

SCAW

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 12

MARK FREEDMAN and RENAY FREEDMAN,

MOTION SEQUENCE #s 8-11

Plaintiffs,

INDEX NO. 34751/97

-against-

MOTION DATE:

June 9, 2000

STEWART SENTER, TENNIS PLANNING CORPORATION, QUIET AIR SYSTEMS, INC., NATIONAL ROOFING CORPORATION, GRASING ASSOCIATES, MIKE GRASING, and BRIARCLIFF LANDSCAPE, INC.,

Defendants.

STEWART SENTER and TENNIS PLANNING CORPORATION,

INDEX NO. 34751/97

Third-Party Plaintiffs,

-against-

BRIAN SHORE, ALAN FELDMAN, LYNBROOK GLASS and CORREIA DESIGN,

Third-Party Defendants.

The following papers read on these motions: 1-2 for amendment relief and imposition of sanctions
3-4 for dismissal

1-2 Notices of Motion	XX
3-4 Notices of Cross-motion	XX
Answering Papers	XXXXXXX
Reply Papers	XXX
Memoranda of Law	XX

Upon the foregoing papers it is ordered that the respective applications are determined as hereinafter set forth:

This action involves the plaintiffs' claims against the construction manager and various contractors arising out of the construction of the plaintiffs' home located at 1 Lista Lane in Brookville, New York. The plaintiffs' original complaint contained fourteen causes of action and was against Stewart Senter, Tennis Planning Corp., Air Systems, Inc., National Roofing Corp., Grasing Associates, and Mike Grasing. The plaintiffs' amended complaint contained sixteen causes of action and added Briarcliff Landscape, Inc. as defendant.

The plaintiffs now seek leave to serve a second amended complaint, which would include twenty causes of action and would add Feldman Plumbing and HT Steel Erectors, Inc. as defendants. These are the subjects of branch (1) of the plaintiffs' first motion and the plaintiffs' second motion, respectively. It is well established that leave to amend and supplement pleadings is to be freely given "[a]bsent prejudice or surprise resulting directly from the delay." (**McCaskey, Davies and Associates, Inc. v New York City Hospitals Corporation**, 59 NY2d 755, 757) No such prejudice or surprise has been demonstrated.

With respect to the merits of the proposed amendments, the rule is that leave to amend should be withheld "[w]here the insufficiency or lack of merit of the cause of action sought to be

asserted is clear and free from doubt.” (**Metral v Horn**, 213 AD2d 524, 525) The insufficiency or lack of merit of the amendment, proposed not been demonstrated.

Initially, the Court notes that there is no opposition to the addition of HT Steel Erectors, Inc., as a defendant, nor to the proposed nineteenth and twentieth causes of action, which are against HT Steel Erectors, Inc. The plaintiffs are, consequently, granted leave to add these proposed causes of action to the second amended complaint. There is, however, opposition from third-party defendant Feldman Plumbing to the plaintiffs’ proposal to add two causes of action (i.e., the seventeenth and eighteenth) against Feldman Plumbing in the main action. The proposed seventeenth cause of action is based upon negligence and alleges, *inter alia*, that Feldman Plumbing failed to exercise reasonable care in the performance of the work required by the plumbing contract. The proposed eighteenth cause of action is based upon breach of contract and alleges, *inter alia*, that Feldman Plumbing breached the terms of the plumbing contract by reason of the acts and omissions set forth in the complaint.

With respect to the negligence cause of action, counsel for Feldman Plumbing states that: “Here [the] plaintiffs, in their initial summons and complaint and in their proposed second supplemental summons and second amended complaint have not alleged, nor has this Court found, that an independent legal duty has been breached.” Counsel contends that: “Therefore, plaintiffs should not be permitted to add [Feldman Plumbing] as a direct defendant under a theory of negligence.” As to the breach of contract cause of action, counsel states that: “At no time did [Feldman Plumbing] have a written contract with [the plaintiffs], nor was [Stewart Senter] acting as their agent.” Counsel contends that: “In this case, plaintiffs are simply not in privity of contract

with [Feldman Plumbing] and as a result, cannot sue for an alleged breach of the same.”

