Georgia State University
ScholarWorks @ Georgia State University

Georgia Business Court Opinions | College of Law

10-6-2010

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

Follow this and additional works at: http://scholarworks.gsu.edu/col_businesscourt

Recommended Citation
Bonner, Alice D., "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.)" (2010). *Georgia Business Court Opinions*. Paper 164.
http://scholarworks.gsu.edu/col_businesscourt/164

This Court Order is brought to you for free and open access by the College of Law at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

COPY

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.

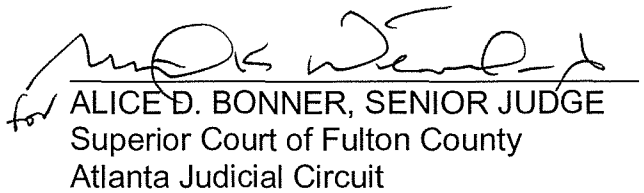
In its second argument, Manhattan contends that Place's material breach of their contract bars Place from suing for contribution or indemnification. Specifically, Manhattan argues that Place's failure to pay it in full, even after an arbitration award in favor of

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

Copies to:

Attorneys for Kennesaw State University Foundation:
Anthony D. Lehman, Esq.
DLA Piper LLP (US)
1201 West Peachtree Street, Suite 2800
Atlanta, GA 30309-3450
404-736-7805
Anthony.lehman@dlapiper.com

Dennis J. Powers, Esq.
DLA Piper LLP (US)
203 North LaSalle Street
Suite 1900
Chicago, IL 60601
312-368-7273
Dennis.powers@dlapiper.com

Attorneys for Place Collegiate Development, LLC & Cecil M. Phillips:
Mark C. de St. Aubin, Esq.
J. David Mura, Esq
Smith Gambrell & Russell, LLP
Promenade II, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, GA 30309-3592
404-815-3676
mdestaubin@sgrlaw.com

Attorneys for Manhattan Construction Company:
Roger Sumrall
Sean Gill
Bendin, Sumrall & Ladner, LLC
One Midtown Plaza
1360 Peachtree Street NE, Suite 800
Atlanta, GA 30309
404-671-3100
404-671-3080 (fax)
sgill@bsllaw.net
rsumrall@bsllaw.net

Attorneys for CPD Plastering, Inc.
Harry W. Bassler
Ann Gower
Crim & Bassler, L.L.P.
100 Galleria Parkway
Suite 1510
Atlanta, GA 30339

Attorneys for St. Paul Fire and Marine Ins. Co.
Neil L. Wilcove, Esq.
Arthur A. Ebbs, Esq.
Freeman Mathis & Gary, LLP
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339-5948

Attorneys for TC Drywall and Plaster, Inc. and the Guarantee CO. of North America USA
Scott W. McMickle
Kevin P. Branch
McMickle, Kurey, & Branch, LLP
178 South Main Street, Suite 225
Alpharetta, GA 30009
678-824-7800
678-824-7801 (fax)
smcmickle@mkblawfirm.com
kbranch@mkblawfirm.com

Attorneys for Atlanta Drywall and Acoustics, Inc.
L Judson "Tip" Carroll, III, Esq.
All Star Financial Group, Inc.
1301 Hightower Trail, Suite 210
Atlanta, GA 30350

Attorneys for American Southern Ins. Co.,
Brenda K. Orrison
Porter & Orrison, LLP
Lenox Towers – Suite 1135
3400 Peachtree Road, N.E.
Atlanta, GA 30326
404-233-2334