

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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THE TIDES AT CHARLESTON HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

- against -

PC GROUP INC., et al.,

Defendants.

DCM 1M

Present:

HON. CHARLES TROIA
DECISION AND ORDER

Index No. 150309/16

Motion Nos.: 2575-004

3050-005

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The following papers numbered 1 to 12 were fully submitted on the 8th day of September, 2017:

Paper Numbered

Notice of Motion to Dismiss by Defendant Rampulla Associates Architects, LLP, with Exhibits (dated June 26, 2017).....	1
Memorandum of Law by Defendant Rampulla (dated June 26, 2017).....	2
Affirmation in Opposition by Defendant Greenberg Farrow Architecture (dated June, 2017).....	3
Plaintiff's Affirmation in Opposition (dated July 20, 2017).....	4
Affirmation by Defendant Trades Construction Services Corporation (dated July 20, 2017).....	5
Reply Memorandum of Law (dated July 26, 2017).....	6
Notice of Motion to Dismiss by Defendant Trades Construction Services Corporation, with Exhibits (dated July 28, 2017).....	7
Memorandum of Law by Defendant Trades Construction Services Corporation (dated July 28, 2017).....	8
Affirmation in Opposition by Defendant Greenberg Farrow Architecture (dated August 3, 2017).....	9

Plaintiff's Affirmation in Opposition to Defendant Trades Construction Services Corporation's Motion to Dismiss (dated August 25, 2017).....	10
Plaintiff's Memorandum of Law in Opposition to Defendant Trades Construction Services Corporation's Motion to Dismiss, with Exhibits (dated August 25, 2017).....	11
Reply by Defendant Trades Construction Services Corporation (dated September 6, 2017).....	12

Upon the foregoing papers, defendant Rampulla Associates Architects, LLP's motion to dismiss the "Second Amended Complaint" and all cross claims is granted. The cross-motion by defendant Trades Construction Services Corporation to dismiss the second amended complaint and cross-claims for contribution and common law indemnification is also granted.

Plaintiff The Tides at Charleston Homeowners Association, Inc. commenced this action on or about March 16, 2016 against defendant PC Group, LLC (hereinafter "PCG"), the sponsor/developer of the project referred to as "the Tides at Charleston" alleging, *inter alia*, breach of contract and negligence arising from purported improper design and construction defects. An amended complaint was then filed on February 23, 2017, adding defendant Trades Construction Services Corporation (hereinafter "Trades") as a defendant.

Thereafter, plaintiff filed a supplemental summons and "second" amended complaint which names defendant Design Plumbing & Heating Service Inc. (hereinafter "Design"), PRP Holdings, LLC (hereinafter "PRP"), A.J. Caruso Electrical, Inc. (hereinafter "AJ Caruso"), Raymond Homes, LLC (hereinafter "Raymond Homes"), DUO Plumbing & Heating Corp. (hereinafter "DUO"), Island Concrete Corp. (hereinafter "Island"), Greenberg Farrow Architecture (hereinafter "GFA") and Rampulla Associates Architects, LLP (hereinafter "Rampulla"). Plaintiff filed a stipulation of discontinuance with prejudice as to defendant

Raymond Homes, LLC on June 20, 2017. Plaintiff also filed a stipulation of discontinuance with prejudice as to defendant A.J. Caruso on October 31, 2017.

It is undisputed that The Tides at Charleston is a gated, waterfront community located in Staten Island. According to plaintiff, The Tides at Charleston Homeowners Association, Inc. (hereinafter "HOA") is responsible for the management, operation, maintenance, repair and replacement of Tides's common property, including storm water and drainage systems, roads, asphalt, sidewalks, concrete, landscaping and other HOA improvements. Plaintiff seeks to recover economic damages arising from the purported repair, restoration and construction of various portions of the project.

In support of its motion to dismiss, defendant Rampulla contends that plaintiff's first and third causes of action for malpractice and breach of contract are barred by the statute of limitations. According to Rampulla, plaintiff is time barred from recovering on its malpractice and breach of contract claims having failed to commence an action within three years of the completion of Rampulla's contractual obligations for the subject project. Plaintiff's second cause of action against Rampulla for breach of express and implied warranties has been withdrawn.

In addition, defendant Rampulla contends that plaintiff's malpractice and breach of contract claims should be dismissed inasmuch as no privity exists between plaintiff and Rampulla. Defendant Rampulla contends that it was not retained by plaintiff. According to Rampulla it was hired solely by PCG, the developer/sponsor, to provide architectural, engineering and governmental approval services for the subject project. Rampulla contends that its contract with PCG does not contain an express intent to benefit plaintiff. As such, Rampulla contends that it owes no independent duty to plaintiff, and that plaintiff is an incidental beneficiary and is not an intended third-party beneficiary.

