SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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AFR LLC,

Plaintiff,

-against-

ATLANTIC SUBSEA, INC. and SEA GATE ASSOCIATION

Defendants.

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ATLANTIC SUBSEA, INC.

Third-Party Plaintiff,

-against-

CG 3PL ENGINEERING DESIGN PROFESSIONAL CORPORATION and ROGERS SURVEYING, PLLC,

Third-Party Defendants.

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Mot. Seq. # 1

Index # 503634/2022

DECISION AND ORDER

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to Dismiss submitted on June 3, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1, 2 [Exh. A-H], and 3 [Exh. A-C]
Affirmation/Affidavit in Opposition	5 [Exh. A-F], 6 [Exh. A-C]
Memorandum of Law	4
Reply Memorandum	7

The third-party defendant, CG 3PL Engineering Design Professional Corporation (hereinafter, "CG") moves pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) for an order dismissing the third-party complaint of the defendant/third-party plaintiff, Atlantic Subsea, Inc. (hereinafter, "Atlantic") and all cross-claims against CG defendant, based upon documentary evidence and failure to state a cause of action. Atlantic has agreed to dismiss its claims for contractual indemnification and breach of contract as set forth in its opposition papers. However, Atlantic maintains its claims for contribution and common law indemnification. Atlantic and the third-party

defendant, Rogers Surveying, PLLC (hereinafter, "Rogers"), oppose CG's motion on the grounds that they have pled viable causes of action for contribution and common law indemnification, and the documentary evidence submitted by CG does not refute the claims for contribution and common law indemnification. In addition, Rogers opposes CG's motion as to contractual indemnification and breach of contract on the grounds that CG has not proffered any documentary evidence demonstrating whether it was a party to any written contracts with Rogers that contain indemnification and/or insurance procurement provision and the motion is premature.

Discussion

Plaintiff, AFR, LLC (hereinafter, "AFR"), commenced this action for civil trespass and private nuisance against the defendants, Atlantic and Sea Gate Association (hereinafter, "Sea Gate") due to a bulkhead that was installed by Atlantic at the behest of Sea Gate in 2020, which allegedly encroaches approximately 4 feet onto plaintiff's property within the Sea Gate community. Plaintiff claims that the alleged encroachment interferes with and deprives it of the full use and enjoyment of real property that it owns located at 4200 Atlantic Avenue, Brooklyn, New York. Sea Gate is a homeowner's association for homeowners in the Sea Gate community. Atlantic is a general contractor that built or restored a bulkhead that spans various properties of the Sea Gate community, including plaintiff's property. Atlantic impleaded the third-party defendants, CG and Rogers by filing a third-party complaint alleging causes of action for contribution, common law indemnification, contractual indemnification, and breach of contract for failure to procure insurance. Atlantic alleges that it relied on the surveying, design, and engineering of CG as a consultant and Rogers as a surveyor in installing the subject bulkhead. In addition, Atlantic asserts cross-claims against all defendants and third-party defendants for contribution, common law indemnification, and contractual indemnification. Rogers asserts cross-claims against all defendants and third-party defendants for contribution, common law indemnification, contractual indemnification, and breach of contract for failure to procure insurance.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. *See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See, CPLR 3212[b]; Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference. See, *Cortland Street Recovery Corp v. Bonderman*, 31 N.Y.3d 30, 73 N.Y.S.3d 95 (2018). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion

to dismiss. Furthermore, "unlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings." Id., supra, citing, *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005).

Contractual Indemnification and Breach of Contract

CG argues that Rogers' claim for contractual indemnification and breach of contract by failing to procure insurance should be dismissed because CG's written contract with Sea Gate does not contain an indemnification clause or a provision to procure insurance in favor of Rogers. Instead, said contract requires CG to indemnify Sea Gate and its directors, officers, employees, and stockholders under specific circumstances. In support, CG has offered the contract for consultant services between CG and Sea Gate; the contract for bulkhead construction services between Atlantic and Sea Gate; and the affidavit of CG's President, Richard Cloutier. CG argues that Rogers cannot assert third-party beneficiary status since there is no express language naming Rogers as an intended third-party beneficiary of the CG and Sea Gate contract.CG further argues that it did not enter into contract with Rogers and did not receive compensation from Rogers for any services related to the bulkhead construction project.

In opposition, Rogers argues that CG has not offered any documentary evidence with respect to any contractual relationship it may or may not have had with Rogers, other than a self-serving affidavit from its President. Rogers further argues that the motion is premature, and CG can move for summary judgment if on-going discovery demonstrates that there is no enforceable indemnification or insurance procurement provisions with respect to Rogers. In regard to CPLR 3211(a)(7), Rogers argues that due to the lack of discovery, it is not currently in possession of information to plead allegations with the level of particularity it will need to ultimately prevail on its cross-claims.

