

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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**ALPHA I MARKETING CORP., KRASDALE
FOODS, INC., KOOLTEMP FOODS LLC, and
CONSOLIDATED SUPERMARKET SUPPLY,
L.L.C.,**

Plaintiffs,

- against -

NEWBANK,

Defendant.

-----X
NEWBANK,

Third-Party Plaintiff,

- against -

**TERRINAZ ENTERPRISES LLC, BROOK
MEAT & PRODUCE CORP., and ANIBAL
RODRIGUEZ,**

Third-Party Defendants.

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The following papers numbered 1 to 3, read on this motion, noticed on 7/15/2022, and duly submitted as no. 2 on the Motion Calendar of 7/15/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Third-Party Defendant Terrinaz Enterprises, LLC's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 8/17/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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**ALPHA I MARKETING CORP., KRASDALE
FOODS, INC., KOOLTEMP FOODS LLC, and
CONSOLIDATED SUPERMARKET SUPPLY,
L.L.C.,**

Plaintiffs,

DECISION AND ORDER

- against -

Index No. **29715/2020E**

NEWBANK,

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NEWBANK,

Third-Party Plaintiff,

- against -

**TERRINAZ ENTERPRISES LLC, BROOK
MEAT & PRODUCE CORP., and ANIBAL
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-----X

Third-Party Defendant Terrinaz Enterprises, LLC (“Terrinaz”) moves to dismiss the third-party summons and complaint pursuant to CPLR 3211(a)(7), 3211(a)(8) and CPLR 1007. Defendant/Third-Party Plaintiff (“Newbank”) opposes.

For the reasons which follow, Terrinaz’s motion is granted.

BACKGROUND:

On September 1, 2020, Plaintiffs commenced the instant action against Newbank by filing a summons and verified complaint,¹ alleging causes of action for breach of contract and fraud.

The complaint alleges that Brook’s Ave Food Advantage Corp. (“Brook’s Ave”) was the owner and operator of a supermarket located at 228 Brook Avenue, Bronx, NY (the “Premises”) (Compl., ¶ 13). The complaint also alleges that A&N Food Enterprises, Inc. (“A&N Food”) was

¹ The complaint is verified by counsel.

the owner and operator of a supermarket located at 250 Cypress Avenue, Bronx, NY (Compl., ¶ 14).

The complaint alleges that Plaintiffs and Newbank each provided loans and other advances to Brook's Ave and A&N Food (the "Debtors"), secured by the collateral and property owned by the Debtors (Compl., ¶ 15).

The complaint alleges that on October 31, 2017, the parties entered into an intercreditor agreement in connection with the obligations owed by A&N Food to the parties (Compl., ¶ 16). Plaintiffs allege that the agreement provided that in the event A&N Food defaulted on its obligations to either Plaintiffs or Newbank, any collateral or proceeds derived from the collateral received by either Plaintiffs or Newbank would be distributed between them (Compl., ¶ 17).

The complaint alleges that on October 31, 2017, the parties also entered into an intercreditor agreement in connection with the obligations owed by Brook's Ave to the parties (Compl., ¶ 18). Plaintiffs allege that the agreement provided that in the event Brook's Ave defaulted on its obligations to either Plaintiffs or Newbank, any collateral or proceeds derived from the collateral received by either Plaintiffs or Newbank would be distributed between them (Compl., ¶ 19).