Moreover, defendant Rampulla maintains that defendants' cross-claims for contribution should also be dismissed as they are purely economic. Further, defendant Rampulla maintains that defendants' cross-claims for contractual and common law indemnification should be dismissed as no contract exists with defendants and plaintiff has asserted independent acts of negligence by the co-defendants.

In opposition, plaintiff contends that defendant Rampulla's motion to dismiss is premature as discovery is incomplete. Plaintiff also contends Rampulla has not definitively shown that its claims are time barred.

Defendant GFA also opposes defendant Rampulla's motion and alleges that discovery is not complete and that Rampulla fails to sufficiently show that the claims are time barred.

In support of its cross-motion to dismiss, defendant Trades contends that plaintiff is barred by the statute of limitations and that plaintiff is an incidental beneficiary. Plaintiff's second cause of action against Trades for breach of express and implied warranties has been withdrawn. Trades contends that its contract with "Raymond Homes, Inc." is unambiguous and shows that plaintiff's claims are time barred and that the contract expresses no intention by the parties to benefit plaintiff.¹ Trades contends that plaintiff's expressions of hope and speculation are insufficient to defeat its motion to dismiss.

Moreover, defendant Trades maintains that plaintiff's claims are for economic damages which bars causes of action in tort. Trades also maintains that all cross-claims for contribution should be dismissed as the measure of damages are "purely economic." Further, Trades maintains that the cross-claims for common law indemnification should be dismissed inasmuch

¹Raymond Homes, Inc. was added as a party defendant in plaintiff's "Third Amended Complaint" on October 20, 2017.

as plaintiff has asserted independent acts of negligence by the co-defendants.

In opposition to the cross-motion, plaintiff contends that it is a third-party beneficiary of the contract between Trades and Raymond Homes, Inc. Plaintiff also contends that discovery is incomplete and Trades has failed to conclusively establish its entitlement to dismissal as a matter of law.

A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his or her benefit, and (3) that the benefit to him or her is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost (*see BDG Oceanside, LLC v. RAD Terminal Corp.*, 14 AD3d 472, 473 [2nd Dept. 2005]). The party claiming to be a third-party beneficiary has the burden of demonstrating that it has an enforceable right (*see World Trade Knitting Mills v. Lido Knitting Mills, Inc.*, 154 AD2d 99 [2nd Dept. 1990]).

In addition, the best evidence of whether the contracting parties intended their contract to benefit third parties is the language of the contract itself (*see Nepco Forged Products, Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 99 AD2d 508 [2nd Dept. 1984]). Here, plaintiff proffers mere conclusions, expressions of hope or unsubstantiated allegations or assertions. Any benefit plaintiff may have derived from defendants' agreements is not sufficiently immediate to indicate the assumption by the contracting parties of a duty to compensate plaintiff.

Moreover, a breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated (*see Bd. of Managers of Riverview at College Point Condo III v. Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665-666 [2nd Dept. 1992]). This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract,

although it may be connected therewith and dependent upon the contract (*see I.d.*).

Here, affording the pleadings the benefit of every favorable inference and considering whether the facts as alleged fit within any cognizable legal theory, plaintiff fails to assert a duty independent of the contract alleged to have been violated.

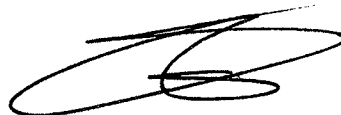
Further, defendant Rampulla has established its entitlement to dismissal of the cross-claims for contribution, and common law and contractual indemnification (*see Arrendal v. Trizechahn Corp.*, 98 AD3d 699 [2nd Dept. 2012]). Defendant Trades has established its entitlement to dismissal of the cross-claims for contribution and for common law indemnification.

Accordingly, defendant Rampulla's motion to dismiss the second amended complaint and all cross-claims against it is granted, without prejudice. Defendant Tides's cross-motion to dismiss the second amended complaint and cross-claims for contribution and common law indemnification against it is also granted, without prejudice.

This constitutes the decision and order of the court.

Dated: December 1, 2017

ENTER,

A handwritten signature in black ink, appearing to be 'C. Troia', written over a horizontal line.

J. S. C.

Hon. Charles M. Troia
Justice of the Supreme Court