STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
COMMERCIAL DIVISION

DECISION & ORDER

STATE OF NEW YORK,

Plaintiff,

-against-

ALL AROUND STORAGE, L.L.C., d/b/a
ALL AROUND EXCAVATING,

Defendant.

ALL AROUND STORAGE, L.L.C., d/b/a
ALL AROUND EXCAVATING,

Third-Party Plaintiff,

-against-

RUSTON PAVING CO., INC.,

Third-Party Defendant.

RUSTON PAVING CO., INC.,

Fourth-Party Plaintiff,

-against-

HANSON AGGREGATES NEW YORK, LLC and
BARRETT PAVING MATERIALS, INC.,

Fourth-Party Defendants.

Index No. 900009-19

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

This action arises out of the Taughannock Falls Overlook Reconstruction Project ("Project"). Plaintiff State of New York ("State") contracted with defendant/third-party plaintiff All Around Storage LLC d/b/a All Around Excavating ("All Around") to perform certain work on the Project, including the construction of a parking lot. All Around subcontracted the paving portion of its work to third-party defendant/fourth-party plaintiff Ruston Paving Co., Inc. ("Ruston"). Ruston procured asphalt pursuant to specifications established by the State from fourth-party defendants Hanson Aggregates New York, LLC ("Hanson") and Barrett Paving Materials, Inc. ("Barrett"). The State commenced this action based on allegations that the asphalt parking lot installed by All Around was inadequate and defective.

Hanson and Barrett separately move pursuant to CPLR 3211 (a) (5) and (7) and/or CPLR 3212 for dismissal of Ruston's fourth-party complaint, which alleges a combined claim for indemnification and/or contribution. The fourth-party defendants argue that Ruston failed to commence suit within the contractual limitations period of one year, and, in any event, the Fourth-Party Complaint fails to allege viable causes of action for indemnification or contribution. Ruston opposes the motion, as do the State and All Around.

BACKGROUND

In September 2014, the State awarded Contract No. D004567 ("Contract") to All Around. The general contractor's scope of work included "the demolition of existing asphalt paving, a wood frame building and other structures, and the construction of concrete, flagstone, pervious concrete and permeable asphalt paving, a new septic system, site utilities, a new single

story building, mortared stone walls, site amenities, embankment for a 0.5 mile multi-use trail, and woodland restoration plantings" (NYSCEF Doc Nos. 8, 27 ["Complaint"], ¶ 4). All Around began work on the Project on or about March 23, 2015, and its work was physically completed and accepted on April 27, 2016 (*see id.*, ¶ 5). The State paid All Around the sum of $1,830,740.61 pursuant to the Contract (*see id.*, ¶ 6). However, "within seven months of the date of physical completion [of the Project]" (*id.*, ¶ 8), the State discovered that the "porous asphalt pavement parking lot installed by [All Around] as part of the Project was inadequate and defective and failed" (*id.*, ¶ 7).

The State commenced this action in February 2019, seeking to recover $102,400 in damages from All Around under theories sounding in breach of contract, breach of warranty and negligence (*see id.*, ¶¶ 10-32). All Around joined issue in May 2019 and filed a third-party complaint against Ruston (*see* NYSCEF Doc No. 29 ["Third-Party Complaint"]).

All Around alleges that it entered into a subcontract ("Subcontract") with Ruston "to perform portions of the obligations arising from" the Contract, "including but not limited to paving, which is the subject of [the Complaint]" (*id.*, ¶ 6). According to All Around, "Ruston failed to adequately perform its contracted obligations pursuant to the Subcontract and specifications," and "[the State's] damages [were] wholly caused by [Ruston] without fault of [All Around]" (*id.*, ¶¶ 9-14). In addition to direct claims against Ruston for breach of the Subcontract and for breach of express and implied warranties (*see id.*, ¶¶ 8-14, 19-27), All Around seeks contractual and common-law indemnification from Ruston, as well as contribution (*see id.*, ¶¶ 15-18).

