

**Bloostein v Morrison Cohen LLP**

2016 NY Slip Op 31309(U)

July 11, 2016

Supreme Court, New York County

Docket Number: 651242/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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JONATHAN BLOOSTEIN, ET. AL.,

Plaintiff,

-against-

DECISION AND  
ORDER

Index No.  
651242/2012  
Mot. Seq. 002, 003

MORRISON COHEN LLP, BRIAN SNARR  
and DOES 1-10,

Defendants.

-----X  
MORRISON COHEN LLP, BRIAN SNARR  
and DOES 1-10,

Third Party Plaintiffs,

-against-

STONEBRIDGE CAPITAL, LLC, and BROWN  
RUDNICK, LLP,

Third Party Defendants.

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**HON. ANIL C. SINGH, J.:**

In this action for contribution and indemnification, third-party defendants Stonebridge Capital, LLC (“Stonebridge”) and Brown Rudnick, LLP (“Brown Rudnick”) move to dismiss the second amended third-party complaint of third-party plaintiffs Morrison Cohen, LLP, Brian Snarr, and Does 1-10 (collectively “Morrison Cohen”) pursuant to CPLR 3211 (1) and (7). Morrison Cohen opposes the motion.

Motion Sequence 002 and 003 are consolidated for disposition.

Plaintiffs in the main action (the “investors”) are small to mid-sized business owners who sold shares of their businesses to their employees through Employee Stock Ownership Plan (“ESOP”) transactions. Stonebridge Capital LLC (“Stonebridge”), a financial services company, was engaged by the investors to structure the reinvestment of their ESOP proceeds (the “transaction”). Stonebridge and each of the plaintiff investors entered into a February 28, 2007 agreement (the “Stonebridge/Investor agreement”) to memorialize the engagement.<sup>1</sup>

In or around the first half of 2007, the plaintiff investors engaged Morrison Cohen as attorneys to represent and advise them in connection with the transaction. The advice rendered by Morrison Cohen to the investors form the basis for the main action.

Based on the moving papers in this case, there is no written agreement between Stonebridge and Morrison Cohen.

Stonebridge independently retained two law firms to represent their interests in the transaction, including Brown Rudnick. The terms of Stonebridge’s retention of Brown Rudnick are set forth in the March 16, 2006 Stonebridge/ Brown Rudnick engagement letter.

According to the allegations in the complaint, Brown Rudnick was the primary drafter of the transaction documents. Shortly before the closing of the transaction, Stonebridge’s counsel, Brown Rudnick altered a provision of the transaction document and allegedly created a fundamental risk to which the investors claim they had not previously agreed. As a result, the investors allege that the lender was able to declare the loan to be in default causing the investors to incur substantial capital gain liability. The transaction closed on September 26, 2007.

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<sup>1</sup> The parties have only produced a sample agreement but not the specific agreements for each plaintiff investor.

The plaintiff investors commenced the main action against Morrison Cohen for, *inter alia*, legal malpractice. In the main action, plaintiffs allege that Morrison Cohen was negligent in failing to address the inclusion of the new provision and as a direct result of this negligence, the investors incurred various damages, including having to pay significant capital gains taxes.

On or about January 9, 2015, Morrison Cohen commenced the present third-party action against Stonebridge and Brown Rudnick, seeking contribution and indemnification.

## **Discussion**

### **Legal Standard for Motion to Dismiss**

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accepting the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 (2005). 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). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions, as well as factual claims, flatly contradicted by the record are not entitled to any such consideration. See, Morone v Morone, 50 NY2d 481 (1980).

“A motion to dismiss the complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law.” See, Granada Conominium III Association v Palomino, 78 AD3d 996, 996 (2d Dept 2010). Furthermore, the

documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the cause of action. Goshen v Mut. Life Co. of N.Y., 98 NY2d 314, 326 (2002)..

