

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

The ROCKEFELLER UNIVERSITY

Plaintiff-Respondent

v.

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK
Defendant-Appellant

And

STANLEY H. GOLDSTEIN, P.C., et al.

Defendants

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Third-Party Plaintiff-Appellant

v.

ROSEN & MORELLI MASONS, etc., et al.
Third-Party Defendants
[And Other Related Actions]

The ROCKEFELLER UNIVERSITY

Plaintiff

v.

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant-Respondent

and

STANLEY H. GOLDSTEIN, P.C., et al.

Defendants

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Third-Party Plaintiff-Respondent

v.

ROSEN & MORELLI MASONS, etc., et al
Third-Party Defendants

WESTINGHOUSE ELEVATOR COMPANY, etc.

Third-Party Defendant-Appellant

June 26, 1997

HENRY PAUL, INC.

Third-Party Defendants
[And Other Related Actions]

The ROCKEFELLER UNIVERSITY

Plaintiff-Respondent

v.

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, et al.

Defendants-Respondents
[And Other Related Actions]

STANLEY H. GOLDSTEIN, P. C., et al.

Sixth-Party Plaintiffs-Respondents

v.

CENTURY MAXIM CONSTRUCTION CORP., et al.

Sixth-Party Defendants-Respondents

ABRAMOVITZ-KINGSLAND-SCHIFF, etc.

Sixth Party Defendant-Appellant

The ROCKEFELLER UNIVERSITY

Plaintiff-Appellant

v.

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant-Appellant

and

STANLEY H. GOLDSTEIN, P.C., et al.

Defendants
[And Other Related Actions]

ROSEN & MORELLI MASONS, etc., et al.

Fifth-Party Plaintiffs-Respondents

v.

CONSTRUCTION WATERPROOFERS, INC.

Fifth-Party Defendant
[And Another Related Action]

Thomas P. Hanley, for Rockefeller University.

Thomas S. Finegan, for Tishman Construction Corporation of New York.

Edward Weissman, for Westinghouse Elevator Company.

Thomas S. Finegan, Patricia A. Moores, for Tishman Construction Corporation of New York.

Patricia A. Moores, for Stanley H. Goldstein, P.C.

James L. Fischer, for Abramovitz-Kingsland-Schiff.

Frederick B. Simpson, for Rosen & Morelli Masons.

Before ROSENBERGER, J.P., and WALLACH, NARDELLI, RUBIN and COLABELLA, JJ.

MEMORANDUM DECISION

Order, Supreme Court, New York County (Herman Cahn, J.), entered May 23, 1996, which, *inter alia*, granted defendant Tishman Construction Corporation's motion to dismiss the causes of action for misrepresentation and fraud set forth in the amended complaint, unanimously affirmed, with costs to respondent Tishman.

Order, same court and Justice, entered October 30, 1996, which, *inter alia*, granted plaintiff Rockefeller University's motion to dismiss Tishman's third affirmative defense and counterclaim of release, denied third-party defendant Westinghouse Elevator Company's motion for summary judgment dismissing Tishman's claim against it for implied indemnification, and denied sixth-party defendant Abramovitz-Kingsland-Schiff's (AKS) motion for summary judgment dismissing third-party defendant Stanley H. Goldstein, P.C.'s claims against it for contribution, unanimously modified, on the law, to the extent of granting Abramovitz-Kingsland-Schiff's motion for summary judgment dismissing Stanley H. Goldstein, P.C.'s contribution claims against it, and otherwise affirmed, with costs to the respective prevailing parties.

Consistent with its prior order affirmed by this Court (232 A.D.2d 155, 647 N.Y.S.2d 513, *lv. denied* 89 N.Y.2d 811, 657 N.Y.S.2d 404, 679 N.E.2d 643), the motion court correctly held that Rockefeller's misrepresentation and fraudulent misrepresentation claims against Tishman are duplicative of its breach of contract cause of action since the identical contractual benefit of the bargain

recovery is sought.

Viewing the evidence in the light most favorable to the party opposing the summary judgment motion (see, Lehrer McGovern Bovis v. New York Yankees, 207 A.D.2d 256, 258, 615 N.Y.S.2d 31), the motion court properly found that Tishman had failed to meet its burden of demonstrating that Rockefeller had released the claims sought to be barred (see, Domino Media v. HRH Constr., 212 A.D.2d 359, 622 N.Y.S.2d 253) by showing an expression of a present intention to renounce the claims (see, Carpenter v. Machold, 86 A.D.2d 727, 447 N.Y.S.2d 46). Tishman's present argument that Rockefeller's oral promise to release its claims gave rise to an estoppel is a purely factual contention improperly raised for the first time at this juncture, and is in any event unsupported by Tishman's factual submissions.

It is immaterial whether or not Westinghouse sufficiently demonstrated in support of its claim for implied indemnification that Tishman had an on-site supervisory presence with respect to Westinghouse's installation of the elevators in Rockefeller's building, inasmuch as Westinghouse failed to offer an acceptable excuse for its failure to submit the purported documentation of such presence on its initial motion for the same relief (see, Foley v. Roche, 68 A.D.2d 558, 568, 418 N.Y.S.2d 588). The excuse offered, that its counsel believed that the representative documents initially submitted would be sufficient, reflects a conscious tactical choice by counsel rather than an excusable miscue by a mistaken litigant, and is inadequate (cf., Martinez v. Hudson Armored Car & Courier, 201 A.D.2d 359, 361, 607 N.Y.S.2d 644). Notably, in its reply, Westinghouse advanced an entirely different excuse. In any event, on the merits, the motion court properly adhered to its prior order. While the new documents may show that on-site meetings with Tishman were held, there still is no proof of what Tishman did at the worksite. So too, the progress reports sent by Westinghouse to Tishman, while probative, are not dispositive of Tishman's alleged supervision and control of Westinghouse's work, since the use of such reports also supports the contrary inference that they were necessary because there was no on-site supervision.

However, engineer Stanley H. Goldstein, P.C.'s contribution claim against AKS, the architect, should have been dismissed. While Goldstein correctly maintains that breach of contract and malpractice causes of action may be simultaneously asserted even though both arise from the same contractual relationship (see, e.g., Santulli v. Englert, Reilly & McHugh, 78 N.Y.2d 700, 579 N.Y.S.2d 324, 586 N.E.2d 1014), as stated by this Court on a prior appeal herein (232 A.D.2d, *supra*, at 155, 647 N.Y.S.2d 513, citing Bocre Leasing Corp. v. General Motors Corp., 84 N.Y.2d 685, 621 N.Y.S.2d 497, 645 N.E.2d 1195), the determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought. Here, Rockefeller's direct claims against Goldstein seek the identical contractual benefit of the bargain, their tort language notwithstanding, and, in the absence of tort liability, contribution is unavailable (*id.*). To the extent that Robinson Redevelopment Co. v. Anderson, 155 A.D.2d 755, 547 N.Y.S.2d 458 may suggest a different result, we decline to follow it.

We have considered appellants' other contentions and find them to be without merit.

659 N.Y.S.2d 460, 240 A.D.2d 341

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