Ruston joined issue and filed a fourth-party complaint against Hanson and Barrett in July 2019 (*see* NYSCEF Doc No. 31 ["Fourth-Party Complaint"]). Ruston alleges therein that "[t]he subject porous asphalt parking lot consisted of a subbase which All Around had prepared, on top of which Ruston installed a four (4) inch layer of porous asphalt pursuant to its subcontract with All Around" (*id.*, ¶ 5). Ruston further alleges that it "purchased the porous asphalt materials that it installed on the subject parking lot from [Hanson and Barrett]" (*id.*, ¶ 6), and the State "approved the mix design of the material which [Hanson and Barrett] had proposed to furnish for the porous asphalt parking lot" (*id.*, ¶ 8). The Fourth-Party Complaint contains a single cause of action for indemnification and/or contribution, alleging:

> If it is determined that there are any defects in the subject . . . parking lot, they were caused, in whole or in part, by the acts or omissions of the [State], [Ruston] and/or [Hanson and Barrett], including by materials furnished by [Hanson and Barrett] which failed to comply with the mix design that the [State] had approved or which otherwise were defective or unsuitable for installation by Ruston, without any fault, culpable conduct or breach of contract on the part of Ruston causing or contributing thereto (*id.*, ¶ 10).

ANALYSIS

A. Statute of Limitations

Hanson and Barrett first seek dismissal of the Fourth-Party Complaint as barred by the expiration of the one-year limitations period allegedly established by the pertinent contracts.

In New York, contracting parties may agree to shorten the applicable limitations period (*see* CPLR 201; *Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.*, 32 NY3d 139, 153 [2018]; *Anderson v Allstate Ins. Co.*, 171 AD3d 1331, 1332 [3d Dept 2019]). An agreement to shorten a statute of limitations "does not conflict with public policy but, in fact, more effectively

secures the end sought to be attained by the statute of limitations. Thus an agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 551 [1979] [internal quotation marks and citations omitted]).

"Absent proof that the contract is one of adhesion or the product of overreaching, or that the altered period is unreasonably short, the abbreviated period of limitation will be enforced" (*Batales v Friedman*, 144 AD3d 849, 850 [2d Dept 2016] [internal quotation marks and citations omitted]). To be enforceable, the shortened period must be fair and reasonable in view of the circumstances of the particular case (*see John J. Kassner & Co.*, 46 NY2d at 551). It is the fairness and reasonableness of the shortened limitations period under the circumstances of the particular case – not its absolute duration – that is determinative (*see Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 519 [2014]).

"On a motion pursuant to CPLR 3211 (a) (5) to dismiss a cause of action as time-barred, the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired, and if the defendant satisfies that burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the action was actually commenced within the applicable statute of limitations" (*Pugni v Giannini*, 163 AD3d 1018, 1019 [2d Dept 2018] [citation omitted]; *see Hoosac Val. Farmers Exch. v AG Assets*, 168 AD2d 822, 823 [3d Dept 1990]).

Hanson and Barrett argue that the contract by which they supplied asphalt to the Project gave Ruston one year from the 2015 delivery of the materials to bring suit. While there is

nothing inherently unreasonable about a contractual limitations period of one year, the Court agrees with Ruston that the shortened period is unreasonable under the particular facts and circumstances of this case.

