

**QBE Ins. Corp. v Maloof, Lebowitz, Connahan & Oleske, P.C.**

2015 NY Slip Op 32113(U)

May 13, 2015

Supreme Court, New York County

Docket Number: 600412/2010

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

EA  
5/14/15  
E

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

**PRESENT: HON. CAROL EDMEAD**

**PART 35**

Index Number : 600412/2010  
QBE INSURANCE CORP  
vs  
MALOOF LEBOWITZ CONNAHAN &  
Sequence Number : 009  
SUMMARY JUDGMENT

*Justice*  
**RECEIVED**  
MAY 14 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

**FILED**

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

MAY 14 2015

**NEW YORK  
COUNTY CLERK'S OFFICE**

Motions 009, 010, and 011 are consolidated for disposition and decided herein as follows:

**Based on the accompanying Memorandum Decision, it is hereby**

ORDERED that defendants Maloof Lebovitz, Connahan & Oleske, P.C., Jack Maloof, and Jerald Oleske's motion for summary judgment dismissing defendant Claims Service Bureau's cross claims (motion seq. No. 009) is granted; and it is further

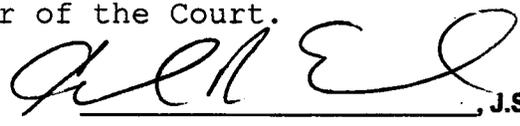
ORDERED that second third-party defendant Rockville Risk Management Associates, Inc.'s motion for summary judgment dismissing the second third-party plaintiff complaint (motion seq. No. 010) is granted; and it is further

ORDERED that third-party defendant Newman Myers Kreines Gross Harris, P.C.'s motion for summary judgment dismissing third-party defendant Claims Service Bureau (CSB)'s cross claims (motion seq. No. 011) is granted; and it is further

ORDERED that defendants Maloof Lebovitz, Connahan & Oleske, P.C., Jack Maloof, and Jerald Oleske shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/13/15

  
\_\_\_\_\_, J.S.C.

**HON. CAROL EDMEAD**

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

- 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: PART 35

-----X  
QBE INSURANCE CORPORATION,

Plaintiff,

Index No. 600412/10  
Motion Seq. Nos.  
009, 010, 011

MALOOF, LEBOWITZ, CONNAHAN & OLESKE,  
P.C., JACK A. MALOOF, ESQ., JERALD  
F. OLESKE, ESQ., and CLAIMS SERVICE  
BUREAU OF NEW YORK INC.,

Defendants.

-----X  
MALOOF, LEBOWITZ, CONNAHAN & OLESKE,  
P.C., JACK A. MALOOF, ESQ., and JERALD  
F. OLESKE, ESQ.,

Third-party Plaintiffs,

Third-party index  
No. 590715/11

-against-

CLAIMS SERVICE BUREAU AND NEWMAN FITCH  
ALTHEIM MYERS, P.C. A/K/A NEWMAN MYERS  
KREINES GROSS HARRIS, P.C.,

**FILED**

MAY 14 2015

Third-party Defendants.

-----X  
CLAIMS SERVICE BUREAU OF NEW YORK, COUNTY CLERKS OFFICE

Second Third-party Defendants,

Second Third-party  
index No. 590885/13

-against-

ROCKVILLE RISK MANAGEMENT ASSOCIATES,  
INC.,

Second Third-party Defendants.

-----X  
**CAROL R. EDMEAD, J.:**

In this attorney malpractice action, defendants/third-party plaintiffs Maloof, Lebovitz, Connahan & Oleske, P.C., Jack Maloof, and Jerald Oleske (collectively, Maloof), move, pursuant to CPLR 3212, for summary judgment dismissing the cross claims of defendant/third-party defendant/second third-party plaintiff

Claims Service Bureau (CSB) (motion sequence No. 009). Second third-party defendant Rockville Risk Management Associates, Inc. (Rockville) moves for summary judgment dismissing CSB's second third-party complaint (motion sequence No. 010). Third-party defendant Newman Myers Kreines Gross Harris, P.C. (Newman) moves for summary judgment dismissing CSB's cross claims as against it (motion seq. No. 011). All three motions against CSB are consolidated for disposition.

