

Khadidiatou Bah v Stuart
2013 NY Slip Op 30171(U)
January 17, 2013
Supreme Court, New York County
Docket Number: 113354/06
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 113354/2006
BAH, KHADIDIATOU
vs.
STUART, CAL
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. 113354/06
MOTION DATE _____
MOTION SEQ. NO. 004

The following papers, numbered 1 to 16, were read on this motion to dismiss 3rd party complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-10
Answering Affidavits — Exhibits _____ No(s). 11-15
Replying Affidavits _____ No(s). 16

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

FILED
JAN 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: January 17, 2013

Joan M. Kenney, J.S.C.
JOAN M. KENNEY

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Khadidiatou Bah and Washington
Mutual Bank,

Plaintiff,

-against-

Cal Stuart aka "John Russo,"
Beneficial Settlement Services,
John A. Dalley, and CILMI &
Associates PLLC,

Defendants.

DECISION AND ORDER
Index Number: 113354/06
Motion Seq. No.: 004

-----X
CILMI & Associated PLLC,

Third-Party-Plaintiff,

-against-

Commonwealth Land Title
Insurance Company,

Third-Party-Defendant,

FILED
JAN 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

-----X
KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1-10
Opposition Affirmation, Exhibits, and Memo of Law	11-15
Reply Affirmation	16

In this action seeking contribution and/or indemnification, third-party defendant, Commonwealth Land Title Insurance Company (Commonwealth), moves for an Order, pursuant to CPLR § 3211(a)(1) and (7), dismissing the third-party complaint.

Factual Background

Plaintiffs Bah (Bah) and Washington Mutual Bank (WaMu) commenced this action on or about September 18, 2006, seeking to recover proceeds from a real estate closing that were allegedly converted by co-defendants Cal Stuart, John Dalley, and Beneficial Settlement Services

(Beneficial). Defendant and third-party-plaintiff CILMI and Associates PLLC (CILMI) alleges that it had no part in the alleged conversion. Nevertheless, plaintiff is suing CILMI for fraud and legal malpractice.

Briefly, on August 22, 2005, plaintiff Bah purchased real property located at 721 Commonwealth Ave., Bronx, NY (the property), from Karamoko Diabi (seller). The price of the property was \$360,000.00 and in connection with the purchase, Bah obtained a mortgage from WaMu in the amount of \$328,000.00.

The seller had a prior mortgage on the property in the amount of \$305,733.54, to be satisfied with the proceeds of the sale of the property. Plaintiffs allege that at the closing, on August 22, 2005, CILMI & Associates (CILMI), on behalf of WaMu, issued a check to satisfy the prior mortgage to Beneficial. Allegedly, those funds were stolen and converted by co-defendants Stuart, Beneficial, and Dalley, and not used to satisfy the prior mortgage; all of this after Stuart told CILMI, and plaintiffs that the money was needed in escrow to secure the title insurance from Commonwealth. The escrow account was created by Union National Abstract, LLC (Union), Commonwealth's policy-issuing agent. CILMI believes that because Union is an agent of Commonwealth then Cal Stuart is an agent of commonwealth, because he pushed for the money to be placed into the escrow account.

Commonwealth issued the title insurance policy to WaMu for the closing of the property. Third-party-plaintiff alleges that not only is Commonwealth responsible for insuring this loss, but that Cal Stuart was an agent working for Commonwealth, making Commonwealth culpable for some of the loss. (see also, The third-party summons and complaint, annexed as Exhibit B to the moving papers). The third-party summons and complaint filed against Commonwealth by CILMI alleges that Commonwealth should be responsible for contribution should WaMu prevail against

CILMI.

Arguments

Third-party-defendant claims that CILMI fails to state a claim for contractual indemnification and common law indemnification, because there was no privity between CILMI and Commonwealth.

Third-party-plaintiff contends that, regardless of privity, Commonwealth is liable as they are responsible for some or all of the damage because defendant Cal Stuart was acting as Commonwealth's agent throughout the transaction.

Commonwealth denies that defendant Cal Stuart was their agent.

Discussion

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 A.D.2d 98, 489 N.Y.S.2d 231 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (*Joel v. Weber*, 166 A.D.2d 130, 569 N.Y.S.2d 955 [1st Dept, 1991]). A motion to dismiss is made pursuant to CPLR 3211(a)(7), which allows such a motion on the ground that the pleading fails to state a cause of action. The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance

with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced.

“Contribution is generally available as a remedy ‘when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person.’ (*Garrett v Holiday Inns*, 58 NY2d 253..., quoting *Smith v Sapienza*, 52 NY2d 82...). ‘A contribution claim can be made even when the contributor has no duty to the injured plaintiff.’ (*Raquet v Braun*, 90 NY2d at 182). In such situations, a claim of contribution may be asserted if there has been a breach of duty that runs from the contributor to the defendant who has been held liable. The ‘critical requirement’ for apportionment by contribution under CPLR Article 14 is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought.’ (*Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891 [1st Dept. 2003]). CPLR 1401 states that “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.”

A right to indemnity, as distinguished from contribution, is not dependent upon legislative will, but springs from contract, express or implied, and full, not partial reimbursement is sought. (*McDermott v City of New York*, 50 NY2d 211 [1980]).

Pursuant to CPLR 1007, "After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant..." Further, 1007 also states that "suits against a third party can only be maintained for contribution or indemnification claims." (*Phoenix Erectors, LLC v Fogarty*, 90 AD3d 468 [1st Dept. 2011]).

Commonwealth's self-serving statement that they had no privity with CILMI is unsupported by admissible evidence and is insufficient, at this juncture, to grant the application to dismiss the third-party complaint. It is noted that Commonwealth may still be liable for all or part of the claims asserted by plaintiff. Whether it be contributory or full indemnification, Commonwealth may be liable as the principal to Cal Stuart, the principal to Union, or as the insurer of WaMu. However, the exact nature of the relationships between Commonwealth and the parties to this action during the course of the transaction and sale of the property has not been conclusively established by admissible documentary evidence, no doubt due to the fact that discovery on this 2006 matter is not complete. In fact, it is asserted that discovery on this matter has yet to begin. Accordingly, it is hereby

ORDERED, that third-party-defendant's motion, to dismiss the third-party-action, is denied, in its entirety; and it is further

ORDERED, that the parties appear for a preliminary conference on February 14, 2013 at 9:30 am in Room 304 located at 71 Thomas Street, New York, NY 10013.

Dated: 1/17/13

FILED
JAN 29 2013
NEW YORK COUNTY CLERK'S OFFICE



Joan M. Kenney, J.S.C.