



SUPERIOR COURT OF NEW JERSEY

SARAH BETH JOHNSON, J.S.C.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

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LLC, PRDC Properties, LLC, PRDC of NJ
Corp., and David Perlman

RE: Bendesky, et al v. The Waves, LP, et al.

DOCKET NO. ATL-L-2516-19

Third Party Defendant Viwinco, Inc. seeks summary judgment in its favor and the dismissal with prejudice of all claims asserted against it in connection with this matter. Defendants Sto Corp. and The Waves, LP, Waves GP, LLC, PRDC Properties, LLC, PRDC of NJ Corp., and David Perlman (collectively “The Waves Defendants”) have opposed the motion. The court heard oral argument on this application on October 10, 2023.

For the reasons set forth herein, the motion is **DENIED**.

Background

This is a complex construction action arising from the allegedly defective design and construction of townhomes located on the Ventnor City boardwalk. Plaintiff homeowners filed the original complaint in September 2019; amendments were filed in April 2020, September 2020, and August 2022.

On August 29, 2022, former Defendant/Third-Party Plaintiff Universal Supply Co., Inc. (“Universal”) filed an amended answer and third-party complaint against Viwinco. Subsequent answers to the amended complaint by the other Defendants/Third Party Plaintiffs asserted crossclaims for contribution and indemnity against all parties, including Viwinco.

Viwinco filed its answer and crossclaims in December 2022. Discovery ended June 15, 2023, and the matter is listed for trial beginning February 5, 2024.

Applicable Standard

Rule 4:46-2 provides that summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

In deciding a summary judgment motion, the court’s “function is not ... to weigh the evidence and determine the truth ... but to determine whether there is a genuine issue for trial.” Brill, 142 N.J. at 540. The court must consider “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Ibid.

If there is “a single, unavoidable resolution of the alleged disputed issue of fact,” then the issue is not “genuine.” Ibid. The thrust of Brill is that “when the evidence ‘is so one-sided that one party must prevail as a matter of law,’ ... the trial court should not hesitate to grant summary judgment.” Ibid.

Undisputed Material Facts

I find the following undisputed facts relevant to my determination:

- Universal is a construction supplier retained by the project developers to supply windows and doors for the various townhome units at issue in this matter.
- Viwinco is a manufacturer of pre-assembled windows and doors.
- Universal ordered from Viwinco pre-assembled “Ocean View Impact” windows and patio doors.
- Neither Universal nor Viwinco installed the Ocean View Impact windows or doors in the Plaintiffs’ townhomes.
- The Plaintiffs’ expert witnesses opine that the windows and doors were defective and a source of water infiltration which proximately caused property damage to Plaintiffs.
- They also opine that the windows and doors were not properly installed.
- Sto Corp.’s expert similarly opines that “[t]he Viwinco windows and sliding doors and their installations at the Project were both found to be sources for water penetration and resultant damage...”

- Universal’s expert witness refutes these opinions, finding no evidence that any Viwinco window or door caused or contributed to the water infiltration experienced by the Plaintiff homeowners.
- Universal’s expert also opines that developers were supplied with the Ocean View Impact windows and doors they had ordered.
- In February 2023, Universal moved for summary judgment dismissal of all direct and third-party claims asserted against it as the supplier of the Ocean View Impact windows and doors.
- On March 31, 2023, the court entered an order granting the motion and dismissing with prejudice all direct, cross, and counterclaims against Universal.
- In reaching its determination, the court found as a matter of undisputed fact that Universal did not manufacture, assemble, or install any of the Ocean View Impact windows or doors, and thus no reasonable factfinder could conclude Universal had or breached a duty to the Plaintiff homeowners.
- The court also found, based on Viwinco’s certification, that Universal did not supply a warranty for the Ocean View Impact windows or doors.
- Rather, Viwinco – as the manufacturer – had its own warranty, and Universal performed repair labor for Viwinco after the windows and doors were installed.

Analysis

Procedurally, Viwinco asserts that there are no active claims against it since the dismissal of Universal in March. It argues that no party has asserted or pursued claims against Viwinco beyond Universal, and it is too late in the litigation for any Defendant to attempt to do so. Substantively, Viwinco appears to rely on the expert opinion proffered by Universal, which conflicts with that asserted by the Plaintiffs’ experts.

In response, Sto Corp. and The Waves Defendants assert that the responsive pleadings effectively preserve their crossclaims for contribution and indemnification against Viwinco regardless of Universal’s dismissal from the matter. They also contend that the conflicting expert opinions establish disputed, material issues of fact precluding the entry of summary judgment under R. 4:46-2.

I agree with the Defendants.

First, Viwinco’s reliance on the decision of Bahrle v. Exxon Corp., 279 N.J. Super. 5 (App. Div. 1995), aff’d 145 N.J. 144 (1996) is misplaced. In Bahrle, the Appellate Division found the trial court erred in permitting defendant Texaco to submit proofs that two dismissed parties/co-defendants caused the alleged injury after Texaco had not opposed summary judgment dismissing those parties. Id. at 21-22. Because summary judgment had been granted to the co-defendants based on a finding that those parties did not, in fact, cause the injury, the court held

that Texaco could not later create an “empty chair” defense based on proofs that were not presented during summary judgment motion. Ibid. The court also held that the application of judicial estoppel should have prevented Texaco from asserting newly found theories of liability at trial. Id. at 22

This record does not support a similar conclusion that Sto Corp. and The Waves Defendants should be estopped from proceeding with their crossclaims against Viwinco because Universal is no longer a party.

The theory against Universal and Viwinco is essentially the same: the Ocean View Impact windows and doors are a source of water infiltration in the townhouses. It is undisputed that, while Universal did not manufacture, assemble, or install the windows or doors, Viwinco did manufacture them.

Therefore, the declination of any party to contest Universal’s apparent lack of duty or warranty vis a vis the windows and doors does not estop that party from pursuing crossclaims for indemnification and contribution from Viwinco as the manufacturer of the windows and doors. The record shows there are currently pending independent third-party claims against Viwinco; Defendants are entitled to pursue them.

Second, Viwinco’s motion fails because there is conflicting evidence in the expert reports regarding the impact of the Ocean View Impact windows and doors on the water infiltration suffered by the Plaintiff homeowners. It is the factfinder’s function to assess the credibility and weight of these opinions based on the expert witnesses’ sworn testimony at trial. As such, the entry of summary judgment is not appropriate under Rule 4:46-2.

Conclusion

The record contains issues of fact precluding the entry of summary judgment in favor of Viwinco. Accordingly, the motion is **DENIED**.

An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision. The filing of the Order and this Memorandum on e-courts shall serve as service of same on all counsel of record.

Sarah Beth Johnson

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