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Order on Motion for Summary Judgment of Defendants Place Collegiate Development, LLC and Cecil M. 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

COPY

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 MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS PLACE COLLEGIATE DEVELOPMENT, LLC AND CECIL M. PHILLIPS

On September 13, 2010, counsel appeared before the Court to present oral argument on the Motion for Summary Judgment of Defendants Place Collegiate Development,LLC and Cecil M. Phillips as to Plaintiff's claims in this case. 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 in to 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.

In May 2006, KSUF and Place entered into a settlement agreement and limited release ("Settlement Agreement") based on claims arising out of the Project. That agreement provides:

> In exchange for the consideration stated in paragraph 1 above, and other good and valuable consideration, the receipt and sufficiency of which is

> hereby acknowledged, KSUF, its employees, officers, directors, agents, successors, assigns, affiliates, and insurers, including representatives of each of them, do hereby release PLACE, and its employees, officers, directors, agents, successors, assigns, parent companies, affiliates, subsidiaries, and insurers, including representatives of each of them, from and against all claims, demands, allegations, or causes of action of every kind, including attorneys' fees, expenses, interest and costs, KSUF has, had or may have in the future, arising out of or relating to the Project or the Development Agreement, including , but not limited to, claims relating to diminution in value of the Project, defective work, and late completion of the Project, EXCEPT KSUF does not waive or release PLACE, its employees, officers, directors, agents, successors, assigns, parent companies, affiliates, subsidiaries, and insurers, including representatives of each of them, from claims for express indemnity, as stated in paragraph 2.1.4 of the Development Agreement insurance coverage and latent defects.

KSUF asserts claims against Place for (1) breach of contract, (2) breach of implied warranty, and (3) negligent construction. Place has filed for summary judgment on all claims asserted by KSUF.

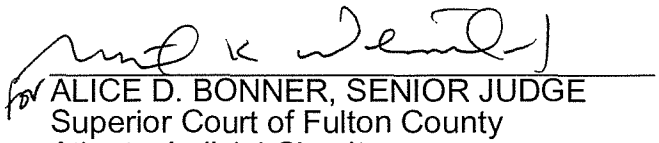
In support of its motion for summary judgment, Place argues that KSUF has released the claims asserted in this case under the terms of the Settlement Agreement. In response, KSUF argues that the Settlement Agreement expressly excludes latent defects.

"A settlement agreement is a contract and the question of its enforceability is for the court to decide." Gray v. Higgins, 205 Ga. App. 52, 53 (1992). The Settlement Agreement provides that "KSUF does not waive or release Place...from ...latent defects." A latent defect is one that "a buyer could not reasonably discover" Cendant Mobility Financial Corp. v. Asuamah, 285 Ga. 818, 819 (2009). The latent defect at issue in this case is the failure to have installed a water-resistant barrier and other defects that permitted water infiltration into the Project over time. The Court finds that these alleged defects

are latent defects as they are not ones that KSUF could reasonably discover. A water-resistant barrier could have been achieved using a number of different methods. The Court cannot conclude as a matter of law that KSUF's volunteer directors could have reasonably discovered such a defect during their occasional and sporadic visits to the Project site especially when Place, as the developer, and all of the other construction professionals working on the Project day in and day out failed to discover the alleged defects.

Accordingly, the Settlement Agreement does not apply to the claims asserted in this case, and Place's Motion for Summary Judgment against Plaintiff 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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