SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

BOARD OF MANAGERS OF OCEAN ONE CONDOMINIUM,	:	Index No. 704031/2013
	:	Hon. Orin R. Kitzes
Plaintiff,	:	Motion Sequence No. 006
- against -	:	Return Date: February 2, 2015
OCEAN ONE CONDOMINIUM, INC., ROSEMILL, LLC, A.R. RENAISSANCE CORP., SESSA PLASTERING CORP., JOSEPHANTHONY PLASTERING CORP., SURF GLASS CORP., FM HOME IMPROVEMENT INC., BASS PLUMBING & HEATING CORP., DRYVIT SYSTEMS, INC., STARLINE INDUSTRIES, INC., EVERGREEN PRODUCTS, LLC, WILLIAM LEGGIO ARCHITECT, LLC, JONATHAN T. MILLER, ALLAN V. ROSE and JOHN DOES Nos. 1 through 10,	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS CROSS-CLAIMS

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Defendants Sessa Plastering Corp. ("Sessa") and JosephAnthony Plastering Corp. ("JosephAnthony"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Memorandum of Law in opposition to the motion of Defendants Ocean One Condominium, Inc. ("Ocean One"), Rosemill LLC ("Rosemill"), Jonathan T. Miller ("Miller") and Allan V. Rose ("Rose") for an Order, *inter alia*: (i) pursuant to CPLR 3211, dismissing Sessa and JosephAnthony's cross-claims for contractual indemnification, common-law indemnification and contribution; and (ii) awarding such other and further relief as the Court deems just and proper.

STATEMENT OF THE FACTS

Plaintiff Board of Managers of Ocean One Condominium (the "Board") alleges twenty-one causes of action for allegedly defective design, manufacture and construction of a condominium project at 151 Beach 96th Street, Rockaway, New York 11693 (the "Project") (*see* Amended Complaint, dated April 30, 2014, annexed as Exhibit "D" to the Affirmation of Stanford Strenger, Esq. in Support of Defendants' Motion to Dismiss, dated October 6, 2014 ["Strenger Aff."]). The Board alleges that water infiltrated the Project via the siding, windows, roof and HVAC units (*id.*, ¶¶ 2-5). The Amended Complaint names twenty-four defendants (*id.*, ¶ 8-20). They include: (i) the Project's sponsor, Ocean One; (ii) the general contractor and construction manager, Rosemill; and (iii) Ocean One and Rosemill's principals, Miller and Rose (all of whom are referred to herein collectively as the "Sponsor Defendants") (*id.*, ¶¶ 2-3, 7-8, 20, 102-150, 250-256). The Amended Complaint also names Sessa and JosephAnthony, alleged subcontractors on the Project, as defendants under a variety of legal theories, including common-law negligence (*id.*, ¶¶ 10-11, 169-216).

As is prudent before discovery has begun in a complicated, multi-party construction litigation, Sessa and JosephAnthony alleged cross-claims against all co-defendants for

contractual indemnification, common-law indemnification and contribution (*see* Answer to Amended Complaint with Affirmative Defenses and Cross-Claims, dated June 23, 2014, annexed as Exhibit "E" to Strenger Aff.). No one but the Sponsor Defendants moved to dismiss Sessa and JosephAnthony's cross-claims.

ARGUMENT

Point I

THE COURT SHOULD DENY THE SPONSOR DEFENDANTS' MOTION TO DISMISS THE FIRST CROSS-CLAIM FOR CONTRACTUAL INDEMNIFICATION

The First Cross-Claim for contractual indemnification alleges that Sessa and JosephAnthony "entered into an agreement whereby one or more of Co-Defendants" including the Sponsor Defendants "agreed to indemnify" Sessa and JosephAnthony "from and against the damages alleged in the Complaint" (Strenger Aff., Ex. E, ¶¶ 284-85). The Sponsor Defendants argue that Sessa and JosephAnthony "failed to identify any alleged indemnification agreement" and "[b]are legal conclusions" that one existed "are not to be presumed true" (Memorandum of Law in Support of Defendants' Motion to Dismiss, dated October 7, 2014 ["Opening Bf."], at 41). The Sponsor Defendants misstate the applicable law.