### **Contribution**

Under New York law, there is no right to contribution in contract actions, either by common law or by the CPLR which limits contribution to “personal injury, injury to property or wrongful death. New York CPLR 1401. “[A] purely economic loss resulting from a breach of contract does not constitute an “injury to property” within the meaning of CPLR 1401.” See, Bd. of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley, 71 N.Y. 2d 21, 26 (1987); Structure Tone, Inc. v Universal Servs. Grp., Ltd., 87 AD3d 909, 911 (1st Dept 2011). If “a plaintiff’s direct claims...seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable.” Trump Vil. Section 3 v New York State Hous. Fin. Agency, 307 A.D. 2d 891, 897 (1st Dept 2003). Although CPLR 1401 requires the existence of tort liability, independent of a breach of contract, the mere existence of a contract does not preclude the possibility of tort liability. Landon v Kroll Lab. Specialists, Inc., 91 AD3d 79, 83 (2d Dept 2011) (“A person is not necessarily insulated from liability in tort merely because he or she is engaged in performing a contractual obligation.”) (citations omitted).

### ***As against Stonebridge***

The case against Stonebridge hinges on whether Stonebridge breached a duty to the plaintiff investors independent of the Stonebridge/Investor agreement. Here, Morrison Cohen argues that Stonebridge breached a fiduciary duty to the investors because it acted as their advisor. Additionally, Morrison Cohen argues that Stonebridge owed the investors “an independent duty to exercise reasonable care” as an expert and a financial services provider.

In New York, “[i]n order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct.” Pokoik v Pokoik, 115 A.D.3d 428, 429 (1st Dept 2014). Morrison Cohen points the court to EBC I, Inc. v Goldman, Sachs & Co., 5 N.Y. 3d 11, 20 (2005) to argue that Stonebridge owed a fiduciary duty apart from a contractual duty. In EBC, the court held that “a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust than would arise from the underwriting agreement alone.” In EBC, the court held that the allegations in the complaint did allege “an advisory relationship that was independent of the underwriting agreement.” In particular, the court found that “according to the complaint, [plaintiffs] hired [defendant] underwriter to give it advice for the benefit of the company, and the underwriter thereby had a fiduciary obligation to disclose any conflict of interest concerning the pricing of the IPO.”

However, EBC is distinguishable from the case at hand. Here, Morrison Cohen’s allegations - failing to read the indenture before signing it and not noticing that it contained the wrong loan default trigger - are all rooted in provisions in the Stonebridge/Investor agreement. At most, these allegations constitute a breach of the implied contractual obligations. Stonebridge’s alleged representations of its expertise and superior knowledge of 1042 transactions does not create a “relationship of higher trust” independent of the Stonebridge/Investor agreement as in EBC. As the court held in Bd. of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley, 71 N.Y. 2d 21, 29 (1987), “[m]erely charging a breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim”.

Morrison Cohen has not pointed to any <sup>6 of 12</sup> advisory relationship that is independent of the

Stonebridge/ Investor agreement. See, Clark-Fitzpatrick, Inc. v. Long Is.R.R.Co, 70 N.Y.2d 382 (1987) (“legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract”).

Morrison Cohen also argues that Stonebridge, as an expert and financial service provider, had an independent duty to exercise reasonable care in this transaction. Here, Morrison Cohen has not alleged an independent duty to exercise reasonable care.<sup>2</sup> In Sommer, the court held that “[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship...[p]rofessionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.” Further, the Court observed that “the nature of the injury, the manner in which the injury occurred and the resulting harm” are all relevant factors in considering whether claims for breach of contract and tort may exist side by side. However, the Court of Appeals have declined to extend Sommer to cases involving only economic harm. New York Univ. v Cont. Ins. Co., 87 N.Y. 2d 308, 314 (1995). In New York Univ., the issue was whether plaintiff, in seeking coverage under an insurance contract, could receive punitive damages. Distinguishing Sommer, the court held that such damages were only available if the conduct in question rose to the level of a tort independent of the contract itself. It found that the defendant's denial of the plaintiff's claim did not qualify as a tort, even in light of the regulatory scheme established by the Insurance Law. See also, Verizon New York, Inc. v Opt. Communications Group, Inc., 91 A.D.3d 176, 181 (1st Dept 2011) (“the public's interest in compliance with a statutory and regulatory scheme is not sufficient to create tort liability...(r)ather, tort liability arises out of catastrophic

