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Order on Motion for Summary Judgment of Third-Party Defendants St. Paul Fire & Marine Insurance Company and CPD Plastering, Inc. (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.	)	**Civil Action File No. 2008-CV-156905**
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.	)	

<u>ORDER ON MOTION FOR SUMMARY JUDGMENT OF THIRD-PARTY DEFENDANTS ST. PAUL FIRE & MARINE INSURANCE COMPANY AND CPD PLASTERING, INC.</u>

On September 13, 2010, counsel appeared before the Court to present oral argument on the Motion for Summary Judgment of Third-Party Defendants St. Paul Fire & Marine Insurance Company and CPD Plastering, Inc. 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:

This case arises out of the construction of two mid-rise dormitories on the campus of Kennesaw State University ("the Project"). Plaintiff, Kennesaw State University Foundation ("KSUF"), is a not-for-profit Georgia corporation that serves as a fundraising and support organization for the university. In August 2003, KSUF entered into a contract with Place Collegiate Development, LLC and Cecil M. Phillips (collectively "Place") to develop and construct the Project. In turn, Place entered into a contract with Manhattan Construction Company ("Manhattan") to construct the Project. Manhattan served as the general contractor for the Project. The Project was completed and students began occupying the dormitories in 2004.

KSUF seeks damages in this case because alleged construction defects have allowed water infiltration into the Project. Such flooding has caused damage to the interiors of the project including damage to carpeting, fixtures, furniture and, in some instances, personal property. As a result, some units of the dorms were completely uninhabitable.

Manhattan has filed third-party complaints against several subcontractors that worked on the Project including CPD Plastering, Inc. ("CPD") which was responsible for installing the hard coat stucco wall system and associated work. In its third-party complaint, Manhattan seeks contribution and indemnity for any liability it may incur due

to negligence on the part of CPD and has filed a performance bond ("Bond") claim against CPD's performance bond surety, St. Paul Fire and Marine Insurance Company ("St. Paul"). Additionally, Place has asserted cross-claims against CPD and St. Paul seeking contractual and common law contribution and indemnity. CPD and St. Paul have filed a motion for summary judgment on all of these claims.

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 non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

In support of their motion for summary judgment, St. Paul and CPD argue that neither of them can be held liable for KSUF's damages because KSUF's claims are based on alleged construction defects—the lack of a building wrap and improper flashing—that were not included in CPD's scope of work. Specifically, CPD and St. Paul argue that the supply of building wrap was expressly excluded from CPD's subcontract and CPD did not install any flashing on the Project. Accordingly, they argue, they cannot be held responsible for KSUF's alleged damages and do not owe indemnity to Place or Manhattan on KSUF's claims. However, there is evidence in the record, including deposition testimony from Plaintiff's experts Stewart Aiken and James Brown, that CPD's work contributed to water infiltration into the Project. The Court therefore finds that genuine questions of material fact exist as to what extent, if any, CPD's work contributed to KSUF's alleged damages.

Next, St. Paul argues that neither Manhattan nor Place have a valid claim on the Bond. As to Manhattan, St. Paul argues that under the terms of the Bond, Manhattan was required to give it notice of CPD's default and that there is no evidence that Manhattan ever provided written notice of default to St. Paul. In response, Manhattan produced two letters it sent to St. Paul from which a jury could conclude that Manhattan provided proper notice under the terms of the Bond. Thus questions of fact remain as to whether Manhattan provided St. Paul with proper notice. As to Place, St. Paul argues that Place does not have a valid claim on the Bond because it is not a third-party beneficiary of the Bond. However, paragraph 17.7 of CPD's subcontract provides that it shall "defend, indemnify, and hold harmless the Owner" and its "officers, agents, employees, and indemnities from and against any and all claims … arising out of or in any way connected with the Subcontractor's Work." The term "Owner" is defined on page two of the subcontract as Place Collegiate Development Company. In addition, the Bond incorporates CPD's subcontract "in its entirety" and guarantees to remedy any default by CPD by completing the subcontract which, in this case, includes CPD's obligation to indemnify Place. Accordingly, per the plain language of CPD's subcontract and the Bond, Place may pursue indemnity claims against St. Paul.

CPD and St. Paul additionally argue that they are entitled to summary judgment on Place's claims because KSUF previously released its claims against Place so that there is no valid claim by KSUF against Place and, therefore, no proper cross-claim by Place against CPD and St. Paul for indemnification. In an order filed contemporaneously with this one, the has Court found that the release to which CPD and St. Paul refer expressly excludes latent defects and that KSUF's claims in this case

are based on latent defects which, therefore, have not been released. As KSUF's claims remain pending against Place, Place's claims for indemnification from CPD and St. Paul remain pending as well.

Lastly, CPD and St. Paul argue that Place has no valid claims against them because Place Collegiate Development, LLC is named as the Defendant/Third-Party Plaintiff, but Manhattan contracted with Place Collegiate Development Co. which is a separate and distinct entity. CPD and St. Paul further argue that to the extent any "Place" entity has a claim against St. Paul or CPD through Manhattan, such claim belongs to Place Collegiate Development Co. not Place Collegiate Development LLC. In response, Place shows that Place Collegiate Development, LLC is the legal successor in interest to Place Collegiate Development Co. and that the two companies are, in fact, the same entity. Specifically, Place explains that Place Collegiate Development Co. was a Tennessee corporation that was legally converted into a Tennessee LLC under Tennessee law in 2003. Under Tennessee law, when a corporation converts into an LLC, "the domestic LLC shall be deemed to be the same entity as the converting other entity." Tenn. Code Ann. § 48-249-703(e)(1).

Finding that the arguments of CPD and St. Paul are without merit on the point of which entity is named in this lawsuit, as well as the other arguments of CPD and St. Paul in connection with their motion, the Court hereby **DENIES** their Motion for Summary Judgment.

SO ORDERED this 6th day of October, 2010.

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

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