To state a claim for contractual indemnification, the claimant must merely allege "the existence of a written agreement between itself and the party from whom it is seeking indemnification" (*Bd. of Mgrs. of Bay Club Condominium v Bay Club of Long Beach, Inc.*, 15 Misc 3d 282, 289-90 [Sup Ct Nassau County 2007]; *Cunningham v N. Shore Univ. Hosp. at Glen Cove Hous., Inc.*, 123 AD3d 650 [2d Dept 2014] [same]). The issue of whether a contract exists is not a "legal conclusion," as the Sponsor Defendants suggest, it is generally an issue of fact (*Mega Contr., Inc. v Ins. Corp. of New York*, 37 AD3d 669, 670 [2d Dept 2007] ["there are

triable issues of fact regarding the existence of a valid contract"]). On a 3211 motion, "the facts as alleged in the complaint must be accepted as true" (*Douglas v Dashevsky*, 62 AD3d 937, 938 [2d Dept 2009] [internal quotations omitted]). Thus, so long as the complaint pleads the mere existence of a contract, it is sufficient to survive a motion to dismiss (*Hampshire Properties v BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573 [2d Dept 2014] [denying 3211 motion to dismiss because the plaintiff alleged "the existence of a contract"]). Because Sessa and JosephAnthony alleged the existence of an indemnification agreement with the Sponsor Defendants, they state a valid claim for contractual indemnification (*see Bd. of Mgrs. of Bay Club Condominium v Bay Club of Long Beach, Inc.*, 15 Misc 3d at 289-90). Therefore, the Court should deny the Sponsor Defendants' motion to dismiss the First Cross-Claim for contractual indemnification.

Point II

THE COURT SHOULD DENY THE SPONSOR DEFENDANTS' MOTION TO DISMISS THE SECOND CROSS-CLAIM FOR COMMON-LAW INDEMNIFICATION

The Second Cross-Claim for common-law indemnification alleges that the Board's damages, if any, "were due solely to the performance or nonperformance of an act or acts solely within the province of one or more Co-Defendants," including the Sponsor Defendants, and that Sessa and JosephAnthony "did not participate" and "bear no responsibility" for those acts or omissions (Strenger Aff., Ex. E, ¶¶ 287-88). The Sponsor Defendants argue that there can be no claim of implied indemnification "[a]bsent a duty of the alleged tortfeasor to the injured party" and that Sessa and JosephAnthony "failed to allege that such legal duty exists" (Opening Bf. at 40-41). The Sponsor Defendants misstate the applicable law.

"Implied indemnification claims . . . may rest on various independent grounds—for

example, indemnity may be appropriate because of a separate duty owed the indemnitee by the indemnitor, or because one of two parties is considered actively negligent or the primary or principal wrongdoer" (*Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 296 [1991]). Accordingly, a "defendant may be held liable for common-law indemnification in the absence of a duty running to the plaintiff if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of [the defendant]" (*Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 [2d Dept 2010] [internal quotations omitted]).

Based on the foregoing authorities, Sessa and JosephAnthony did not have to allege the existence of a duty, only that they were (i) free from fault and (ii) that the Board's injuries were "attributable solely" to the "performance or nonperformance of an act solely within the province" of the Sponsor Defendants (*id.*). Sessa and JosephAnthony alleged precisely that (Strenger Aff., Ex. E, ¶ 287). Therefore, the Court should deny the Sponsor Defendants' motion to dismiss the Second Cross-Claim for common-law indemnification.

