

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LONGPORT OCEAN PLAZA	:	
CONDOMINIUM, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
ROBERT CATO & ASSOCIATES, INC.,	:	No. 00-CV-2231
et al.	:	(Consolidated with 02-CV-1724)
	:	
and	:	
	:	
THE WINDOW ASSOCIATES, INC.,	:	
et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

August 29, 2002

Presently before the Court is Plaintiff Longport Ocean Plaza Condominium, Inc.’s (“Longport’s”) Motion to Dismiss the Third Party Complaint filed by Defendant/Third Party Plaintiff EFCO Corporation, Inc. (“EFCO”) against Jack Cooney, Harvey Brodsky, George Hamid, Robert Ford, Albert Kofsky, Lorraine Robins, Neil Glickman, and Donald Marino, in their capacity as the 1996-98 Board of Trustees of Longport Ocean Plaza Condominium Association (“the Board” or the “Third Party Defendants”). For the reasons stated below, the Motion is GRANTED.

I. FACTS AND PROCEDURAL HISTORY

The facts of this dispute regarding a construction-renovation project were set forth by the Court in its Memorandum granting summary judgment in favor of EFCO in the first lawsuit filed by Longport (the “first lawsuit”). See Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Assoc., 2002 WL 436742 (E.D. Pa. Mar. 18, 2002). Therefore, the Court need not repeat them fully here. In that action, docketed at 00-CV-2231, Longport asserts claims for breach of construction contracts and warranties therein against its general contractor, Robert Cato & Associates, Inc. (“Cato”). Cato, in turn, asserts various tort and contract claims against numerous additional parties. Until March 2002, those parties included EFCO, the designer and manufacturer of windows and doors used in the renovation project. However, on March 18, 2002, the Court granted summary judgment in favor of EFCO on the basis of the economic loss doctrine, since Cato’s claims against EFCO sounded only in tort, and the damages sought did not include harm to “other property.” Id. The Court also granted summary judgment on other parties’ claims for contribution and indemnification against EFCO, since these claims were premised upon EFCO’s status as a tortfeasor. Id.

Subsequently, Longport filed another action pertaining to the same dispute, asserting contract-based claims for breach of warranty directly against EFCO (the “second lawsuit”). The second lawsuit, docketed at 02-CV-1724, was consolidated with the first lawsuit, as reflected in the caption above. EFCO then filed a Third Party Complaint asserting claims for contribution and indemnification against the Board. EFCO asserts, *inter alia*, that the Board intentionally, recklessly or negligently failed to discharge its responsibilities to Longport and its individual condominium owners when it failed to properly evaluate the scope of the renovation

project and failed to hire an appropriate contractor to manage the project. As a result, EFCO contends, it has wrongfully incurred damages and costs associated with the instant litigation.

Longport now moves to dismiss EFCO's complaint against the Board, arguing that EFCO may not seek contribution or indemnification as a matter of law.¹

II. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). To prevail, the movant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957). In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859

1. Longport also contends that EFCO should be judicially estopped from asserting its claims for contribution and indemnification. The New Jersey Supreme Court recently "summarized the contours" of the judicial estoppel doctrine: "The purpose of the judicial estoppel doctrine is to protect 'the integrity of the judicial process.' A threat to the integrity of the judicial system sufficient to invoke the judicial estoppel doctrine only arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding." Ali v. Rutgers, 166 N.J. 280, 287, 765 A.2d 714, 718 (2000) (footnotes and citations omitted). The doctrine is "designed to prevent litigants from 'playing fast and loose with the courts.'" Cummings v. Bahr, 295 N.J. Super. 374, 387, 685 A.2d 60, 67 (App. Div. 1996) (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)).

