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Order on American Southern Insurance Company's Motion for Summary Judgment on Third-Party Complaint of Manhattan Construction Company (KENNESAW STATE UNIVERSITY FOUNDATION, INC.)

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Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

KENNESAW STATE UNIVERSITY FOUNDATION, **Plaintiff,** **v.** **PLACE COLLEGIATE DEVELOPMENT LLC, CECIL M. PHILLIPS, and MANHATTAN CONSTRUCTION COMPANY.,** **Defendants.**	)	**Civil Action File No. 2008-CV-156905**
MANHATTAN CONSTRUCTION COMPANY., **Counter/Cross and Third-Party Plaintiff,** **v.** **KENNESAW STATE UNIVERSITY FOUNDATION, INC., PLACE COLLEGIATE DEVELOPMENT, LLC, and CECIL M. PHILLIPS, et al.,** **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 AMERICAN SOUTHERN INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT ON THIRD-PARTY COMPLAINT OF MANHATTAN CONSTRUCTION COMPANY</u>

On September 13, 2010, counsel appeared before the Court to present oral argument on the Motion for Summary Judgment of Third-Party Defendant American Southern Insurance Company ("ASIC") as to the third-party claims filed against it by Manhattan Construction Company. 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:

Plaintiff Kennesaw State University Foundation ("KSUF") contracted with Defendants Place Collegiate Development LLC and Cecil Phillips (collectively "Place") for the construction of two dormitories on the campus of Kennesaw State University (the "Project"). Place in turn entered into a contract with Manhattan Construction Company ("Manhattan"), a general contractor, for the actual construction of the Project.

In December 2003, Manhattan entered into a subcontract with Atlanta Drywall and Acoustics, Inc. ("ADA") for the installation of a load bearing metal wall system. ASIC was the performance bond ("Bond") surety for ADA's work on the Project. Under the terms of the Bond, ADA was listed as the principal, ASIC as the surety, and Manhattan as the obligee. During ADA's work, alignment problems arose relating to the installation of the load bearing walls. These problems were discussed openly between ADA, Manhattan, and Place, after which ADA was not required to modify any of its work.

In August 2004, Manhattan and ADA entered into a Settlement Agreement and Release concerning the Project. Under that agreement, Manhattan paid $473,312.39 to ADA and ADA completed its work which was accepted by Manhattan as of October 15, 2004.

Manhattan and Place participated in arbitration proceedings in August 2007 concerning sums owed to Manhattan by Place. Although ADA was not a party to that arbitration, ADA participated in the proceedings on behalf of Manhattan. In September 2008, KSUF initiated the instant suit against Place and Manhattan for alleged water infiltration that damaged the Project. KSUF attributes the water infiltration to a number of alleged construction defects which include, in part, portions of the work completed by ADA. In November 2008, Manhattan filed a third-party complaint against ADA and ASIC for indemnity and contribution, seeking to recover from ASIC under the Bond. ASIC has moved for summary judgment as to Manhattan's third-party claims.

A court should grant a motion for summary judgment pursuant top 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 its motion for summary judgment, ASIC first argues that Manhattan's third party complaint fails to allege that any work performed by ADA, ASIC's principal, was the cause of KSUF's damages. Accordingly, ASIC argues that as ADA's surety, it cannot be liable for KSUF's damages.

During his deposition, Stewart Aiken, Plaintiff's expert, was asked , "Do you have any reason to believe that the issue of the plumbness of the stud walls either caused or contributed to any cracking in the stucco or any water infiltration into the building?" He replied, "No, I don't." ASIC argues that Aiken's statement establishes that Plaintiff does not attribute its damages to ADA's work. However, in a later portion of his deposition,

Mr. Aiken was asked whether the use of sheathing boards of various thicknesses used to compensate for the misalignment of the load bearing walls (work performed by ADA) "in any way contribute[d] to cracking that manifested in the stucco?" Mr. Aiken was not able to rule out unequivocally any impact ADA's work may have had on the cracking in the stucco which ultimately led to the water infiltration into the project. Accordingly, this Court finds that a genuine issue of material facts exists as to whether ADA's work contributed to KSUF's alleged damages.