The problem with the limitations period here "is not its duration, but its accrual date" (*Executive Plaza*, 22 NY3d at 518). An indemnification/contribution claim does not even accrue until the party seeking such relief has made payment to the injured party (*see McDermott v City of New York*, 50 NY2d 211, 217 [1980]; *Bay Ridge Air Rights v State of New York*, 44 NY2d 49, 55 [1978]; *Community Steel Corp. v Terra Mar. Dredging Corp.*, 176 AD2d 1196, 1196 [4th Dept 1991]).[1]

Thus, accepting Hanson and Barrett's argument would mean that Ruston's right to pursue indemnification was extinguished *before* its cause of action even accrued. Indeed, Ruston's time to sue for indemnity would have expired before the State even learned that the asphalt lot had failed (*see* Complaint, ¶¶ 7-8). "[A] limitation period that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim" (*Executive Plaza*, 22 NY3d at 518; *accord Digesare Mech., Inc. v U.W. Marx, Inc.*, 176 AD3d 1449, 1452 [3d Dept 2019]; *D&S Restoration, Inc. v Wenger Constr. Co., Inc.*, 160 AD3d 924, 926 [2d Dept 2018]).

Accordingly, the Court concludes that Ruston has demonstrated that application of the alleged one-year contractual limitations period would be unreasonable under the circumstances presented here. Accordingly, the branch of Hanson and Barrett's motion seeking dismissal of the

[1] As a matter of efficiency, claims for indemnity/contribution may be asserted in a pending lawsuit – before they technically become ripe – so that the parties may establish their rights/liabilities in one action (*see* CPLR 1007; *Krause v American Guar. & Liab. Ins. Co.*, 22 NY2d 147, 152-153 [1968]).

Fourth-Party Complaint as time-barred is denied (*see Executive Plaza*, 22 NY3d at 518-519; *Digesare Mech.*, 176 AD3d at 1452; *D&S Restoration*, 160 AD3d at 926; *Baluk v New York Cent. Mut. Fire Ins. Co.*, 126 AD3d 1426, 1427-1428 [4th Dept 2015]; *JC Ryan EBCO/H&G, LLC v Lipsky Enters., Inc.*, 78 AD3d 788, 790 [2d Dept 2010]; *Montoya v Clean Cut Const., Inc.*, 2018 NY Slip Op 33332[U], *5 [Sup Ct, Suffolk County 2018]).

B. Sufficiency of Ruston's Indemnification/Contribution Claim

Hanson and Barrett next challenge the legal sufficiency of Ruston's cause of action for indemnification and/or contribution.

On a motion to dismiss made pursuant to CPLR 3211 (a) (7), "the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [citations omitted]).

Initially, the Court agrees with Hanson and Barrett that there is nothing in the text of the pertinent contracts that provides Ruston with a right of indemnity (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 199 [3d Dept 1989]), and Ruston's damages consist merely of economic loss, which precludes a claim for contribution (*see Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 AD3d 419, 420 [1st Dept 2017]; *Westbank Contr., Inc. v Rondout Val. Cent. School Dist.*, 46 AD3d 1187, 1190 [3d Dept

2007]). Ruston makes no arguments in opposition as to the sufficiency of these aspects of its fourth-party claim (*see e.g.* NYSCEF Doc No. 57 ["Ruston Opp Mem"] at 2), thereby effectively abandoning these theories of liability (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Weldon v Rivera*, 301 AD2d 934, 935 [3d Dept 2003]; *Matter of FYM Clinical Lab. v Perales*, 147 AD2d 840, 841 [3d Dept 1989], *affd* 74 NY2d 539 [1989]).

Ruston therefore is left with its common-law/implied indemnification theory, which "is based in simple fairness and seeks to avoid unjust enrichment by 'recogniz[ing] that [a] person who, in whole or in part, has discharged a duty which is owed by him [or her] but which as between himself [or herself] and another should have been discharged by the other, is entitled to indemnity'" (*Westbank Contr.*, 46 AD3d at 1189, quoting *McDermott*, 50 NY2d at 217). A claim for implied indemnification "is appropriate when a defendant's role in causing a plaintiff's injury is strictly passive and, consequently, its liability purely vicarious" (*Deyo v County of Broome*, 225 AD2d 865, 865 [3d Dept 1996] [internal quotation marks and citation omitted]; *see Hackert v Emmanuel Cong. United Church of Christ*, 130 AD3d 1292, 1295 [3d Dept 2015]).

