

Georgia State University College of Law
Reading Room

Georgia Business Court Opinions

10-6-2010

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

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>

Institutional Repository Citation

Bonner, Alice D., "Order on Motion for Summary Judgment of Defendants Place Collegiate Development, LLC and Cecil M. Phillips (KENNESAW STATE UNIVERSITY FOUNDATION, INC.)" (2010). *Georgia Business Court Opinions*. 163.
<https://readingroom.law.gsu.edu/businesscourt/163>

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

KENNESAW STATE UNIVERSITY
FOUNDATION, INC.,

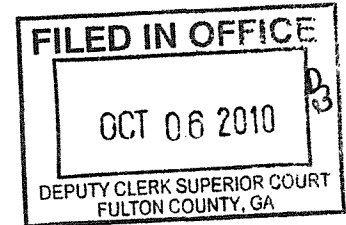
Plaintiff,

v.

PLACE COLLEGIATE DEVELOPMENT,
LLC, CECIL M. PHILLIPS, and
MANHATTAN CONSTRUCTION
COMPANY,

Defendants,

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,

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.

**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.

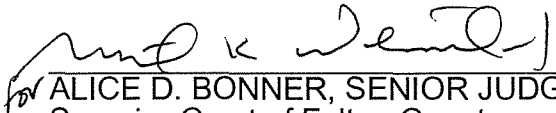
In support of its motion for summary judgment, Place argues that KSUF has released the claims asserted in this case under the terms of the Settlement Agreement. In response, KSUF argues that the Settlement Agreement expressly excludes latent defects.

"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

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
770-956-1813

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