At a minimum, EFCO's claim for contribution comes very close to the type of conduct that the doctrine of judicial estoppel is intended to prevent. In the first lawsuit, EFCO argued, and this Court agreed, that (1) in order for EFCO to be held liable under a theory of contribution, it must be a joint tortfeasor, and (2) because it could not be a joint tortfeasor by operation of the economic loss doctrine, summary judgment was appropriate as to the contribution claims against it. Now, in connection with the second lawsuit, EFCO asserts precisely the opposite: that, although it and the Board are not joint tortfeasors, it may nonetheless *assert* a claim for contribution against the Board.

However, the New Jersey Supreme Court also cautioned that judicial estoppel is an "extraordinary remedy," which should be invoked only "when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Ali, 166 N.J. at 288, 765 A.2d at 718 (quoting Ryan Operations, 81 F.3d at 365). Therefore, because EFCO's claims for contribution and indemnification may not be maintained as a matter of law on their merits, the Court not need invoke the doctrine of judicial estoppel.

(3d Cir. 1994). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

A. Contribution

Longport argues that EFCO may not assert a claim for contribution against the Third Party Defendants because, by its own admission, it cannot be a joint tortfeasor in this case. Under the New Jersey Joint Tortfeasor Contribution Law, the right of contribution “exists among joint tortfeasors.” N.J Stat. Ann. § 2A:53A-2 (2001). More specifically, the right arises when “injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors.” N.J Stat. Ann. § 2A:53A-3 (2001). In such circumstances, one tortfeasor is “entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share.” Id. A tortfeasor is one of “two or more persons jointly or severally liable *in tort*.” N.J Stat. Ann. § 2A:53A-1 (2001)(emphasis added).

Given the rather straightforward language of the statute, it is not surprising that courts dismiss contribution claims when the party against whom the claim is asserted may not, as a matter of law, be held liable as a joint tortfeasor. See, e.g., Resolution Trust Corp. v.

Moskowitz, 845 F. Supp. 247, 251 (D.N.J. 1994) (dismissing cross-claims for contribution against defendant because the only claim asserted against it by plaintiff was grounded in contract, not tort), vacated, in part, on other grounds, 1994 WL 475811 (D.N.J. Aug. 31, 1994). EFCO advanced this exact argument in its motion to dismiss the claims and cross-claims for contribution against it in the first lawsuit. The Court agreed with this reasoning. See Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Assoc., 2002 WL 436742 at *7 (E.D. Pa. Mar. 18, 2002).

As the term “*joint* tortfeasors” and the language of the statute indicate, both the party against whom a claim for contribution is asserted as well as the party *asserting* the claim must be tortfeasors. However, the only claims asserted against EFCO are grounded in contract, and EFCO itself admits that it may not be held liable as a joint tortfeasor in this case. Therefore, just as contribution claims *against* EFCO may not be maintained, contribution claims *by* EFCO may also not be maintained.

EFCO argues that the New Jersey Supreme Court’s decision in Dunn v. Praiss, 139 N.J. 564, 656 A.2d 413 (1995), is controlling, and permits a claim for contribution in this case. The Court disagrees. In that case, a physician-provider who was guilty of medical malpractice sought contribution from his health maintenance organization (“HMO”) on the basis of the HMO’s independent breach of contractual duty to the patient. The court, carving out an exception to the general rule that contribution must be sought between parties jointly liable in tort, held that such claims were permitted. However, it did so carefully limiting its holding based on (1) the harm suffered and (2) the particular nature of the breach of contractual duty in that

case. The instant case is dissimilar from Dunn on these matters, and therefore Dunn is inapposite.

First, the Dunn court limited its holding to cases in which the harm suffered by the plaintiff was personal injury. The court defined the question before it as: “Can there be contribution between a party whose breach of contract is the proximate cause of *personal injury* and another party whose negligence is a proximate cause of the same injury?” Dunn, 139 N.J. at 575, 656 A.2d at 419 (emphasis added). It went on to “agree ... that it is appropriate *in this case* to apportion responsibility based on a breach on contract that is alleged to have proximately caused *personal injury*.” Dunn, 139 N.J. at 577, 656 A.2d at 420 (emphasis added). In the instant case, there is no similar allegation of personal injury by any party.