Hanson and Barrett contend that implied indemnity is unavailable to Ruston because its potential liability is not strictly passive. Rather, Hanson and Barrett argue that the State's claims are based upon allegations of actual wrongdoing by All Around, not vicarious responsibility based on All Around's relationship with its paving subcontractor. Hanson and Barrett also emphasize that the Third-Party Complaint filed by All Around alleges that Ruston breached its warranties and improperly performed services under the Subcontract, which constitute allegations of direct wrongdoing. From this, Hanson and Barrett reason that if All Around and/or

Ruston are found liable, it will be due to their own breaches of contract or other wrongful actions – not because they are being held vicariously liable for wrongdoing committed by Barrett or Hanson – thereby precluding a claim by Ruston for common-law indemnification (*see e.g. Chatham Towers*, 151 AD3d at 420; *Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244-1245 [4th Dept 2012]).

In opposition, Ruston argues that it would be entitled to indemnification if "the State ultimately proves that the porous asphalt lot failed because the porous asphalt mixes furnished by [Hanson and Barrett] were defective or did not comply with the proposed job mix formulas that each of them had submitted and which the State had approved" (Ruston Opp Mem at 2).[2] In this regard, Ruston relies upon the State's amplification of its Complaint,[3] made in a verified bill of particulars, alleging that "the failure of the parking lot installed by All Around was caused by the . . . improper installation and construction of the parking lot by mixing at excessive temperatures, using an improper asphalt binder and *failure to comply with the job specifications including the specified job mix formula*" (NYSCEF Doc No. 46, ¶ 1 [emphasis added]).[4]

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[2] Hanson and Barrett argue that the State and All Around lack standing to oppose their motions (*see* NYSCEF Doc Nos. 58-60) because neither party has alleged claims against them (*see e.g. Walsh v New York Univ.*, 2019 NY Slip Op 30982[U], *4 [Sup Ct, NY County 2019]). However, as explained below, Hanson and Barrett are, in essence, challenging the sufficiency of All Around's Third-Party Complaint. In any event, Ruston has stated a legally sufficient claim for common-law indemnification irrespective of the arguments proffered by the State and All Around.

[3] The pertinent portion of the State's Complaint, submitted by Hanson, alleges that "[t]he porous asphalt pavement parking lot installed by [All Around] as part of the Project was inadequate and defective and failed," that the "[f]ailure of the porous asphalt parking lot . . . appeared within seven months of the date of physical completion," and that the "parking lot needs to be replaced" (Complaint, ¶¶ 7-9).

[4] As fourth-party defendants observe, this Verified Bill of Particulars indicates that the State's "claims are against All Around . . . only" (*id.*). But given the State's lack of contractual privity with the

Giving the operative pleadings a liberal construction, and reading them in light of the documentary evidence submitted by the parties concerning Hanson and Barrett's role in supplying materials to the Project (*see* NYSCEF Doc Nos. 17-18, 23-24, 39-43, 52-53), the Court concludes that the present record does not foreclose the prospect that Ruston may be found vicariously liable to All Around based solely on the failure of Hanson and/or Barrett to supply compliant materials for the Project.

In arguing to the contrary, Hanson and Barrett emphasize All Around's assertion of fault-based claims against Ruston. Thus, Barrett cites All Around's allegation "in the Third-Party Complaint that Ruston breached warranties with it and negligently performed services under the Subcontract, *i.e.* direct wrongdoing on its part" (NYSCEF Doc No. 66 at 3). And Hanson goes so far as to argue that "All Around's theory of liability is solely limited to the breach/wrongdoing of Ruston" (NYSCEF Doc No. 62, ¶ 6). But in addition to All Around's claims alleging active wrongdoing on the part of Ruston, the Third-Party Complaint also pleads causes of action for both contractual and common-law indemnification (*see* Third-Party Complaint, ¶¶ 15-18). In this regard, it is well settled that "a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery" (*Cohn v Lionel Corp.*, 21 NY2d 559, 563 [1968]; *see* CPLR 3017).