In reply, CG argues that no contract exists between CG and Rogers, and Rogers has failed to explain why it believes another contract exists that would provide a basis for CG to indemnify or procure insurance for Rogers. CG further argues that Rogers has failed to explain why CG would agree to indemnify and procure insurance in another contract and has failed to suggest how discovery would produce evidence of a second written contract entered into by CG for the bulkhead project. Lastly, Rogers has failed to explain why it would not have a copy or knowledge of a written contract between it and CG.

"In considering a motion to dismiss a complaint pursuant to CLPR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See, *Lessin v. Piliaskas*, 188 A.D.3d 859, 136 N.Y.S.3d 87 (2nd Dept., 2020), citing *Gould v. Decolator*, 121 A.D.3d 845, 994 N.Y.S.2d 368 (2nd Dept., 2014). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable," such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. *Karpovich v City of New York*, 162 A.D.3d 996, 80 N.Y.S.3d 364 (2nd Dept., 2018). A party's right to contractual indemnification depends upon the specific language of the relevant contract. See, *Gurewitz v City of New York*, 175 A.D.3d 658, 109 N.Y.S.3d 167 (2nd Dept., 2019).

Here, CG has satisfied its burden in making a prima facie showing of its entitlement to the dismissal of Roger's cross-claims for contractual indemnification and breach of contract by submitting documentary evidence demonstrating that it entered into contract with Sea Gate, not Roger's. Accordingly, CG was not contractually obligated to indemnify or procure insurance for Rogers. In opposition, Rogers has failed to raise a triable issue of fact as they did not offer any proof that Rogers entered into contract with CG beyond mere speculation and conclusory allegations that other contracts may exist. It is noteworthy that Roger's is in the best position to provide any contract that it may have entered into with CG, yet they have failed to offer said purported contract.

As to the Roger's argument that the plaintiff's motion for summary judgment is premature due to outstanding discovery, the court finds that argument unpersuasive. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. See, *Singh v Avis Rent A Car Sys., Inc.*, 119 A.D.3d 768, 989 N.Y.S.2d 302 (2nd Dept., 2014). Here, the mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion. See, *Lopez v WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2nd Dept., 2006).

Contribution

CG argues that Atlantic and Rogers' claims for contribution must be dismissed because contribution only applies to actions for personal injury, injury to property, and wrongful death. According to CG, the plaintiff's claims for trespass and nuisance require dismissal of the contribution claims since the measure of the plaintiff's alleged damages can only be classified as an economic loss. The plaintiff seeks to recover damages based on the square footage taken and approximate fair market value of same, which is an economic loss. The plaintiff does not seek to repair or replace damaged property, which would be considered as an "injury to property." CG argues that contribution applies to "injury to property," but not to the economic loss damages sought by the plaintiff.

In opposition, Atlantic and Rogers point out that CG's argument implies that any complaint which carries with it a claim for economic damages precludes a cause of action for contribution under CPLR § 1401, regardless of the facts which caused said economic damages. Conversely, Atlantic and Rogers interpret CPLR § 1401 as permitting a cause of action for contribution when there has been a claim for economic damages based on either personal injury, injury to property, or wrongful death. Atlantic and Rogers further argue that the restrictions contained in CPLR § 1401 apply exclusively to breach of contract claims in that contribution is not available where the economic damages sought are exclusively for breach of contract. As such, the plaintiff's inclusion of a claim for economic damages stemming from an alleged injury to real property through trespass, nuisance, and deprivation of full use and enjoyment of real property does not preclude contribution.

CPLR § 1401 states, inter alia, that two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against

the person from whom contribution is sought. See, *CPLR § 1401*. Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person. See, *Godoy v Abamaster of Miami*, 302 A.D.2d 57, 754 N.Y.S.2d 301 (2nd Dept., 2003). Contribution arises automatically when certain factors are present and does not require any kind of agreement between or among the wrongdoers. See, *Fox v County of Nassau*, 183 A.D.2d 746, 583 N.Y.S.2d 482 (2nd Dept., 1992). To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries. See, *Guerra v St. Catherine of Sienna*, 79 A.D.3d 808, 913 N.Y.S.2d 709 (2nd Dept., 2010). The critical requirement 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. See, *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 N.Y.2d 599, 528 N.Y.S.2d 516 (1988).