Second, the court stressed the fact that the HMO’s contractual duty was closely analogous to the tort duties imposed on the physician-provider. The court held that “[i]n the context of this case in which the breach of contractual duty appears to parallel closely the fault-based duty of care imposed on a health care provider, it is appropriate to allow for contribution ... In this case, the alleged failure of the HMO is more like a negligent act.” Id. In the case at bar, the contractual duties imposed on EFCO are in no way similarly parallel to the fiduciary duties imposed on the Board.

As a result, EFCO’s claims for contribution against the Board must be dismissed.

B. Indemnification

Longport also contends that EFCO may not assert a claim for indemnification against the Board because EFCO (1) cannot be liable in tort; and (2) does not have a “special legal relationship” with the Board necessary to support such a claim. Common law

indemnification “is available under New Jersey law to a person who is not at fault, but has become responsible *in tort* for the conduct of another.”² Ronson v. Talesnick, 33 F. Supp.2d 347, 357 (D.N.J. 1999) (emphasis added). See Adler’s Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 80, 159 A.2d 97, 110 (1960); Restatement, Restitution § 96 (1937) (stating that “[a] person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity”). Furthermore, common law indemnification must be based on a “special legal relationship between the parties [that] creates an implied right of indemnification,” since the party asserting such a claim must only be liable in a “constructive, secondary or vicarious” manner. Allied Corp. v. Frola, 730 F. Supp. 626, 639 (D.N.J. 1990). See Moskowitz, 845 F. Supp. at 251-52; Ruvolo v. United States Steel Corp., 133 N.J. Super. 362, 367, 336 A.2d 508, 510-11 (Law. Div. 1975).

In order to assert its claim for indemnification, then, EFCO must be subject to tort liability that is actually the Board’s fault. However, the only claims asserted against EFCO are contract claims. Indeed, in connection with the first lawsuit, EFCO argued, and the Court agreed, that it could not be held liable in tort under the economic loss doctrine. As a matter of law, then, EFCO cannot be subject to tort liability for the Board’s conduct. As a result, EFCO’s claims for indemnification must be dismissed on this basis alone.

EFCO cites Henry Heide, Inc. v. WRH Products Co., 766 F.2d 105 (3d Cir. 1985) and cases cited therein for the proposition that a defendant may possess a claim for indemnification against a co-defendant even if the plaintiff’s claim against it is based solely on contract or quasi-contract under the U.C.C. See Henry Heide, 766 F.2d at 112. However, these

2. Contractual indemnification is not asserted by EFCO.

cases – like Dunn – demonstrate only a limited exception to the general rule that is not applicable here. They permit such indemnification only “between parties in a product distribution chain.”

Id. In this case, the Board is obviously not part of such a chain.

Just as importantly, as noted above, in order to maintain a claim for common law indemnification, EFCO must also demonstrate a special legal relationship with the Board such that a claim for common law indemnification is proper. The types of relationships that New Jersey courts have held fulfill this requirement are those of lessor-lessee, bailor-bailee, principal-agent, employer-employee, and union-member. See Moskowitz, 845 F. Supp. at 251-52; Allied Corp., 730 F. Supp. at 639 n. 7. However, EFCO had no such relationship with the Board. Longport, by and through the Board, contracted with Cato to oversee the renovation project. Cato then contracted with a third party to supply and install new windows and doors. That party then arranged to use EFCO products. Regardless of the existence of any warranties which may run from EFCO to Longport, the relationship between the EFCO and the Board is extremely attenuated, and it is not a special legal relationship that supports a claim for common law indemnification.

As a result, EFCO’s claims for indemnification against the Board must similarly be dismissed.

IV. CONCLUSION

EFCO may not maintain its claims for contribution or indemnification against the Board. As a result, its Third Party Complaint based on these claims is properly dismissed.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