Taking the proposed breach of contract cause of action first, counsel for the plaintiffs points out that the Construction Management Agreement (“CM Agreement”) between the plaintiffs and Tennis Planning Corp. (TPC) “[p]rovides that all trade contracts were between the Freedman’s and the trade contractors directly.” Counsel further states that “[t]he CM Agreement provides that the Freedman’s were to make payments to the individual contractors and, in fact, plaintiffs provided checks made payable to Feldman Plumbing for its services” (Exhibit B to Reply Affirmation of Timothy B. Cummiskey, Esq., dated June 8, 2000). The Court notes that Exhibit A to said Reply Affirmation is a copy of the CM Agreement, which does refer to the final written contracts being between the owner and each contractor (CM Agreement, Art. 2, § 2.2.15[b]).

Counsel for the plaintiffs additionally contends that “[a]n agency relationship existed between Freedman and TPC to establish the necessary privity between Freedman and Feldman Plumbing.” Counsel states that: “Under the CM Agreement, and as alleged in the complaint, TPC acted as agent for the Freedman’s by, inter alia, recommending to the Freedman’s what contracts should be awarded for each trade.” Counsel quotes from several sections of the CM Agreement (i.e., Section 2.1.5.3 and Section 1.2) to support this contention. Having considered the provisions of the CM Agreement and the copies of checks from the plaintiffs payable directly to Feldman Plumbing, the Court holds that the alleged insufficiency of the proposed breach of contract cause of action is not clear nor free from doubt. Consequently, the plaintiffs are granted leave to add the proposed breach of contract cause of action against Feldman Plumbing to the second amended complaint.

Moving on to the proposed negligence cause of action, counsel for Feldman Plumbing contends that it fails to state a cause of action as a matter of law. Counsel relies upon a prior order of this Court, dated May 3, 1999, which dismissed the third-party complaint against Brian Shore (Exhibit D to Feldman Plumbing's cross-motion). Counsel contends that in that order this Court has already determined that "the damages sought by plaintiffs are contractual, as opposed to uncertain tort damages." In the May 3, 1999 order, it was not the Court's intention to rule upon the merits of the plaintiffs' causes of action nor to restrict the plaintiffs' recovery against the defendants to contract damages. It was the Court's intention only to rule upon the contribution and indemnification claims asserted against Brian Shore in the third-party action. Thus, the May 3, 1999 order is not a bar to the proposed negligence cause of action.

Counsel for Feldman Plumbing also contends that the plaintiffs' motion should be denied because the third-party actions were severed by the May 3, 1999 order and the plaintiffs are attempting to circumvent that order by moving to add Feldman Plumbing as a defendant in the main action. In the May 3, 1999 order it was not the Court's intention to sever the third-party action from the main action but, rather, to sever and dismiss the third-party complaint as against Brian Shore. If a different meaning was conveyed, the Court apologizes for the unclear phrasing. The plaintiffs are, therefore, granted leave to add the proposed negligence cause of action against Feldman Plumbing to the second amended complaint as well.

Branches (2), (3), (4), (5), and (6) of the plaintiffs' first motion, seek sanctions pursuant to CPLR 3126 against various defendants for their failure to respond to the plaintiffs' first request for production of documents and/or their failure to respond to the plaintiffs' first set of

interrogatories. By stipulation dated June 8, 2000, the plaintiffs have withdrawn these applications as against defendants Senter and TPC. Thus, these branches of the plaintiffs' first motion will be considered as seeking sanctions only against Quiet Air Systems, Inc., National Roofing Corp., the Grasing defendants, Briarcliff Landscape, Inc., Feldman Plumbing, and Lynbrook Glass.

The Court rules as follows: Defendants Quiet Air Systems, Inc., National Roofing Corp., and Briarcliff Landscape, Inc., having failed to furnish any opposition to the plaintiffs' motion, are directed to serve responses to both the plaintiffs' first request for production of documents and the plaintiffs' first set of interrogatories within twenty (20) days after being served with a copy of this order together with notice of entry. Failure to serve responses will result in all issues for which the information being sought is relevant being resolved in accordance with the claims of the plaintiffs for the purposes of this action.

