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Order on Manhattan Construction Company's Motion for Summary Judgment as to the Cross-Claims of Place Collegiate Development and Cecil Phillips (KENNESAW STATE UNIVERSITY FOUNDATION, INC.)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

KENNESAW STATE UNIVERSITY FOUNDATION, INC.,

Plaintiff,

v.

PLACE COLLEGIATE DEVELOPMENT, LLC, CECIL M. PHILLIPS, and MANHATTAN CONSTRUCTION COMPANY,

Defendants,

MANHATTAN CONSTRUCTION COMPANY,

Counter/Cross and Third Party-Plaintiff,

v.

KENNESAW STATE UNIVERSITY FOUNDATION, INC., PLACE COLLEGIATE DEVELOPMENT, LLC, and CECIL M. PHILLIPS,

Counter/Cross-Defendants,

and

CPD PLASTERING, INC., ST. PAUL FIRE AND MARINE INS. CO., TC DRYWALL AND PLASTER, INC., THE GUARANTEE CO. OF NORTH AMERICA USA, ATLANTA DRYWALL AND ACOUSTICS, INC., AMERICAN SOUTHERN INS. CO., METRO WATERPROOFING, INC. and WESTERN SURETY CO.,

Third-Party Defendants.

Civil Action File No. 2008-CV-156905

FILED IN OFFICE
OCT 06 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MANHATTAN CONSTRUCTION COMPANY'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-CLAIMS OF PLACE COLLEGIATE DEVELOPMENT and CECIL PHILLIPS

On September 13, 2010, counsel appeared before the Court to present oral argument on the Motion for Summary Judgment of Manhattan Construction Company as to Place Collegiate Development, LLC and Cecil Phillips's cross-claims. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

In August 2003, Kennesaw State University Foundation ("KSUF") entered into a contract with Place Collegiate Development, LLC and Cecil Phillips (collectively "Place") to develop a student housing project consisting of two mid-rise dormitories on the Kennesaw State University campus ("the Project"). In turn, Place entered into a contract with Manhattan Construction Company ("Manhattan") to serve as general contractor and build the Project. Original Project plans called for a "building wrap" to be installed over the exterior sheathing and underneath the exterior cladding of the Project. However, a building wrap was not used in the construction of the Project. KSUF seeks damages against Place and Manhattan because alleged construction defects have allowed water infiltration into the Project. Place has asserted cross-claims against Manhattan for contribution and indemnification.

In 2007, Place and Manhattan arbitrated various claims arising out of the Project ("Arbitration"). Neither KSUF nor any of the subcontractors were a party to that arbitration.

Manhattan's Motion for Summary Judgment as to Place's cross-claim is premised on three arguments. First, Manhattan contends that Place's allegations of negligence could have been raised in the prior arbitration and are now barred by *res judicata.* Second, Manhattan argues that Place's breach of the contract bars any enforcement of the contract's contribution or indemnification provisions. Manhattan's final argument is that Place's claim is barred by the acceptance doctrine, contending that Place was aware of

the omission of the building wrap that resulted in water infiltration in both dormitory buildings.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the nonmovant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

An affirmative defense of res judicata requires three elements: (1) identity of the parties; (2) identity of the cause of action; and (3) adjudication by a court of competent jurisdiction. Trend Development Corp. v. Douglas County, 259 Ga. 425 (1989). The standard for the second element, identity of the cause of action, requires that the claims come from the same "entire set of facts which give rise to an enforceable claim." Morrison v. Morrison, 284 Ga. 112 (2008). The fact that both claims involve the same subject matter or arose out of the same transaction is insufficient to establish identity of cause of action. Id. The Court finds that Manhattan's res judicata claim fails under the requirement of the identity of the cause of action. The arbitration between Place and Manhattan involved claims by Manhattan concerning damages caused by extra work and time required in the building the Project. The present litigation concerns water infiltration into the Project. There being no identity of the causes of action, the Court finds that res judicata based on Place and Manhattan's prior arbitration does not bar Place's cross-claim, and thus summary judgment on this basis is not warranted.

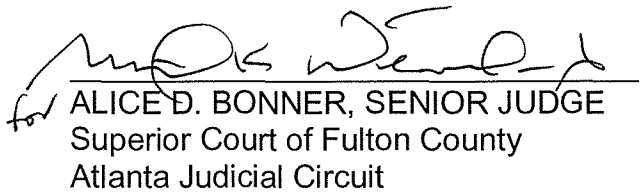
In its second argument, Manhattan contends that Place's material breach of their contract bars Place from suing for contribution or indemnification. Specifically, Manhattan argues that Place's failure to pay it in full, even after an arbitration award in favor of

Manhattan, is a material breach of their contract. A substantial or material breach by one party excuses subsequent performance by the other party. McCoy v. Buckhead Clinic Profess. Ass'n, 123 Ga. App. 853 (1971). The Court finds, however, that a determination of whether Place's failure to pay amounts due to Manhattan is a material breach is a question of fact for a jury and cannot be determined by summary judgment. Martin v. Rolins, Inc., 238 Ga. 119 (1977); Don Swann Sales Corp. v. Parr, 189 Ga App. 222 (1988).

The acceptance doctrine holds that when (1) a contractor does not hold itself out as an expert in design work, (2) performs its work without negligence, and (3) the work is approved and accepted by the owner or the one who contracted for the work on the owner's behalf, the contractor is not liable for injuries resulting from the defective design of the work. Bragg v. Oxford Construction Co., 285 Ga. 98, 98 (2009) citing David Allen Co. v. Benton, 260 Ga. 557, 558 (1990). If, however, the contractor is found to be negligent in the performance of the work, it is subject to liability regardless of whether the owner or the one who contracted for the work accepted it. Bragg, at 98. Here, the Court finds that genuine issues of material fact exist. Some record evidence shows that the original design of the Project called for the use of building wrap, and that Manhattan participated in the decision to omit it. Whether Manhattan was negligent is a question for the jury, and the Court therefore finds that the acceptance doctrine does not bar Place's claims because these questions of fact exist as to Manhattan's negligence.

For the foregoing reasons, Manhattan's Motion for Summary Judgment as to Place's cross-claims is hereby **DENIED**.

SO ORDERED this 6th day of October, 2010.



for ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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