Relatedly, Hanson and Barrett emphasize that each of the State's claims in the main action are predicated on allegations of direct wrongdoing by All Around – the general contractor's alleged breaches of contract, breaches of warranty and negligence – and there are no

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other contractors involved in the paving project, All Around is the only party against whom the State's claims could be asserted.

allegations or claims of vicarious liability. From this, the fourth-party defendants argue that All Around will be unable to seek indemnity from Ruston and that any potential liability that Ruston faces necessarily will be based upon its own fault, thereby precluding the assertion of the indemnity claim alleged in the Fourth-Party Complaint.

But even assuming that Hanson and Barrett are free to challenge the legal underpinnings of the indemnity claims pleaded by All Around in the Third-Party Complaint, they have not affirmatively demonstrated the insufficiency of the claims or that Ruston's potential liability to All Around cannot be strictly passive. While common-law indemnity may be unavailable to a party found liable for breaching a construction contract, New York law does recognize a claim for implied contractual indemnification where a subcontractor's wrongful actions or omissions cause the general contractor to be liable under its contract with the owner (*see Matzinger v Mac II, LLC*, 2018 WL 3350328, *3, 2018 US Dist LEXIS 113612, *9 [SD NY, July 7, 2018, No. 17cv4813, Cote, J.]; *see also Menorah Nursing Home v Zukov*, 153 AD2d 13, 24 [2d Dept 1989]; *see generally Peoples' Democratic Republic of Yemen v Goodpasture, Inc.*, 782 F2d 346, 351-352 [2d Cir 1986]).[5]

[5] Hanson and Barrett's motions properly are treated as "narrowly framed post-answer CPLR 3211 (a) (7) ground(s) asserted in . . . summary judgment motion[s]" (*Chenango Contr., Inc. v Hughes Assoc.*, 128 AD3d 1150, 1151 [3d Dept 2015]). In analyzing the motions, the Court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation marks and citation omitted]). Accordingly, dismissal would not be warranted under CPLR 3211 (a) (7) if the allegations of a pleading support an implied contractual theory of indemnity rather than an indemnity obligation implied in law (*see Peoples' Democratic Republic of Yemen*, 782 F2d at 351-352).

Finally, given the procedural context of this case, it would be inappropriate for the Court to attempt to "'resolve the merits of [the indemnity] claim by making factual determinations'" (*Fitzgerald Morris Baker Firth P.C. v Mayor of the Vil. of Hoosick Falls*, 179 AD3d 1361, 1365 [3d Dept 2020], quoting *T. Lemme Mech., Inc. v Schalmont Cent. School Dist.*, 52 AD3d 1006, 1008 [3d Dept 2008]).

Accordingly, the Court concludes that Ruston adequately has stated a claim for common-law indemnification against the fourth-party defendants and that summary judgment to Hanson and/or Barrett would be inappropriate at this early stage of the litigation.

CONCLUSION

Based on the foregoing,[6] it is

ORDERED that the motions of fourth-party defendants Hanson Aggregates New York, LLC and Barrett Paving Materials, Inc. to dismiss the Fourth-Party Complaint and/or for summary judgment are granted to the extent indicated herein and are otherwise denied; and it is further

ORDERED that a remote preliminary conference shall be scheduled, and the parties are directed to confer in advance of such conference regarding the matters set forth in Commercial Division Rule 8, as well as the use of mediation or other forms of alternative dispute resolution to bring about an early resolution of this action.

[6] The Court has considered the parties' remaining arguments and contentions but finds them unavailing and/or unnecessary to reach in view of the disposition reached herein.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for third-party defendant/fourth-party plaintiff Ruston Paving Co., Inc. shall promptly serve notice of entry on all parties entitled to such notice (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: Albany, New York
October 26, 2020

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 6-66.

10/26/2020