Branches (2) through (6) of the plaintiffs' first motion are denied insofar as they seek sanctions against the Grasing defendants. These defendants have now furnished responses to both the plaintiffs' first request for production of documents and the plaintiffs' first set of interrogatories. These branches are likewise denied insofar as they seek sanctions against Feldman Plumbing, which has now responded to the plaintiffs' first request for production of documents. These branches are also denied insofar as they seek sanctions against Lynbrook Glass. Lynbrook Glass has now partially responded to the plaintiffs' first request for production of documents, and the plaintiffs do not dispute counsel's statement that the plaintiffs have not responded to Lynbrook Glass's demand for interrogatories. This Court will not impose sanctions

upon a party for a default in discovery, if the party seeking sanctions is likewise in default.

Turning to Feldman Plumbing's cross-motion, its counsel for contends that the third-party complaint fails to state a cause of action. Specifically, counsel states that: "[Senter's, i.e., Stewart Senter] allegations include claims for negligence, common law indemnification and contribution, breach of contract and express and implied warranties on the part of all the third-party defendants generally." But, that: "[n]owhere in the third-party complaint does Senter articulate specific negligent conduct allegedly committed by any of the third-party defendants or upon what basis Senter is entitled to common law indemnification and contribution."

Counsel for Feldman Plumbing further states that: "This Court has already determined that [Senter] is not entitled to contribution from any of the third-party defendants simply because CPLR §1401 does not apply to breach of contract actions where the damages sought are purely economic." Counsel contends that: "Since plaintiffs are seeking to recover economic losses only, [Senter] is not entitled to contribution and that cause of action should be dismissed as against [Feldman Plumbing] as a matter of law." Counsel also contends that common-law indemnification is not available to Senter "[b]ecause the plaintiffs are not seeking to hold them vicariously liable for the wrongs allegedly committed by [Feldman Plumbing] and the other third-party defendants." This cross-motion appears to be directed only at the contribution and common-law indemnification claims asserted against Feldman Plumbing in the third-party complaint and has been so considered.

With respect to allegations of specific negligent conduct against Feldman Plumbing, counsel for the third-party plaintiffs states that "[S]enter is unable at this time to expand on the

negligence and tortious conduct asserted against [Feldman Plumbing] until such time as plaintiffs clarify their allegations against Senter with more specificity.” And that “[t]his is not likely to occur until more extensive discovery has been completed.”

The Court will deny the cross-motion pursuant to CPLR 3211(d), insofar as it seeks dismissal of the contribution claim. Moreover, the fact that the Court is granting the plaintiffs leave to serve a second amended complaint, which asserts a direct negligence claim against Feldman Plumbing, provides yet another reason to deny this branch of the cross-motion.

The Court does agree, however, that the third-party complaint does not state a cause of action for common-law indemnification because the plaintiffs are not seeking to hold Senter and TPC vicariously liable for the damages allegedly caused by Feldman Plumbing. All of the causes of action against Senter and TPC are based upon their own wrongdoing. Consequently, the cross-motion is granted to the extent that the common-law indemnification claim asserted against Feldman Plumbing in the third-party action shall be severed and dismissed. (see, **Edgewater Construction Co., Inc. v 81 & 3 of Watertown, Inc.**, 252 AD2d 951, 952, lv den 92 NY2d 814; **Dormitory Authority of the State of New York v Scott**, 160 AD2d 179, 181, lv den 76 NY2d 706)

Insofar as counsel for Feldman Plumbing requests that “[t]he Court issue an Order pursuant to CPLR §3126 dismissing the third-party summons and complaint for the defendant/third-party plaintiff’s [sic] failure to comply with the preliminary conference order, or in the alternative, preclude the third-party plaintiff’s [sic] from giving evidence at the trial as to the items of which particulars have not been delivered”, this request is denied.

Requests for affirmative relief must be made by motion on notice to the adversary, and, in the case of a discovery related motion, must be accompanied by an affirmation of good faith. (see, 22 NYCRR §202.7) Moreover, the Court notes that counsel for the third-party plaintiffs does offer a partial explanation, i.e., that “[S]enter is limited in its discovery to [Feldman Plumbing] to the extent that plaintiffs have not provided their responses to Senter’s discovery demands.”