Purely economic loss resulting from a breach of contract does not constitute "injury to property" within the meaning of New York's contribution statute. See, *Eisman v Village of E. Hills*, 149 A.D.3d 806, 52 N.Y.S.3d 115 (2nd Dept., 2017). According to the economic loss doctrine, contribution under CPLR § 1401 is not available where the damages sought are exclusively for breach of contract. See, *Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 A.D.3d 1349, 924 N.Y.S.2d 172 (2nd Dept., 2011). The existence of some form of tort liability is a prerequisite to application of CPLR § 1401. See, *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 523 N.Y.S.2d 475 (1987). The touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint, but the measure of damages sought therein. See, *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 A.D.3d 318, 879 N.Y.S.2d 418 (1st Dept., 2009).

In the case at bar, the court finds that a cause of action for contribution is not barred by the economic loss doctrine and that Atlantic and Rogers have pled viable causes of action for contribution. The plaintiff did not assert a cause of action to recover for breach of contract against Atlantic. The plaintiff has asserted causes of action sounding in tort based upon Atlantic causing injury to property through trespass and nuisance. As such, the necessary predicate tort liability for a contribution action remains in the case. See, *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 A.D.2d 229, 744 N.Y.S.2d 319 (1st Dept., 2002). Atlantic and Roger's argument that plaintiff's alleged damages can only be classified as an economic loss is unavailing and a misapplication of case law. Civil trespass and private nuisance constitute causes of action for "injury to property" and the fact that the plaintiff is seeking monetary damages does not preclude contribution. Being that contribution only applies to actions for personal injury, injury to property, and wrongful death, and these actions routinely seek the relief of monetary damages, CG's interpretation of the economic loss doctrine would bar contribution in most of these actions, which is unreasonable.

Common Law Indemnification

CG argues that Atlantic and Rogers are not entitled to common law indemnification since they are alleged to be liable for their own respective acts or omissions, whereas common law indemnification requires vicarious liability without fault for the conduct of CG. The plaintiff, Atlantic, and Rogers do not allege any facts under which Atlantic or Rogers would be vicariously liable for CG's acts or omissions. According to CG, Atlantic's installation of the bulkhead per

plans and specifications would not constitute liability to the plaintiff absent an independent duty that Atlantic violates.

In opposition, Atlantic argues that CG has offered unsupported and conclusory legal arguments as to liability. Atlantic further argues that it has pled a viable cause of action for common law indemnification by alleging that it relied upon the surveying performed by CG and Rogers, such that the "encroachment' complained of by the plaintiff was caused solely by the negligence of CG and Roger, not Atlantic. Also, CG has not offered any documentary evidence which refutes the claim for common law indemnification.

In opposition, Rogers argues that given the lack of discovery, it is too early in these proceedings to determine whether any party is free from fault, or vicariously liable. Atlantic further argues that it has pled a viable cause of action for common law indemnification by alleging that if plaintiff or Atlantic sustained damage as alleged in the complaint or third-party complaint, then such damages were due to the primary and active wrongdoing of the cross-claim defendants.

The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party. See, *Arrendal v Trizechahn Corp.*, 98 A.D.3d 699, 950 N.Y.S.2d 185 (2nd Dept., 2012). Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer. See, *Castillo v Port Auth. of N.Y. & N.J.*, 159 A.D.3d 792, 72 N.Y.S.3d 582 (2nd Dept., 2018). 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. See, *Henderson v Waldbaums*, 149 A.D.2d 461, 539 N.Y.S.2d 795 (2nd Dept., 1989). A party can establish its prima facie entitlement to judgment as a matter of law dismissing a claim for common-law indemnification asserted against it by establishing that it was not negligent, and that it did not have the authority to direct, supervise, or control the work giving rise to the injury. See, *State of New York v Defoe Corp.*, 149 A.D.3d 889, 49 N.Y.S.3d 897 (2nd Dept., 2017).

Here, the court finds that CG has not established its prima facie entitlement to judgment as a matter of law dismissing a claim for common-law indemnification since it has not established through documentary evidence that it was not negligent and did not have the authority to direct, supervise, or control the work giving rise to the injury. The contract between CG and Sea Gate references CG providing contractor oversight, which raises triable issues of fact as to CG's authority to direct, supervise, or control the work giving rise to the injury. In addition, there are triable issues of fact as to negligence and vicarious liability, which precludes the dismissal of the common-law indemnification at this juncture in the proceedings. Atlantic and Rogers have pled viable causes of action for common-law indemnification.

Accordingly, CG's motion to dismiss is hereby granted to the extent that Atlantic and Rogers' claims for contractual indemnification and breach of contract are hereby dismissed. CG's motion to dismiss is hereby denied as to Atlantic and Roger's claims for contribution and common-law indemnification, and it is hereby

ORDERED, that the Atlantic and Rogers' claims for contractual indemnification and breach of contract are dismissed, and it is further

ORDERED, that CG's motion to dismiss is denied as to Atlantic and Rogers' claims for contribution and common-law indemnification.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
December 6, 2024

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
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