

**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: <http://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*. Paper 163.  
<http://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 [jgermann@gsu.edu](mailto:jgermann@gsu.edu).

**COPY**

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

KENNESAW STATE UNIVERSITY  
FOUNDATION, INC.,

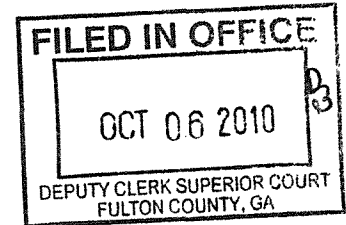
Plaintiff,

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.

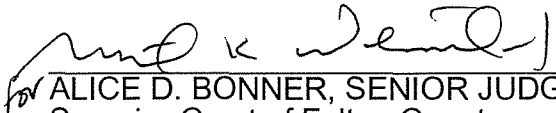
In support of its motion for summary judgment, Place argues that KSUF has released the claims asserted in this case under the terms of the Settlement Agreement. In response, KSUF argues that the Settlement Agreement expressly excludes latent defects.

"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 6<sup>th</sup> 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](mailto:sgill@bsllaw.net)  
[rsumrall@bsllaw.net](mailto: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