

<b>Stackpole v Cohen, Ehrlich &amp; Frankel, LLP</b>
2009 NY Slip Op 30708(U)
March 23, 2009
Supreme Court, New York County
Docket Number: 117128/06
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN

PART 11

Index Number : 117128/2006

J.S.C.

STACKPOLE, SARAH

vs

COHEN, EHRLICH

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

**FILED**  
MAR 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, numbered \_\_\_\_\_, in this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is consolidated for determination with motion sequence no. 003 and the consolidated motions are determined in accordance with the annexed decision and order.

Dated: March 23, 2009

[Signature]  
HON. JOAN A. MADDEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
SARAH STACKPOLE, M.D.,

INDEX NO.: 117128/06

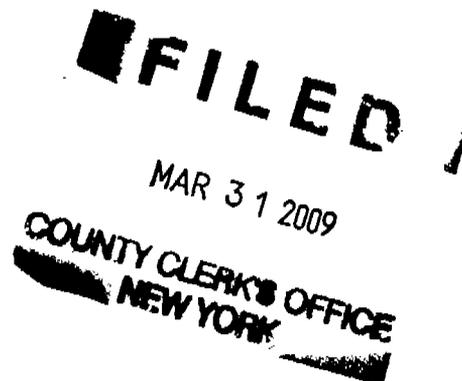
Plaintiff,

-against-

COHEN, EHRLICH & FRANKEL, LLP.,

Defendants.  
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JOAN A. MADDEN, J.



In this action for legal malpractice, third-party defendants The MAAI Group and Marsh Architecture and Interiors (collectively “Marsh”) (motion sequence no. 001), and third-party defendant 240-79 Owners Corp. (“Owners Corp.”) (motion sequence no. 003), are moving for an order pursuant to CPLR 3211(a)(7) dismissing the third-party complaint.<sup>1</sup> Defendant/third-party plaintiff Cohen, Ehrlich & Frankel, LLP (“Cohen Ehrlich”) opposes the motions. Plaintiff Sarah Stackpole, M.D. takes no position as to the merits of the motions.

Plaintiff is a medical doctor and defendant Cohen Ehrlich is the law firm plaintiff hired in March 2005 to represent her in connection with the purchase of a cooperative apartment located on the ground floor of 240 East 79<sup>th</sup> Street, in Manhattan. It is not disputed that plaintiff intended to use the apartment as a professional office for her medical practice. The complaint alleges that even though Cohen Ehrlich used a contract designed for purchasing residential as

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<sup>1</sup>Motion sequence nos. 001 and 003 are consolidated for determination. In motion sequence no. 002, third-party defendant First National Bank of Long Island also moved to dismiss the third-party action. That motion was permitted to be withdrawn, as the third-party claims against the bank were discontinued pursuant to stipulation filed June 30, 2008.

opposed to commercial property, the contract specifically stated that the apartment was to be used as a “doctor’s office” and for “professional” as opposed to residential use.

Plaintiff purchased the apartment on November 20, 2005 for approximately \$550,000. In November 2006, plaintiff commenced the main action against Cohen Ehrlich for legal malpractice.<sup>2</sup> The complaint alleges that the certificate of occupancy did not permit the use of the apartment as a doctor’s office or for any professional use, and that Cohen Ehrlich did not advise her of that fact or that she should review the certificate of occupancy, before she purchased the apartment. The complaint also alleges that Cohen Ehrlich did not include in the contract of sale, provisions that the seller represents and warrants that the apartment could be used as a doctor’s office, and that plaintiff had an opportunity to require the seller to cure the deficiency in the certificate of occupancy prior to closing, or that plaintiff had the right to demand that the contract of sale be amended so that the representations and warranties of the contract could survive the closing so she could maintain an action against the seller for rescission. The complaint further alleges that Cohen Ehrlich failed to advise her of a “serious issue” regarding Local Law 58, which plaintiff characterizes as “New York’s version of the Americans with Disabilities Act.”

Plaintiff alleges that she did not learn about the issues regarding the certificate of occupancy and Local Law 58, until “[s]hortly after she acquired the apartment.” The complaint asserts that plaintiff “has been able to obtain a modification of the certificate of occupancy,” and

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<sup>2</sup>Although the complaint does not specifically denominate the legal theory for plaintiff’s claim against defendant law firm, the complaint asserts a single cause of action for legal malpractice. See Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1 (1<sup>st</sup> Dept 2008); Schauer v. Joyce, 54 NY2d 1 (1981); Comi v. Breslin & Breslin, 257 AD2d 754 (3<sup>rd</sup> Dept 1999).

