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Fuqua BCDE Peachtree Corners Project Owner v. Ordner Construction Co., et. al., Order on Defendants' Motion to Dismiss

Wesley B. Tailor

Fulton County Superior Court, Metro Business Case Division

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IN THE SUPERIOR COURT OF FULTON COUNTY
 BUSINESS CASE DIVISION
 STATE OF GEORGIA

FUQUA BCDC PEACHTREE CORNERS PROJECT)	
OWNERS, LLC,)	
)	
Plaintiff,)	
)	CIVIL ACTION FILE
v.)	NO. 2022CV374079
)	
ORDNER CONSTRUCTION COMPANY, INC. and)	
EAGLE EXCAVATION, INC.,)	
)	
Defendants.)	
)	
v.)	
)	
HAYWARD BAKER, INC., CARLISLE COATINGS)	
& WATERPROOFING, INC., METROMONT, LLC,)	
METRO WATER-PROOFING, INC.,)	
WALL TECHNOLOGIES COMPANY, INC.,)	
and JOHN DOES 1-4,)	
)	
Third Party Defendants.)	

ORDER ON THIRD PARTY DEFENDANT'S MOTION TO DISMISS

Before the court is the motion filed by Third Party Defendant Hayward Baker, Inc. ("Hayward") to dismiss the third party complaint filed by Defendant and Third Party Plaintiff Ordner Construction Company, Inc. ("Ordner"). Having considered the entire record, the court finds as follows:

Plaintiff Fuqua BCDC Peachtree Corners Project Owners, LLC ("Fuqua") filed this lawsuit on December 19, 2022. This case was transferred to this court by Order entered on March 31, 2023. Fuqua is the developer of a parking deck construction project located in the City of Peachtree Corners. In June 2017, Fuqua entered into a contract with Ordner to serve as the contractor responsible for construction of the parking deck and with Defendant Eagle Excavation, Inc. ("Eagle") for the construction of the sitework at the project. Fuqua sues for breach of contract, breach of warranty, and negligent construction as a result of certain purported construction defects experienced at the project.

On February 3, 2023, Ordner answered and filed its third-party complaint against Hayward and others. The Third-Party Defendants are subcontractors retained by Ordner and Eagle to work on the parking deck project. Ordner alleges that the subcontractors are liable to Ordner for any damages resulting from "the acts and omissions or negligence of or the breach of

the contract terms by Subcontractor Defendants” and pleads claims for negligence, breach of contract, indemnification, and contribution. Hayward filed its motion to dismiss the third-party complaint pursuant to O.C.G.A. § 9-11-12(b)(6) on March 13, 2023. Ordner opposes Hayward’s motion.

The standard for granting a motion to dismiss is a stringent one. As our Supreme Court notes:

It is well established that: a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.... In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party’s favor.

Scouten v. Amerisave Mortg. Corp., 283 Ga. 72, 73 (2008) (citations and punctuation omitted); accord *Austin v. Clark*, 294 Ga. 773, 774-75 (2014). “In making this analysis, we view all of the plaintiff’s well-pleaded material allegations as true, and view all denials by the defendant as false, noting that we are under no obligation to adopt a party’s legal conclusions based on these facts.” *Love v. Morehouse College, Inc.*, 287 Ga. App. 743, 743-44 (2007) (citations omitted). “In deciding a motion to dismiss, we are cognizant of the fact that a complaint is not required to set forth a cause of action, but need only set forth a claim for relief. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.” *Id.* at 744 (citations and punctuation omitted).

Hayward argues that Ordner’s third-party complaint fails to state a claim against Hayward because Ordner’s complaint is “wholly derivative” of the original complaint filed by Fuqua and nothing in that pleading “implicates the work of Hayward.” Hayward further argues that there are no allegations in Fuqua’s complaint that would trigger Hayward’s obligation to indemnify and defend Ordner pursuant to its subcontractor’s agreement with Ordner.

In opposing Hayward’s motion, Ordner contends that, on September 27, 2017, it entered into its subcontract with Haywood for the construction of the “Aggregate Pier Foundation Installation” connected with the parking deck project. The aggregate piers comprise a part of the foundation of the parking deck that Fuqua alleges to be defective, allowing the deck to move or slump.

In its third-party complaint, Ordner alleges that it retained Hayward as a subcontractor on the project and that Hayward performed work on the project pursuant to the contract and was paid for said work. Hayward acknowledges that it entered into the subcontractor agreement with Ordner. Ordner further alleges in its pleading as follows:

If the Plaintiff has been damaged or injured as described in the Complaint, which is denied, then that damage was the result of the acts and omissions or negligence of or the breach of the contract terms by Subcontractor Defendants. If Defendant Ordner is found liable to Plaintiff in any respect, which is denied, Defendant Ordner is entitled to contribution and indemnity, either in contract and/or equity, from Subcontractor Defendants for any liability that may be adjudged against it in favor of the Plaintiff, as well as the costs and expenses in defending this lawsuit and their actual, consequential and special damages.

At this juncture, the court cannot find that Ordner could not possibly introduce evidence within the framework of its third-party complaint sufficient to warrant a grant of the relief it seeks against Hayward. Therefore, the court hereby **DENIES** Hayward's motion to dismiss Ordner's third-party complaint.

SO ORDERED, this 15th day of May, 2023.

/s/ Wesley B. Tailor

Wesley B. Tailor, Judge