

SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, FIRST DEPARTMENT

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The ROCKEFELLER UNIVERSITY

Plaintiff

v.

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant/Third-Party  
Plaintiff-Appellant,

v.

ROSEN & MORELLI MASONS, etc., et al.

Third-Party Defendants

ABRAMOVITZ-HARRIS-KINGSLAND

Third-Party Defendant-Respondent

And

STANLEY GOLDSTEIN, P.C./Consulting Engineer, et al.

Third-Party Defendants  
[And a Fourth-Party Action]

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The ROCKEFELLER UNIVERSITY

Plaintiff-Respondent

v.

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, et al.

Defendants

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TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Third-Party Plaintiff-Appellant

v.

ROSEN & MORELLI MASONS, etc., et al.

Third-Party Defendants

Century Maxim Construction Corp., et al.

Third-Party Defendants-Respondents,  
and

ABRAMOVITZ-HARRIS-KINGSLAND, et al.

Third Party Defendants  
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Oct. 1, 1996

William B. Flynn, for Tishman Construction Corporation of New York.

Bernard London, for Abramovitz-Harris-Kingsland.

Jerome Reiss, for Rockefeller University.

Frederick B. Simpson, for Rosen & Morelli Masons.

Patti F. Potash, Edward Weissman, for Century Maxim Construction Corporation, et al.

Before MURPHY, P.J., and WALLACH, KUPFERMAN, WILLIAMS and MAZZARELLI, JJ.

#### MEMORANDUM DECISION

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered June 13, 1995, dismissing defendant/third-party plaintiff Tishman Construction Corporation's third-party complaint as against Abramovitz- Kingsland-Schiff ([AKS] sued as Abramovitz-Harris-Kingsland), and bringing up for review an order, same court and Justice, entered May 4, 1995; judgment, Supreme Court, New York County (Herman Cahn, J.), entered December 15, 1995, dismissing Tishman's third-party complaint as against Century Maxim Construction Corp. and Tishman's claims for contribution and contractual indemnification as against Westinghouse Elevator Company, and bringing up for review an order, same court and Justice, entered November 8, 1995; and order, same court and Justice, entered May 9, 1996, denying Tishman's motion for, inter alia, renewal of the November 8, 1995 order, unanimously affirmed, with costs.

The motion court properly dismissed Tishman's contribution causes of action, since the complaint in the main action by the project owner sought damages for economic loss resulting from a breach of contract, the tort language therein notwithstanding (see, Bocre Leasing Corp. v. General Motors Corp., 84 N.Y.2d 685, 621 N.Y.S.2d 497, 645 N.E.2d 1195), and absent some form of tort liability, contribution is unavailable (see Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21, 28, 523 N.Y.S.2d 475, 517 N.E.2d 1360). In light of the benefit of the bargain recovery sought here for the cost of repairs and the diminution of the building's value, the mere potential for serious physical injury or property damage is not enough to create a duty independent of

the contract thereby authorizing recovery in tort. Sommer v. Federal Signal Corp. (79 N.Y.2d 540, 583 N.Y.S.2d 957, 593 N.E.2d 1365), relied upon by appellant, is not to the contrary, inasmuch as Sommer follows Sargent in denying tort recovery where the recovery sought is the contractual benefit of the bargain (id., at 553, 583 N.Y.S.2d 957, 593 N.E.2d 1365; see also 15 E. 11th Apt. Corp. v. Elghanayan, 220 A.D.2d 295, 632 N.Y.S.2d 119, 120, dismissed in part, lv. denied in part 87 N.Y.2d 1050, 644 N.Y.S.2d 140, 666 N.E.2d 1053).

We agree with the motion court's interpretation of the contractual provisions upon which appellant grounded its requests for express contractual indemnification and the resulting dismissal of such claims (see, Dormitory Auth. v. Scott, 160 A.D.2d 179, 553 N.Y.S.2d 149, lv denied 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888).

The implied indemnification claims were also properly dismissed. Indemnification was premised on Tishman's actual fault and not merely its vicarious liability (see, Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 109 A.D.2d 449, 453, 492 N.Y.S.2d 371). In response to AKS's dismissal motion, which raised an issue of law only, Tishman's submissions were silent as to the allegation that it supervised the work, focusing instead on the acts of AKS. Nor was there any issue of fact raised with regard to Century's claim that Tishman actively supervised the concrete work in light of admissions to that effect in Tishman's own correspondence and the evidence of its participation contained in the construction documents. This evidence demonstrated that Tishman's supervisory activity was not limited to mere periodic progress inspections. We have considered defendant/third-party plaintiff's other contentions and find them to be without merit.

Motion to strike brief and cross-motion for sanctions denied.

647 N.Y.S.2d 513, 232 A.D.2d 155

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