[\* 4 ]

“is able to comply with Local Law 58 . . . [and] renovate the apartment for use as her professional office,” but she has been “compelled to expend hundreds of thousands of dollars to date to renovate the apartment for use as her medical office” and to maintain her medical practice in her former office rather than in the apartment. The complaint demands judgment against Cohen Ehrlich in the “sum of not less than \$600,000.”

In March 2008, Cohen Ehrlich commenced the third-party action, asserting claims for common law indemnification and contribution, against Marsh and Owners Corp. The third-party complaint alleges that before plaintiff purchased the apartment, she hired Marsh to provide architectural and engineering services in connection with the potential renovations or alterations to the apartment, and Marsh failed to advise Cohen Ehrlich of its relationship with plaintiff and the potential renovations “and their compatibility with the certificate of occupancy.” The third-party complaint further alleges that Marsh either knew or should have known about the content of the certificate of occupancy, and if Marsh had such knowledge it either advised plaintiff before she purchased the apartment, or should have done so.

As to third-party defendant Owners Corp., the cooperative corporation that owns the building, the third-party complaint alleges that Owners Corp. approved plaintiff’s application to purchase the apartment, knowing that she intended to use it solely as her medical office and that the previous occupant of the apartment had utilized it as a medical office. The third-party complaint also alleges that Owners Corp. had been “inside the apartment within three years of plaintiff’s purchase,” and before plaintiff purchased the apartment, Owners Corp. had a copy and was aware of the contents of the certificate of occupancy. The third-party complaint further alleges that Owners Corp. “acquiesced” in the apartment being used as a medical office,

\* 5 ]  
“violated its duty to exercise care to prevent harm to plaintiff,” and “violated the New York City Administrative Code and other applicable statutes and regulations.”

Third-party defendants Marsh and Owners Corp. are now moving to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.<sup>3</sup>

On a motion to dismiss addressed to the sufficiency of the pleadings, the claims must be liberally construed, and the Court must accept all allegations as true and accord them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. See Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1<sup>st</sup> Dept 2005); DeMicco Bros. Inc. v. Consolidated Edison Co., 8 AD3d 99 (1<sup>st</sup> Dept 2004). In determining a motion to dismiss for failure to state a cause of action, the test is simply whether the proponent of the pleading has a cause of action, not whether they have stated one. See Leon v. Martinez, 84 NY2d 83, 88 (1994); Wiener v. Lazard Freres & Co., 241 AD2d 114 (1<sup>st</sup> Dept 1998).

The motions to dismiss are granted only to the extent of dismissing the indemnification claims against Marsh and Owners Corp., and the contribution claim against Owners Corp.; the contribution claim against Marsh shall stand, at least until discovery in the third-party action has been conducted.<sup>4</sup>

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<sup>3</sup>While third-party defendant Marsh asserts, as an additional ground for dismissal, a defense based on documentary evidence pursuant to CPLR 3211(a)(1), it produces no document which “utterly refutes” the third-party complaint’s factual allegations and “conclusively establishing a defense as a matter of law.” Goshen v. Mutual Life Insurance Co., 98 NY2d 314, 326 (2002); accord Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 289 (1<sup>st</sup> Dept 2003).

<sup>4</sup>Even though plaintiff and defendant were deposed on August 14, 2007, the third-party action was not commenced until March 2008, and in lieu of answering, third-party defendants

It is not disputed that defendant/third-party plaintiff Cohen Ehrlich relies solely on a theory of common law indemnification. “Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer.” Trustees of Columbia University v. Mitchell/Giurgola Assocs, 109 AD2d 449, 451 (1<sup>st</sup> Dept 1985). “Common law indemnification is predicated on ‘vicarious liability without actual fault,’ which necessitates that ‘a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine.’” Edge Management Consulting, Inc. v. Blank, 25 AD3d 364 (1<sup>st</sup> Dept), lv app dism, 7 NY3d 864 (2006)(quoting Trump Village Section 3, Inc. v. New York State Housing Finance Agency, 307 AD2d 891 [1<sup>st</sup> Dept], lv app den, 1 NY3d 504 [2003]).

Common law indemnification is not available in this case, as plaintiff’s claims against Cohen Ehrlich are not based upon any theory of vicarious liability. See Trump Village Section 3, Inc. v. New York State Housing Finance Agency, supra at 895-896. To the contrary, plaintiff asserts a direct claim against her former attorney for legal malpractice. Thus, since the liability of Cohen Ehrlich would be based on such defendant’s own participation in the acts giving rise to the loss, that is, as an actual wrongdoer, Cohen Ehrlich is precluded from seeking recovery on the basis of common law indemnity. See Edge Management Consulting, Inc. v. Blank, supra at 367; Trump Village Section 3, Inc. v. New York State Housing Finance Agency, supra at 896.