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<sup>2</sup> Morrison Cohen cites two Second Circuit cases in support of its argument, William Wrigley v. Water, 890 F.2d 594, 602 (2d Cir. 1989) and Banco Multiple Santa Cruz v. Moreno, 888 F. Supp. 2d 356, 374 (E.D.N.Y. 2012). Both are based on federal law and more importantly, distinct from the case at hand.

consequences that ... flow from [a party]'s failure to perform its contractual obligations with due care”). Moreover, First Department case law does not support the proposition that financial advisors have independent duties of care. See, Leather v U.S. Trust Co. of New York, 279 A.D. 2d 311, 312 (1st Dept 2001) (“[t]he cause of action for “negligence” and “gross negligence”, which plaintiff later referred to as a “malpractice” claim against “professionals [who] fail[ed] to give proper financial and tax advice”, and the cause of action for breach of fiduciary duty, are based on the same allegations set forth in the cause of action for breach of contract claim, and were properly dismissed as redundant); Starr v Fuoco Group LLP, 137 A.D. 3d 634 (1st Dept 2016) (a financial advisor such as [defendant] is not a “professional”).

Moreover, the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein. Children's Corner Learning Ctr. v A. Miranda Contr. Corp., 64 A.D. 3d 318, 324 (1st Dept 2009); Sommer v. Federal Signal Corp., 79 N.Y.2d 540 (1992) (“the determination of whether a claim is grounded in contract or tort is the damages the plaintiff seeks”); In Fid. and Deposit Co. of Maryland v Levine, Levine & Meyrowitz, CPAs, P.C., 66 A.D. 3d 514, 515 (1st Dept 2009), the court held that because plaintiff seeks to recover against defendants for actions and omissions explicitly covered in the scope of a contract, and both causes of action seek the same measure of damages, defendants may not seek contribution against the third-party defendants, whether the causes of action are labeled breach of contract or malpractice. Here, the damages sought by plaintiff in the main action are purely economic damages.

***As against Brown Rudnick***

The third-party complaint also seeks contribution from Brown Rudnick. There is no dispute that Brown Rudnick did not have direct privity with the plaintiff investors. However, Morrison

Cohen claims that Brown Rudnick breached its duty of care to the plaintiff investors and ultimately did have a relationship approaching privity in issuing an Opinion Letter which contained false representations of what the default trigger rating would be. Exhibit E.

Morrison Cohen cites to Millennium Import, LLC v Reed Smith LLP, 104 AD3d 190, 194 (1st Dept 2013) which held that, “[i]t is well settled that attorneys may be liable for their negligence both to those with whom they have actual privity of contract and to those with whom the relationship is ‘so close as to approach that of privity. It also cites to Prudential Ins. Co. v Dewey, 80 N.Y. 2d 383-85 (1992), where, in the context of opinion letters, the Court of Appeals has held that a relationship “approaching privity” exists between the drafting attorney and a non-client recipient where there is: “(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.” In Prudential, the court found that the relationship between lender and the law firm representing borrower was sufficiently close to support liability for law firm's alleged negligent creation of an opinion letter regarding the effect of restructuring of loan transaction and the transmission of that letter to the creditor for its own use. In particular, the court found that the law firm knew that letter was to be used by lender in deciding whether to permit debt restructuring, the lender unquestionably relied on the opinion letter in agreeing to that restructuring, and the law firm addressed and sent the opinion letter directly to lender.

Similarly, here, Brown Rudnick was aware that its Opinion Letter was to be used for the purpose of the Transaction. It also addressed and directly sent the Opinion Letter to each of the investors. The Letter also states at page 34 that, “this Opinion may not be relied upon except with

respect to the consequences discussed herein” and “this Opinion may be relied upon and used by the parties listed in Schedule A”. Schedule A includes the plaintiff investors.

