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# Order on the Motions for Partial Summary Judgment and for Summary Judgment of TC DryWall & Plaster, Inc. and the Guarantee Company of North America, USA (KENNESAW STATE UNIVERSITY FOUNDATION, INC.)

Alice D. Bonner
*Superior Court of Fulton County*

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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,

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MANHATTAN CONSTRUCTION COMPANY,

Counter/Cross and Third Party-Plaintiff,

v.

KENNESAW STATE UNIVERSITY FOUNDATION, INC., PLACE COLLEGIATE DEVELOPMENT, LLC, and CECIL M. PHILLIPS,

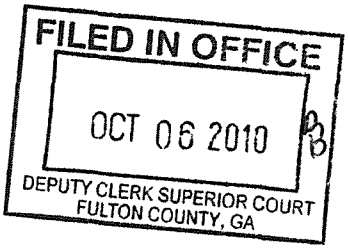
Counter/Cross-Defendants,

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




**ORDER ON THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT OF TC DRYWALL & PLASTER, INC. AND THE GUARANTEE COMPANY OF NORTH AMERICA, USA**

On September 13, 2010, counsel appeared before the Court to present oral argument on the Motion for Partial Summary Judgment of Third-Party Defendants TC Drywall & Plaster, Inc. and the Guarantee Company of North America, USA against Manhattan Construction Company, and the Motion for Summary Judgment of the same movants against Place Collegiate Development, LLC. 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.

In its Complaint, KSUF seeks damages allegedly due to construction defects that 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 a third-party complaint against several subcontractors that worked on the Project including TC Drywall and Plaster, Inc. ("TC Drywall") and its performance bond surety, The Guarantee Company of North America, USA ("GCNA").

In its third-party complaint, Manhattan seeks contribution and indemnity for any liability it may incur due to negligence on the part of TC Drywall and has filed a performance bond ("Bond") claim against GCNA. Additionally, Place has asserted cross-claims against TC Drywall and GCNA seeking contractual and common law contribution and indemnity. TC Drywall and GCNA have filed for partial summary on Manhattan's third-party claims seeking a ruling that it has no liability for any damages resulting from water intrusion into the Project caused by a lack of a moisture barrier, and for summary judgment on Place's cross-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 partial summary judgment, TC Drywall and GCNA argue that TC Drywall properly installed and fastened Dens-Glass on the Project and that it was not otherwise required to seal the Dens-Glass as a moisture barrier. The chief defect alleged by Plaintiff in this case is the lack of a moisture barrier to block water infiltration into the Project. Project plans called for a building wrap to be installed over the exterior sheathing, but one was never installed. The reason for this omission is an issue of great dispute between the parties. The record shows that even if a building wrap were not used, there are other ways in which to provide the Project with a moisture barrier.

Through incorporation of the general contract into its subcontract, TC Drywall was contractually obligated to install the Dens-Glass "per manufacturer

recommendations." In the absence of a building wrap, manufacturer recommendations call for application of a sealant or caulking and mesh tape on the joints and fasteners. There is evidence in the record that TC Drywall knew that a building wrap was not being installed. There is also evidence that TC Drywall used an inadequate tape on the joints and fasteners. Pursuant to paragraph 2.8 of its subcontract, TC Drywall was also contractually obligated to "study and compare the Contract Documents with each other" and "at once report to the Contractor any error, inconsistency or omission discovered." From the record in this case the Court concludes that there are genuine issues of fact as to whether TC Drywall complied with its contractual obligations to install the Dens-Glass "per manufacturer recommendations" and to inform Manhattan of any "error, inconsistency, or omission in the Contract Documents." Questions of fact also exist as to what extent, if any, TC Drywall's work contributed to water infiltration into the Project.

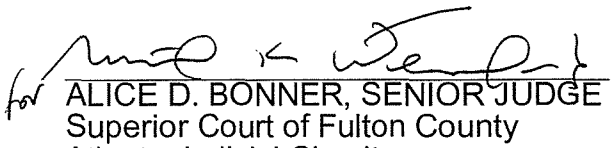
Next, TC Drywall and GCNA argue that Manhattan and Place's involvement in the construction of the Project prevents them from pursuing common law indemnity claims against them. Specifically, TC Drywall and GCNA argue that common law indemnity claims are only recognized in favor of passive tortfeasors who are held liable for the actions of an active tortfeasor and it is undisputed that Manhattan and Place were active tortfeasors because they were actively involved in the inspection and remedying of defects on the Project. Passive negligence consists "only of negative acts or omissions, e.g., failing ... duty to inspect or discover a defective condition," whereas active negligence consists of "positive acts". Peacock Const. Co. v. Montgomery Elevator Co., 121 Ga. App. 711, 713 (1970). It is undisputed that Manhattan and Place's inspection of TC Drywall's work did not produce the defects alleged by Plaintiff. And so the Court finds that Manhattan and Place may proceed against TC Drywall and

GCNA for common law indemnity because, if anything, Manhattan and Place constitute passive tortfeasors with regard to TC Drywall.

Finally, TC Drywall and GCNA argue that Place has no basis for pursuing contractual claims against them. However, paragraph 17.7 of TC Drywall'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, GCNA's bond incorporates TC Drywall's subcontract "in its entirety" and guarantees to remedy any default by TC Drywall's by completing the subcontract which, in this case, includes TC Drywall's obligation to indemnify Place. Therefore, according to the plain language of TC Drywall's subcontract and GCNA's bond, Place may pursue contract-based indemnity claims against TC Drywall and GCNA.

For the foregoing reasons, the Motions for Partial Summary Judgment and for Summary Judgment of TC Drywall and GCNA are 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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