The complaint alleges that by February 21, 2020, the Debtors had defaulted on their obligations to the parties (Compl. ¶ 20). Plaintiffs allege that on or around July 10, 2020, the parties learned that proceeds in the amount of \$225,000.00 would be available for distribution to the parties in connection with the Debtors' debt obligations. Plaintiffs allege that the intercreditor agreement provided that the parties would split the proceeds evenly (Compl., ¶ 24). However, Plaintiffs allege that in August 2020, they learned that a third-party payor had already distributed proceeds to Newbank on behalf of the Debtors to resolve the debts owed to Newbank (Compl., ¶ 25). Plaintiffs allege that the proceeds distributed by the third-party payor to Newbank was part of the Debtors' property and collateral, making such proceeds part of the property and collateral which are subject to Plaintiffs' security interest (Compl., ¶ 28). Plaintiffs allege that pursuant to the intercreditor agreements, Newbank was required to advise Plaintiffs that it had come into possession of proceeds from the third-party payor and to distribute the proceeds (Compl., ¶ 29, ¶ 30). Plaintiffs allege that Newbank breached the intercreditor agreement by failing to do so (Compl., ¶ 31). Plaintiffs allege that Newbank attempted to keep the fact that it had received proceeds from the Debtors' estate hidden from Plaintiffs (Compl., ¶ 32).

On May 12, 2022, Newbank filed a third-party summons and verified complaint against Terrinaz, Brook Meat & Produce Corp., and Anibal Rodriguez, alleging causes of action for declaratory judgment, conversion, accounting, unjust enrichment, and replevin.

The third-party complaint alleges that Terrinaz is the owner of the Premises (TP Compl., ¶ 2). It alleges that Anibal Rodriguez (“Ms. Rodriguez”) took over the Premises as a replacement tenant. It also alleges that Brook Meat & Produce Corp. (“Brook Meat”) is the business entity through which Ms. Rodriguez took over the Premises as a replacement tenant (TP Compl., ¶ 3).

Newbank alleges that on December 15, 2015, it extended a SBA loan to N&A Produce & Grocery Corp. (“N&A Produce”) in the principal amount of \$1,860,000. Newbank alleges that this loan was guaranteed by Brook’s Ave, among other guarantors. Newbank alleges that Brook’s Ave collateralized its guarantee by signing a security agreement pledging all of its personal property located on the Premises to Newbank (TP Compl., ¶ 4-5).

Newbank alleges that on December 15, 2015, it filed a UCC-1 Financing Statement with the New York Department of State, bearing file no. 201512156405849, against Brook’s Ave, among other debtors. Newbank also alleges that on June 18, 2020, it filed a UCC-3 Continuation Statement, bearing file no. 202006186113503 (TP Compl., ¶ 6). Newbank alleges that its present expectation of recovery on this loan is based on Brook’s Ave’s collateralized guarantee of this loan because N&A Produce has filed for bankruptcy. Newbank alleges that its security interest has always been senior to Plaintiffs’ security interests against Brook’s Ave’s personal property on the Premises (TP Compl., ¶ 7).

The third-party complaint alleges that in or around August 2020, Terrinaz, Ms. Rodriguez, and Brook Meat entered into a written agreement pursuant to which Ms. Rodriguez and Brook Meat agreed to pay the sum of \$225,000.00 to Terrinaz to purchase personal property and obtain terminations of security interests from Newbank and Plaintiff Alpha I Marketing Corp., whose liens encumber the personal property on the Premises (the “UCC Purchase Agreement”). Newbank asserts that it was not a party to the UCC Purchase Agreement (TP Compl., ¶ 9).

Newbank alleges that on August 27, 2020, Ms. Rodriguez and Brook Meat paid \$225,000.00 to Terrinaz and purchased and obtained possession and control of all of the personal property on the Premises. Newbank alleges that Terrinaz then paid \$112,500.00 to Plaintiff Alpha I Marketing Corp. in consideration for a termination of its security interests encumbering the personal property on the Premises. Newbank alleges that it did not receive any funds from these transactions. Newbank alleges that although it had agreed to enter into a stipulation of settlement

with Plaintiffs to terminate its security interests in the personal property collateral on the Premises in exchange for the payment of \$112,500.00, Plaintiffs never signed the stipulation. As such, Newbank alleges that it was not made aware of and did not authorize the transfer and sale of the personal property collateral on the Premises (TP Compl., ¶ 10).

On June 8, 2022, Terrinaz filed the instant motion. The motion was marked fully submitted on July 15, 2022.