Turning to the third-party claims for contribution, “[c]ontribution is generally available as a remedy ‘when two or more tortfeasors share in responsibility for an injury in violation of duties

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have made the instant CPLR 3211 pre-answer motions to dismiss.

[\* 7 ]

they respectively owed to the injured person.” Id (quoting Garrett v. Holiday Inns, Inc., 58 NY2d 253, 258 [1983]). A claim for contribution can be asserted when the contributor owes a duty to either the injured person or the defendant who has been held liable. Id. Moreover, contribution is available whether the culpable parties are allegedly liable to the injured party under the same or different legal theories. See Raquet v. Brayn, 90 NY2d 177, 183 (1997).

In moving to dismiss the contribution claim, Marsh argues that plaintiff is seeking “purely economic loss” resulting from a breach of contract, which is not subject to contribution. Marsh’s argument is without merit, as plaintiff asserts a claim for legal malpractice which sounds in tort and to which a claim for contribution is clearly applicable. See Schauer v. Joyce, 54 NY2d 1 (1981); Comi v. Breslin & Breslin, 257 AD2d 754 (3<sup>rd</sup> Dept 1999).

Specifically, plaintiff seeks damages resulting from her former attorney’s alleged negligence in failing, *inter alia*, to discover and protect her against, the certificate of occupancy that did not permit professional use of the apartment. See id. The third-party complaint alleges that before purchasing the apartment, plaintiff hired Marsh as an architectural and engineering firm to prepare renovation or alteration plans for the apartment, and at that time, Marsh knew plaintiff intended to use the apartment as a medical office. The third-party complaint further alleges that Marsh knew or should have known that the certificate of occupancy was limited to residential use, but failed to inform plaintiff before she purchased the apartment, and as a result, its actions or omissions contributed to plaintiff’s loss. Based on the foregoing, where plaintiff hired Marsh before she purchased the apartment in connection with the planned renovations or alterations to the apartment, the third-party complaint provides a sufficient factual and legal basis to support a claim that Marsh owed a duty to plaintiff. See Schauer v. Joyce, *supra*; Comi

[\* 8 ]  
v. Breslin & Breslin, supra. Thus, the contribution claim against Marsh is sufficiently pleaded to withstand the motion to dismiss.

The court reaches a different conclusion with respect to the contribution claim against Owners Corp. The third-party complaint alleges that the cooperative corporation “acquiesced” in the apartment being used as a medical office and “violated its duty to exercise care to prevent harm to plaintiff.” Even assuming that the corporation knew the prior occupant used the apartment as a medical office, knew plaintiff intended to continue that use, and knew the certificate of occupancy permitted only residential use, Cohen Ehrlich provides neither a factual nor legal basis to support its claim that the corporation owed a duty to plaintiff, as a prospective purchaser, to disclose such information. While Cohen Ehrlich argues in opposition to the motion, that the corporation’s consent to plaintiff’s purchase and the nature of the certificate of occupancy, “gives rise to the potential for liability on its part,” it cites no relevant legal authority. The one case cited, Howard v. Berkman, Henoch, Peterson & Peddy, 5 Misc3d 1020(A) (Civ Ct, NY Co 2004), is not on point. Although the court in that case found that a law firm committed legal malpractice for not obtaining a temporary or final certificate of occupancy before the closing of title, the case did not involve the purchase of a cooperative apartment or any issue as to a cooperative corporation’s duty to a prospective purchaser. Thus, absent a sufficient factual basis or legal authority establishing a duty running from Owners Corp. to plaintiff, Cohen Ehrlich cannot recover in contribution against Owners Corp., and such claim is dismissed.

Accordingly, it is hereby

ORDERED that motion to dismiss by third-party defendant 240 79 Owners Corp. is granted, and the third-party complaint is dismissed as against third-party defendant 240-79

Owners Corp., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion to dismiss by third-party defendants The MAAI Group and Marsh Architecture and Interiors, is granted only to the extent of dismissing the third-party claim for indemnification, and the motion is denied as to the contribution claim as against said third-party defendants; and it is further

ORDERED that third-party defendants The MAAI Group and Marsh Architecture and Interiors shall serve and file answers to the third-party complaint within 20 days of the date of this order; and it is further

ORDERED that the remaining parties in this action are directed to appear for a conference on April 9, 2009, at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: March 23 2009

ENTER:

  
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J.S.C.

**FILED**  
MAR 31 2009  
COUNTY CLERK'S OFFICE  
NEW YORK