#### **BACKGROUND**

This case arises from an underlying personal injury action in Kings County entitled *Wright v AWL Industries, Inc.* (index No. 26835/05) and a related coverage action in this county entitled *AWL Indus., Inc. & Virginia Surety Co., Inc. v QBE Insur. Corp.*, index No. 600275/06. In the latter action, plaintiff, QBE Insurance Corporation (QBE), which was represented by Maloof, was found to owe coverage for two reasons: (1) the plaintiff in the coverage action, AWL Industries Inc., a general contractor, was an additional insured under the contract between the general contractor and a subcontractor insured by QBE; and (2) QBE's answer was struck because of failures to comply with discovery. QBE, tendered the full amount of a \$1,000,000 policy in order to settle the underlying personal injury action.

After QBE commenced this action against Maloof for legal

malpractice,<sup>1</sup> Maloof brought third-party claims against CSB (QBE's third-party administrator) and Newman (who substituted as counsel for Maloof in the coverage action in February 2007. CSB brought a third-party claim against Rockville Risk Management (Rockville), alleging that Rockville took over from it as QBE's third-party administrator starting in November 2006.

QBE has since settled its claims against Maloof; all that remains of QBE's complaint is its contractual claim against CSB. Further, Maloof has voluntarily discontinued its third-party action against Newman, and Rockville has discontinued its cross claims against Maloof.

As for CSB's claims against the moving parties, it seeks common-law indemnification and contribution against Maloof, Newman, and Rockville.

#### DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

---

<sup>1</sup> QBE's complaint alleged that Maloof was liable in malpractice for its discovery failures as well as its failure to argue that the general contractor was not an additional insured under the QBE policy as the contract between QBE's insured and the general contractor was not signed until after the underlying plaintiff's accident.

[1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, “`regardless of the sufficiency of the opposing papers’” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

**I. Maloof’s Motion to Dismiss CSB’s Indemnification and Contribution Claims**

**A. Indemnification**

Maloof argues that, if CSB is found liable to QBE, then the court will necessarily have found that CSB was actively at fault. As such, Maloof contends, CSB may not avail itself of common-law indemnification.

In opposition, CSB argues two points: that the QBE/Maloof settlement does not extinguish its indemnification claim against Maloof and that Maloof’s application to dismiss that claim is premature. Maloof acknowledges that the indemnification claim against it is not extinguished by operation of General Obligations Law § 15-108 (b). And, as to the ripeness, CSB argues that Maloof’s application is premature because the court has not yet determined whether CSB is liable to QBE. CSB contends that if it is found liable, such liability would be triggered vicariously through the actions of Maloof and the other parties, rather than through its own fault.

CSB is correct that the motion is premature *if* there is a possibility that CSB will be held liable solely for the fault of

Maloof. However, for the reasons set forth below, this application is not premature, as there is no danger that Maloof will be unjustly enriched and no possibility that CSB will be entitled to common-law indemnification.

Common-law negligence "is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). Thus, courts imply an indemnification agreement requiring the party "actively at fault in bringing about the injury" to indemnify another party that "is held responsible solely by operation of law because of [its] relation to the actual wrongdoer" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [internal quotation marks and citation omitted]).

CSB's liability hinges on an indemnification provision in its contract with QBE, which provides that it must

"indemnify, defend, reimburse, and hold harmless [QBE] . . . from, for and against any and all liability, loss, cost, expense (including, without limitation, attorney's fees and costs) incurred as a result of [CSB's] act or failure to act with respect to any Claim, except to the extent that [CSB's] act or failure to act was at the direction of [QBE]."

It is clear that this provision is narrowly constructed to expose CSB to liability only for its own fault. The complaint alleges three predicates of liability under this provision based on three omissions: (1) failure to advise QBE of a defense to

coverage based on late notice; (2) failure to notify QBE that the plaintiff's in the coverage action were seeking to strike the answer; and (3) failure to provide Maloof with a copy of a statement by a principal of QBE's insured which indicated that there was no contract between the insured and the general contractor at the time of the accident.

CSB argues that none of these alleged omissions could possibly have given rise to QBE's damages. Specifically, CSB argues that it did not cause QBE's losses because QBE terminated CSB before the court struck QBE's answer and the First Department subsequently relied on the striking of the answer in upholding the trial court's declaration of coverage (*see AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [1st Dept 2009]).