DISCUSSION:

CPLR § 1007 provides, in relevant part, that:

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, by filing pursuant to section three hundred four of this chapter a third-party summons and complaint with the clerk of the court in the county in which the main action is pending, for which a separate index number shall not be issued but a separate index number fee shall be collected. The third-party summons and complaint and all prior pleadings served in the action shall be served upon such person within one hundred twenty days of the filing." (emphasis added).

Personal Jurisdiction:

Terrinaz moves to dismiss the third-party complaint on the basis that Newbank did not serve it with all prior pleadings served in this action, as required by CPLR § 1007. With its motion, Terrinaz submitted a copy of the affidavit of service dated May 26, 2022, which states that Terrinaz was served with the third-party summons and complaint on May 19, 2022, and the affidavit of Narciza Diaz, a member of Terrinaz, who attests that Terrinaz did not receive a copy of the prior pleadings served in this action with the third-party summons and complaint on May 19, 2022.

However, in opposition, Newbank submitted an affidavit of service dated July 6, 2022, which states that the third-party summons and complaint and the prior pleadings were served on Terrinaz on June 21, 2022. Terrinaz does not deny receipt of this service. As such, Newbank has demonstrated that it properly served a copy of the prior pleadings upon Terrinaz within 120 days of the filing of the third-party action.

In any case, the Court notes that the failure to serve prior pleadings is not a jurisdictional defect and may be cured pursuant to CPLR 2001 (*Jackson v Long Is. Light Co.*, 59 AD2d 523, 524 [2d Dept 1977]) ["LILCO admits that it did not, pursuant to CPLR 1007, serve copies of the answers

served in the main actions when it commenced the third-party action. These are not jurisdictional defects. The third-party plaintiff should be permitted to correct its failure to serve all prior pleadings (see CPLR 2001”).

Accordingly, Terrinaz’s motion to dismiss the complaint on the basis that Newbank did not serve it with all prior pleadings served in this action, as required by CPLR § 1007, is denied.

Failure to State a Cause of Action:

Terrinaz also moves to dismiss the third-party complaint, arguing that the causes of action alleged against it are not related to Plaintiffs’ claims against Newbank, and as such, are not permitted by CPLR § 1007.

“Consistent with CPLR 3014, the third-party complaint may contain alternative, hypothetical or inconsistent causes of action and such a pleading will be sustained as long as the facts alleged do not necessarily preclude liability on the primary defendant’s part. Impleader is available even if the impleaded party owes no duty whatsoever to the primary plaintiff. However, the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action” (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 92-93 [1st Dept 1985]; *Qosina Corp. v C&N Packaging, Inc.*, 96 AD3d 1032, 1035 [2d Dept 2012]; *Lucci v Lucci*, 150 AD2d 649, 650 [2d Dept 1989]; *Cleveland v Farber*, 46 AD2d 733, 733 [4th Dept 1974]).

Here, Newbank does not dispute that the causes of action in its third-party complaint against Terrinaz do not arise from or are conditioned upon the liability asserted against it by Plaintiffs in the main action. As such, the third-party complaint against Terrinaz must be dismissed as it is not permitted by CPLR § 1007. (*See Qosina Corp.* at 1035 [“Here, the third-party complaint was not permitted by CPLR 1007 since it failed to state any cause of action arising from or conditioned upon the liability asserted against C&N in the main action”]; *see also Cleveland* at 733 [“Here, the wrong committed by third-party defendants is separate, distinct and not related in any way to the wrong committed by third-party plaintiff and, therefore, the third-party complaint was properly dismissed”]).

Although Newbank argues that the causes of action in the third-party complaint are related to its counterclaims, it cites no law in support of its argument that a third-party action brought pursuant to CPLR § 1007 may arise from or be conditioned upon a defendant’s counterclaims.

Accordingly, Terrinaz’s motion to dismiss the third-party complaint as against it is granted.

It is hereby

ORDERED that the Clerk dismiss the third-party complaint as against Terrinaz Enterprises, LLC; and it is further

ORDERED that Terrinaz Enterprises, LLC serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 8/17/22

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.