Brown Rudnick contends that Morrison Cohen does not set forth sufficient facts tending to show that by issuing the Opinion Letter, the investors were caused to execute the transaction documents containing the revised rating trigger. However, in order to state a claim for contribution, Morrison Cohen need only allege that Brown Rudnick’s tortious conduct contributed to the injury alleged by the investors – not that Brown Rudnick’s conduct was the sole cause of the injury. Schauer v Joyce, 54 N.Y. 2d 1, 5 (1981).

Therefore, Morrison Cohen’s claims for contribution against Stonebridge are dismissed. Brown Rudnick’s motion to dismiss the claims based on contribution is denied.

### **Contractual Indemnity**

The right to contractual indemnity depends upon the language of contractual provisions. Smith v Broadway 110 Devs., LLC, 80 AD3d 490, 491 (1st Dept 2011); Lesisz v Salvation Army, 40 AD3d 1050, 1051-1052 (2d Dept 2007).

Morrison Cohen is not entitled to seek contractual indemnification from Stonebridge or Brown Rudnick because it has not pointed to a contractual provision regarding the right to indemnity. Indemnity arises out of a contract that may be express or implied. Garrett v Holiday Inns, 86 AD2d 469 (4th Dept 1982). In this case, the third-party complaint fails to allege that Morrison Cohen entered into a contract with Stonebridge and Brown Rudnick pursuant to which Stonebridge agreed to indemnify Morrison Cohen for damages it was required to pay investors in the main action.

Accordingly, the claim for contractual indemnification against Stonebridge and Brown Rudnick is dismissed.

### **Implied Indemnification**

To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work. Naughton v City of New York, 94 A.D. 3d 1, 10 (1st Dept 2012). The predicate for indemnity is vicarious liability without fault. Aiello v Burns Intl. Sec. Servs. Corp., 110 AD3d 234, 247 (1st Dept 2013); Trustees of Columbia Univ. in City of N.Y. v Mitchell/Giurgola Associates, 109 AD2d 449, 453 (1st Dept 1985); SSDW Co. v Feldman-Misthopoulos Associates, 151 AD2d 293, 296 (1st Dept 1989); Richards Plumbing & Heating Co. v Washington Grp. Int'l. Inc., 59 AD3d 311, 312 (1st Dept 2009). In Taylor v Paskoff, LLP, 2011 NY Misc LEXIS 17152011 (Sup Ct, NY County 2011), the court reiterated the rule that, “common-law indemnification is premised on “vicarious liability without actual fault, the party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.” Id. at 42.

As in Taylor, if Morrison Cohen is found to have been committed legal malpractice, they cannot maintain a claim for common-law indemnification against Stonebridge or Brown Rudnick. In the main action, it has been alleged that Morrison Cohen was negligent in “failing to notice, perceive and/or address the inclusion of the Rating Trigger in the Trust Indentures and/or allowing and advising plaintiffs to respectively execute Trust Indentures containing the Rating Trigger”. The main action does not premise its claims on the vicarious liability of Morrison Cohen.

In the same vein, it is inconsequential whether Brown Rudnick is a third-party beneficiary. The predicate for common law indemnity is vicarious liability and the plaintiff investors in the main action alleges direct negligence on the part of Morrison Cohen.

Accordingly, Morrison Cohen claims for common law indemnification against Stonebridge and Brown Rudnick must be dismissed.

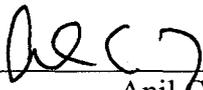
Accordingly, it is hereby

**ORDERED** that the motion by third-party defendant Stonebridge, under motion sequence 002, for an order dismissing the amended complaint is granted; and it is further

**ORDERED** that the motion by third-party defendant Brown Rudnick, under motion sequence 003, for an order dismissing the amended complaint based on indemnification is granted; and it is further

**ORDERED** that the motion by third-party defendant Brown Rudnick, under motion sequence 003, for an order dismissing the amended complaint based on contribution is denied.

Date: July 11, 2016  
New York, New York

  
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Anil C. Singh