Moving on to the cross-motion by the Grasing defendants, counsel for the Grasing defendants contends that the plaintiffs’ complaint against the cross-movants must be dismissed for failure to state a cause of action. The plaintiffs’ amended complaint alleges two causes of action against the Grasing defendants, i.e., the thirteenth and fourteenth. The thirteenth cause of action is for negligence and alleges, *inter alia*, that the Grasing defendants “[f]ailed to fulfill their duty to exercise reasonable care and skill in their performance of the work required by the Stucco Contract and acted negligently through [the acts and omissions set forth in the preceding allegations of the complaint].” The fourteenth cause of action is for breach of contract and is based, *inter alia*, upon the same acts and omissions.

Counsel for the Grasing defendants states that: “As this honorable Court has already determined that the damages sought by plaintiffs are contractual only, by its Order dated May 3, 1999, that determination is now law of the case.” This is not correct. This Court’s May 3, 1999 order did not determine that all of the damages the plaintiffs are seeking from all of the defendants are contractual only. As previously pointed out, it was not the Court’s intention to rule upon the merits of the plaintiffs’ causes of action nor to restrict the plaintiffs’ recovery in this action to contract damages. Thus, the May 3, 1999 order does not support the cross-motion to dismiss the

causes of action against the Grasing defendants.

Counsel for the Grasing defendants further states that the plaintiffs did not have a contract with the Grasing defendants. And that “[p]laintiffs’ only contract was with [Senter], as the construction manager and/or general contractor of the subject project.” In this regard, the Court holds that a triable issue exists as to who the contracting parties were. As noted above, the CM Agreement does state that all trade contracts are between the plaintiffs and the contractors and that the plaintiffs were to make payments to the individual contractors. Even if Senter and/or TPC executed the contract, not the plaintiffs, there would still be a triable issue as to whether Senter and/or TCP executed the contract as agents on behalf of the plaintiffs. Thus, summary judgment cannot be granted to any party on this ground.

Counsel for the Grasing defendants additionally seeks dismissal of all cross-claims asserted against the Grasing defendants for failure to state a cause of action. Counsel states that: “All of the Cross-Claims against [the Grasing defendants] are for contribution and common-law indemnification only.” As to the contribution cross-claims, counsel contends that they are barred by this Court’s May 3, 1999 order because this Court held that contribution is not available in breach of contract actions where only economic damages are sought. Again, that was not the intent of this Court’s May 3, 1999 order, which applies only to the contribution and common-law indemnification claims against Brian Shore in the third-party action. Thus, the May 3, 1999 order is not the law of the case as to the contribution cross-claims asserted against the Grasing defendants in the main action.

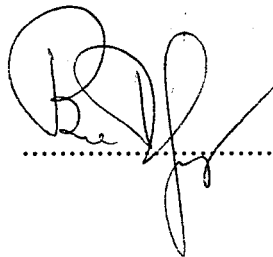
Counsel for the Grasing defendants goes on to argue that common-law indemnification is

not available against the Grasing defendants because the plaintiffs “[a]re not seeking to hold any of the defendants vicariously liable for the actions of [the Grasing defendants]. Rather, plaintiffs are claiming that the individual defendants each caused the claimed damages themselves as a result of breaches of their respective contracts.” The Court agrees that the cross-claims based upon common-law indemnification are legally insufficient for this reason. Consequently, said cross-claims against the Grasing defendants shall be severed and dismissed.

Accordingly, the plaintiffs are granted leave to serve a second amended complaint in the form annexed to the plaintiffs’ second motion. Service should be made within twenty (20) days after the entry of this order.

Additionally, the common-law indemnification claim asserted against Feldman Plumbing in the third-party action is hereby severed and dismissed, as are the common-law indemnification cross-claims asserted against the Grasing defendants in the main action.

DATED: August 23, 2000

A handwritten signature in black ink, appearing to be "J.S.C.", written over a horizontal dotted line.

J.S.C.