

Tanger v Ferrer

2010 NY Slip Op 31355(U)

May 26, 2010

Sup Ct, NY County

Docket Number: 116838/05

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: FRIEDMAN
MARCY S. FRIEDMAN Justice

PART 57

STEVEN TANGEN

INDEX NO. 116838/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 6

ALFRED FERRARO III

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

1

Answering Affidavits – Exhibits _____

2

Replying Affidavits _____

Cross-Motion: Yes No

Memo of Law M-14

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

JUN 01 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/25/10

M.S.F.
MARCY S. FRIEDMAN 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):

6-1-10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

STEVEN TANGER, x

Plaintiff,

- against -

Index No.: 116838/05

ALFRED FERRER III, et al.,

Defendants.

DECISION/ORDER

ALFRED FERRER III, et al.,

Third-Party Plaintiffs,

- against -

Third-Party Index No.:
590531/08

DLA PIPER US LLP,

Third-party Defendant.

FILED
JUN 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiff Steven Tanger seeks damages against defendants/third-party plaintiffs Alfred Ferrer and Eaton & Van Winkle, LLP (“E&V”) for legal malpractice. Third-party defendant DLA Piper US LLP (“DLA Piper”) moves to dismiss the amended third-party complaint pursuant to CPLR 3211(a)(7). The amended third-party complaint alleges causes of action for contribution and contractual indemnification on behalf of Ferrer and E&V against DLA Piper.¹

In the main action, Tanger alleges that Ferrer committed malpractice while he was representing Tanger and his wife in several protracted landlord-tenant actions. Ferrer represented

¹ By order dated July 9, 2009, this court dismissed Ferrer’s and E&V’s claims against DLA Piper for common law indemnification, and granted leave to DLA Piper to renew the branch of its motion to dismiss the contribution claims. The amended third-party complaint that is the subject of the instant motion repleads the common law indemnification claim previously dismissed by the court. By stipulation of the parties dated December 3, 2009, that claim was withdrawn.

the Tangers from 1991 through October 2005. (See Complaint, ¶ 36.) The main action alleges that defendant Ferrer committed malpractice by, among other acts, negligently preparing three tenders pursuant to CPLR 3219, in January 1995, April 1997, and August 1998. (See Complaint, ¶¶ 9-12, 34-37.)

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].)

E&V seeks contribution from DLA Piper based on its allegation that if Tanger sustained damages, said damages were caused by the malpractice of third-party defendant DLA Piper. (See Amended Third-Party Complaint, ¶ 24.) Here, there is no dispute that the 1995 and 1997 tenders were prepared while Ferrer was employed at DLA Piper, and the 1998 tender was prepared while Ferrer was at E&V. (See Third-party Complaint, ¶¶ 18-20; DLA Piper’s Memo. in Support, at 6.) There is no allegation in either the main action or the third-party action of any basis on which E&V could be found liable for the tenders submitted by Ferrer while he was at DLA Piper. E&V’s claim for contribution must therefore fail. To the extent that E&V pleads a contractual indemnity claim against DLA Piper, the claim should also be dismissed, as there is no indemnification agreement between the parties.²

² Although third-party plaintiffs’ counsel appears to argue that the contractual indemnification claim is asserted only on behalf of Ferrer (see E&V’s Memo. in Opp., at 11-12), the amended third-party complaint alleges the contractual indemnity claim on behalf of “third-party plaintiffs.” (See Amended

As to individual third-party plaintiff Ferrer's claim for contribution against DLA Piper, it is well settled that "[w]hile contribution or indemnity may be sought from one who is only vicariously liable for the injury involved, it may not be sought on behalf of the tortfeasor whose negligence is being imputed to those vicariously liable." (Ruddock v Boland Rentals, Inc., 5 AD3d 368, 370 [2d Dept 2004] [internal quotation marks and citation omitted]. See also Rogers v Dorchester Assocs., 32 NY2d 553, 566 [1973]; Barbosa v Dean, 55 AD2d 573 [1st Dept 1976], lv denied 41 NY2d 802 [1977]; Maurillo v Park Slope U-Haul, 194 AD2d 142 [2d Dept 1993].) Here, Ferrer is the alleged tortfeasor. The main action does not assert a claim against DLA Piper based on negligence, vicarious liability or any other theory. Moreover, no facts are alleged in the main action or the third-party action to support a claim that DLA Piper was negligent in supervising or controlling Ferrer's work. Ferrer's claim for contribution against DLA Piper should accordingly be dismissed.

As to Ferrer's claim against DLA Piper for contractual indemnification, the court holds as a matter of law that section 12.5 of the partnership agreement between Ferrer and DLA Piper, on which Ferrer relies, does not provide for DLA Piper to indemnify or provide contribution to Ferrer for the acts of malpractice alleged against him in the main action. (See Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989] ["When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."]) The parties agree that this section apportions liability among partners that are held vicariously liable for tortious acts of other partners. (See E&V Memo. in Opp. at 11.) Here, however, as held above, Ferrer is the active

Third-party complaint, ¶ 24.)

* 5]
tortfeasor. Ferrer's claim for contractual indemnification should therefore be dismissed.

In view of this holding, the court need not reach the question of whether the partnership agreement applies to former partners such as Ferrer, or whether the agreement obligates Ferrer and DLA Piper to arbitrate their disputes.

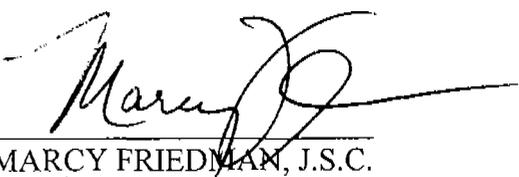
It is accordingly hereby ORDERED that the motion of DLA Piper is granted to the extent that it is

ORDERED that the third-party complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
May 26, 2010



MARCY FRIEDMAN, J.S.C.

FILED
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