May 13, 2009, more than six years after any significant completion date, both are barred by the statutes of limitations. Franke also argues that the action for breach of contract is treated by the law as the same as professional malpractice claim, making it subject to the three-year statute of

limitations as well. See e.g. *Matter of R,M Klement & Frances Halsband, Architects (McKinsey & Company)*, 3 NY3d 538, 539 (2004).

7 Essex argues that it did not bring a claim against Franke until, in the course of a deposition of Matthew Gottsegen (Gottsegen), a non-party witness for Franke, it was divulged that (according to 7 Essex), Franke had knowledge of a condition in the basement of 11 Essex Street prior to February 2002, which Gottsegen felt was "dangerous in terms of the stability" of 11 Essex Street during the excavation for the Project. Thus, 7 Essex claims that it could not have known that Franke bore any potential liability for failing to recognize and remedy a defective condition until the deposition, and could not have brought its suit at an earlier date.

The statute of limitations on a cause of action for indemnification is six years. CPLR 213; *State of New York v Stewart's Ice Cream Co., Inc.*, 64 NY2d 83 (1984). "The six-year limitations period began to run when the plaintiff suffered a loss by paying the debt for which it alleges the defendant should be held responsible" *Union Turnpike Associates, LLC v Getty Realty Corp.*, 27 AD3d 725, 727 (2d Dept 2006); see also *Equitable Life Assurance Society of U.S. v Werner*, 286 AD2d 632 (1st Dept 2001). It matters not that the cause of action is couched in terms of negligence, if it is really one for

indemnification. See *State of New York v Griffith Oil Company, Inc.*, 299 AD2d 894 (4th Dept 2002).

In the present case, all of 11 Essex's causes of action against Franke, while characterized as malpractice, negligence and breach of contract, are really claims for indemnification. Therefore, as 7 Essex has yet to pay any losses occasioned by the damage to 11 Essex's building, the statute of limitations has yet to commence on its claims against Franke, and they are not dismissible based on a defense of statute of limitations.

Franke's request to dismiss the cross claims brought against it is held in abeyance pending submission of additional briefs and a reply by Franke, as the issue was not adequately briefed. "A party seeking contribution must show that the party from whom contribution is sought owes a duty to him or to the injured party and that a breach of this duty has contributed to the alleged injuries" (*Crimi v Black*, 219 AD2d 610, 611 [2d Dept 1995]). Further, a "party sued for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification" (*Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1998]). "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, - AD3d -,

2010 NY Slip Op 02866, *2 [1st Dept 2010]). A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [internal quotation marks and citations omitted]). Although liability in this action has yet to be determined, and therefore whether Franke or any defendant is responsible for any part of the damage suffered by 11 Essex has yet to be resolved, no defendant has produced proof of the relevant contracts, nor identified the relevant duty, nor indicated that Plaintiff is seeking to hold them vicariously liable.

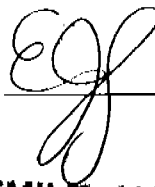
Franke's complaint that it will be "substantially prejudiced" if it is required to litigate in this matter (Franke Memorandum of Law, at 18) is not persuasive. Although much discovery has taken place, accommodations may be able to be made to Franke to bring it "up to speed" on discovery issues. Further, the Court would consider severing the fifth third-party action, upon motion.

Accordingly, the motion brought by fifth third-party defendant Franke, Gottsegen, Cox Architects to dismiss the fifth third-party complaint is denied, except as to dismissal of the cross claims against it, which is held in abeyance pending

additional submissions by August 15, 2010.

Dated: July 9, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED

JUL 13 2010

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NEW YORK**