However, these arguments are better directed against QBE, rather than Maloof. There is no possibility that CSB will be held liable for Maloof's wrongdoing: QBE alleges that CSB is directly, rather than vicariously, liable. Indeed, under the QBE/CSB contract, QBE must show active wrongdoing in order to recover against CSB. Thus, common-law indemnification is not applicable.

Accordingly, the branch of Maloof's motion seeking dismissal of CSB's indemnification claim against it is granted.

#### **B. Contribution**

As QBE and Maloof have settled, and QBE has stipulated to

discontinue against Maloof in July 2014, Maloof argues that CSB's contribution claim must be dismissed under General Obligations Law § 15-108 (b), which provides, in relevant part, that "release given in good faith by the injured person to one tortfeasor . . . relieves him from liability to any other person for contribution." CSB concedes that its contribution claim does not survive the settlement of QBE's claims against Maloof. As such, the branch of Maloof's motion seeking dismissal of QBE's cross claim for contribution is also granted.

## **II. Rockville's Motion to Dismiss CSB's Claims for Indemnification and Contribution**

### **A. Indemnification**

The reasoning behind the dismissal of CSB's indemnification claim against Maloof applies with equal weight to this claim. As such, the branch of Rockville's motion seeking dismissal of CSB's indemnification claim against it is granted.

### **B. Contribution**

Rockville argues, among other things, that CSB's contribution claim against it should be dismissed as contribution is unavailable for contractual claims. CSB argues that QBE's contractual indemnification claim is essentially a negligence claim, so contribution is available to it.

CPLR 1401, "Claim for contribution," provides, in relevant part, 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." The Court of Appeals has held that the legislative history of this statute makes clear "[t]hat purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]).

Courts have routinely upheld this principle (see e.g. *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]; *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]). In short, it is plain that "contribution is unavailable where . . . the underlying contractual claims seek purely economic damages" (*Kleinberg v 516 W. 19th LLC*, 121 AD3d 459, 460 [1st Dept 2014]).

Here, CSB's attempt to characterize QBE's claim against it as contractual in form but tortious in substance is unpersuasive. QBE does not allege damages for "personal injury, injury to property or wrongful death" as those terms are contemplated by CPLR 1401. Instead, it seeks purely economic losses under an indemnification provision in its contract with CSB. As such, contribution is not available. Accordingly, the branch of Rockville's motion seeking dismissal of CSB's claim for

contribution is granted.

**III. Newman's Motion to Dismiss CSB's Claims for Indemnification and Contribution**

Newman is entitled to summary judgment dismissing CSB's claims for contribution and indemnification for the reasons discussed above (see sections I [A] and II [B], *supra*).

**CONCLUSION**

Accordingly, it is

ORDERED that defendants Maloof Lebovitz, Connahan & Oleske, P.C., Jack Maloof, and Jerald Oleske's motion for summary judgment dismissing defendant Claims Service Bureau's cross claims (motion seq. No. 009) is granted; and it is further

ORDERED that second third-party defendant Rockville Risk Management Associates, Inc.'s motion for summary judgment dismissing the second third-party plaintiff complaint (motion seq. No. 010) is granted; and it is further

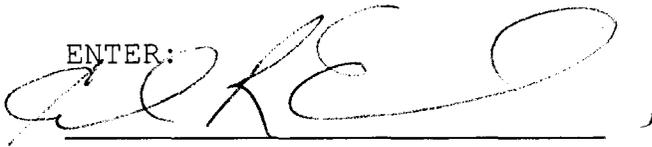
ORDERED that third-party defendant Newman Myers Kreines Gross Harris, P.C.'s motion for summary judgment dismissing third-party defendant Claims Service Bureau (CSB)'s cross claims (motion seq. No. 011) is granted; and it is further

ORDERED that defendants Maloof Lebovitz, Connahan & Oleske, P.C., Jack Maloof, and Jerald Oleske shall serve a copy of this

order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 13, 2015

ENTER:  
  
Hon. CAROL R. EDMED, J.S.C.  
**HON. CAROL EDMED**

**FILED**  
MAY 14 2015  
NEW YORK  
COUNTY CLERK'S OFFICE