Point III

THE COURT SHOULD DENY THE SPONSOR DEFENDANTS' MOTION TO DISMISS THE THIRD CROSS-CLAIM FOR CONTRIBUTION

The Third Cross-Claim for contribution alleges that if the Board was damaged, "such damages were caused or contributed to by the culpable conduct of one or more Co-Defendants," including the Sponsor Defendants, and Sessa and JosephAnthony "are entitled to contribution and/or apportionment" from the Sponsor Defendants (Strenger Aff., Ex. E, ¶¶ 290-91). The Sponsor Defendants argue that Sessa and JosephAnthony seek contribution for pure breach of contract, and "no claim of apportionment of liability exists in claims arising from breach of

contract" (Opening Bf. at 41-42). The Sponsor Defendants misrepresent the allegations in the Amended Complaint.

The Fifteenth Cause of Action in the Amended Complaint alleges a tort claim — common-law negligence — against Sessa and JosephAnthony (Strenger Aff., Ex. D, ¶¶ 212-216). "The existence of some form of tort liability is a prerequisite to application of CPLR 1401" (*Galvin Bros., Inc. v Town of Babylon*, 91 AD3d 715, 715 [2d Dept 2012] [internal quotations and brackets omitted]). If one is sued even in part in tort, he or she may allege a claim of contribution "not only [against] joint tort-feasors, but also [against] concurrent, successive, independent, alternative, and even intentional tort-feasors" (*Bd. of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28 [1987]).

As the Court held in *Sound Refrig. and A.C., Inc. v All City Testing & Balancing Corp.* (84 AD3d 1349, 1350 [2d Dept 2011] [internal quotations omitted]):

> While the plaintiff in the main action did assert . . . a cause of action to recover damages for breach of contract . . . this was but one of several causes of action in the complaint. The plaintiff also asserted against All City a cause of action to recover damages for negligence based on All City's alleged conduct in causing injury to property through the negligent performance of its work. Although it is possible that All City ultimately may not be held liable in tort, at present a tort claim remains pending, and, thus, the necessary predicate tort liability for a contribution action remains in the case.

The exact same rules apply here. Because "at present a tort claim remains pending" against Sessa and JosephAnthony (*id.*; *see* Strenger Aff., Ex. D, ¶¶ 212-216), they state a valid claim of contribution against the Sponsor Defendants. Therefore, the Court should deny the Sponsor Defendants' motion to dismiss the Third Cross-Claim for contribution.

Point IV

THIS OPPOSITION IS TIMELY

In their reply papers, the Sponsor Defendants insinuate that this opposition is untimely (*see* Affirmation of Stanford Strenger, Esq. in Further Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Cross-Motion, dated January 19, 2015, ¶¶ 15-18; Memorandum of Law in Further Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Cross-Motion, dated January 19, 2015, at 17-18). To the contrary, this opposition is timely. The return date of this motion, Motion Sequence No. 006, is February 2, 2015. Accordingly, Sessa and JosephAnthony were required to serve their opposition papers on January 26, 2015, seven days prior to the return date of the motion (*see* CPLR 2214[b]; NYSECF Doc. No. 144). Sessa and JosephAnthony served and filed this opposition brief on January 26, 2015, the day it was due.

The Sponsor Defendants appear to have served their reply papers before Sessa and JosephAnthony served their opposition papers because the Sponsor Defendants entered into a Stipulation with the Board agreeing to a briefing schedule, which did not contemplate the possibility of the Court adjourning the motion (*see* NYSECF Doc. No. 178). The Court adjourned the motion, but the briefing schedule in the Stipulation remained the same (*see id.*). Sessa and JosephAnthony, however, were not parties to the Stipulation or the briefing schedule in it (*see id.*). Thus, Sessa and JosephAnthony's opposition papers were not due until January 26, 2015 (*see* CPLR 2214[b]; NYSECF Doc. No. 144). Therefore, their opposition is timely.

CONCLUSION

For all of the foregoing reasons, the Court should: (i) deny the Sponsor Defendants' motion to dismiss Sessa and JosephAnthony's cross-claims for contractual indemnification, common-law indemnification and contribution; and (ii) award such other and further relief as the Court deems just and proper.

Dated: January 26, 2015

FARRELL FRITZ, P.C.

/s/ *Franklin McRoberts*

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