Second, ASIC argues that the conditions of the Bond have not been met. Under the terms of the Bond, "whenever the Principal shall be, and declared by the Obligee to be, in default under the Subcontract, the Surety shall, upon receipt of written notice of the Principal's default, promptly and without delay remedy the default by completing the Subcontract in accordance with its terms and conditions." ASIC asserts that prior to the filing of its Third-Party Complaint, Manhattan neither declared ADA to be in default under the Subcontract nor provided written notice to ASIC. In its response, Manhattan argues that it provided notice to ASIC of ADA's default in accordance with the terms of the performance bond. Specifically, Manhattan argues that its counsel provided written notice regarding ADA's default via certified mail on October 27, 2008 and requested that ASIC "promptly and without delay agree to respond to the claim, defend Manhattan against any claim, and pay for any damages attributable to Atlanta Drywall's default under the subcontract." The Court finds that questions of fact exist as to whether Manhattan provided ASIC with proper notice.

Third, ASIC asserts that the Settlement Agreement and Release ("Settlement Agreement") entered into by Manhattan and ADA released ADA and ASIC from any

potential claim regarding defects based on ADA's work performed on the Project. The Court disagrees because upon review of the Settlement Agreement, it is clear that only ADA released claims, not Manhattan. The Settlement Agreement also expressly provides that "nothing in this Agreement is intended to, or shall be interpreted to, waive or release any of the following: (a) claims for contribution or indemnity arising out of the construction of the Relevant Projects" and Manhattan's third-party claims are for contribution and indemnity.

Fourth, ASIC argues that it has been prejudiced by Manhattan's actions and is therefore discharged from any obligation under the performance bond. ASIC relies on O.C.G.A. § 10-7-22, which states that "any act of the creditor . . . which injures the surety or increases his risk or exposes him to greater liability shall discharge him[.]" Because it was not notified of any default by ADA at the time of the construction, ASIC argues that it was unable to respond to the default when such default could have been easily remedied, thus increasing its potential liability. The Court finds that notice to ASIC of its indemnification obligations under the Bond, if ADA failed to meet those indemnification obligations, could not have been made at the time of construction because KSUF's allegations were not know at the time of construction. The Court further finds that any alleged prejudice suffered by ASIC is not due to any act by Manhattan.

Lastly, ASIC asserts that the default attributed to ADA has previously been arbitrated, precluding the instant action on the basis of res judicata and collateral estoppel. ASIC contends that the issues concerning the work completed by ADA on the Project were arbitrated during the arbitration proceedings between Place and

Manhattan, thereby barring re-litigation of those issues here. Although ADA was not a party to that arbitration, ASIC asserts that ADA was an active participant. Furthermore, ASIC argues that any matter concerning the misalignment of the walls or the bulging floor joints were issues decided during the arbitration proceedings and are, thus, barred by collateral estoppel.

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, 426 (1989). The Court finds that ASIC has failed to establish an identity of cause of action because the arbitration between Place and Manhattan involved claims by Manhattan concerning extra work and delays in building the Project, while the present litigation concerns water infiltration into the Project. The Court also finds that ASIC has failed to establish an identity of the parties in order to assert res judicata. Neither ASIC nor its principal ADA were parties to the prior arbitration proceedings between Place and Manhattan. ASIC's argument that it is in privity with Manhattan by virtue of the Bond is unpersuasive. For the purposes of res judicata, "[p]rivity is established where a party's interests are fully congruent with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." Dennis v. First Nat. Bank of the South, 293 Ga. App. 890 (2008). Because ASIC is now adverse to Manhattan, ASIC's current interests cannot be fully congruent with Manhattan's previously asserted legal rights in the prior arbitration proceeding, during which ADA participated on behalf of Manhattan. To correctly assert res judicata and bar Manhattan's instant claims, ASIC would need to establish privity with the party opposing Manhattan in the arbitration,

Place, which they have failed to assert. Accordingly, this Court finds ASIC's affirmative defense of res judicata to be without merit.

Collateral estoppel similarly involves stringent requirements:

> The doctrine of collateral estoppel does not bar a prosecution unless the issues of fact central to that prosecution were *necessarily* determined in the former trial. Unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial, the possibility that it may have been does not prevent relitigation of that issue.

Phillips v. State, 272 Ga. 840, 841 (2000) (emphasis in original, internal quotations omitted). In this case, the present record is devoid of any documentation concerning the previous arbitration, except for the final order of the arbitration proceedings. Because there is no documentation in the record as to the issues decided by the previous arbitration, this Court cannot find that the issues involved in the current litigation were necessarily determined during the prior arbitration between Place and Manhattan. Thus, this Court finds that ASIC's affirmative defense of collateral estoppel is similarly without merit.

For the foregoing reasons, ASIC's Motion for Summary Judgment on Third Party Complaint of Manhattan Construction Company is hereby **DENIED**.

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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