

Centennial Insurance Co. v Tadco Construction Corp.

2006 NY Slip Op 30398(U)

November 15, 2006

Supreme Court, New York County

Docket Number: 0603713/2004

Judge: Richard B. Lowe

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

HON. RICHARD B. LOWE, III

PART 54

Index Number : 603713/2004
CENTENNIAL INS. CO.

vs
TADCO CONSTRUCTION CORP.

Sequence Number : 003
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 9/29/06
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 28 2006
NEW YORK
COUNTY CLERK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11/15/06

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

CENTENNIAL INSURANCE COMPANY,

Plaintiff,

Index No. 603713/04

-against-

TADCO CONSTRUCTION CORP., D&D MASON
CONTRACTORS, INC., FRANK DeMARTINO and
THOMAS DeMARTINO,

Defendants.

-----X

TADCO CONSTRUCTION CORP.,

Third-Party Plaintiff,

Index No. 590436/06

-against-

RABINOWITZ & GALINA, MICHAEL ROY GALINA
and MICHAEL MARC RABINOWITZ,

Third-Party Defendants.

-----X

RICHARD B. LOWE III, J.:

Third-party defendants Rabinowitz & Galina, Michael Roy Galina, and Michael Marc Rabinowitz move, pursuant to CPLR 3211 (a) (1) and (7), and CPLR 1007, to dismiss the third-party action.

In the third-party complaint, Tadco Construction Corp. (Tadco), a contractor, alleges that its former attorneys, third-party defendants, disclosed privileged information to Tadco's surety, plaintiff Centennial Insurance Co. (Centennial), which resulted in Centennial demanding the

payment of collateral by Tadco pursuant to a bond which was implicated in an underlying action. When Tadco did not comply, Centennial commenced this main action. In the third-party action, Tadco asserts causes of action based upon breach of fiduciary duties and breach of the attorney-client privilege.

The underlying action involves a dispute between Tadco and a subcontractor, Racanelli Construction Company, Inc. (Racanelli). Tadco contracted with the New York State Office of General Services to construct a crew facility for the New York State Department of Transportation. Racanelli was to supply a pre-engineered metal building for the project. According to Tadco, Racanelli delivered the wrong materials, which caused Tadco to expend far more time and money than expected. Racanelli commenced the underlying action (the *Racanelli* action) in May 2003, in order to obtain payment from Tadco, which Tadco contends is unwarranted in view of the damage caused by Racanelli. Centennial was named as a defendant in its capacity as Tadco's surety. Tadco retained third-party defendants, with whom it had an existing attorney-client relationship, to defend both it and Centennial. Third-party defendants represented Tadco and Centennial in the underlying action for over a year, during which time Centennial never set a reserve, nor did it demand that Tadco tender collateral to it, both of which it was entitled to do pursuant to the terms of the bond and the related indemnity agreement.

In May 2004, Frank DeMartino, the president of Tadco, had a falling out with third-party defendants with respect to a bid on a road improvement project in Nassau County. Tadco thereafter discharged third-party defendants in all matters that they were handling for Tadco, including the *Racanelli* action. Third-party defendants asserted that Tadco had an outstanding bill for legal fees, the propriety of which Tadco disputed. Tadco retained Robert Tavon, Esq. to

defend it in the *Racanelli* action. Third-party defendants asserted a retaining lien on the file. Centennial subsequently retained separate counsel, paid third-party defendants' outstanding bill, and requested the file on the *Racanelli* action, which third-party defendants provided. Tadco asserts in the third-party complaint that the file contained attorney work product that was proprietary to Tadco, and was privileged. Tadco also asserts that third-party defendants discussed Tadco's legal strategies with Centennial and confidential information. Tadco maintains that it was only after obtaining privileged information that Centennial set a reserve in the underlying action.

In the first cause of action, Tadco alleges that third-party defendants violated Disciplinary Rules of the Code of Professional Responsibility, including the rule that an attorney preserve client secrets and confidences. In the second cause of action, Tadco asserts that third-party defendants failed to adhere to the requirement that attorneys protect the attorney-client privilege by giving privileged documents to Centennial and by discussing Tadco's legal strategies with Centennial.

In the third cause of action, Tadco includes another paragraph number, but the paragraph is completely blank. Third-party defendants presume that the third cause of action is for legal malpractice, although there is nothing in the third-party complaint to indicate what that cause of action was intended to allege.

The third-party complaint also seeks punitive damages against defendant Michael Roy Galina.

DISCUSSION

Third-party defendants contend that Tadco failed to plead *prima facie* causes of action

because the third-party complaint consists of bare legal conclusions and factual assertions that either fail to support the claims or are contradicted by the documentary evidence, including the pleadings. Additionally, third-party defendants assert that the claims alleged do not constitute grounds for a third-party action, and that the third-party complaint should be dismissed on that ground as well.

Breach of duty of confidentiality

Third-party defendants argue that Tadco's claim of breach of confidentiality is completely without merit in view of the fact that third-party defendants were representing both Centennial and Tadco. They point out that where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning that matter will be held secret from each other. *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 137 (1996).

Tadco does not deny the validity of third-party defendants' position, but claims that third-party defendants improperly failed to advise Tadco of the possible conflict of interest that could arise. Even assuming the truth of Tadco's assertion, any claim that Tadco attempts to assert based upon breach of confidentiality resulting from third-party defendants releasing the file to Centennial is without merit. Tadco has not raised any claim based upon lack of consent. Therefore, any cause of action based upon revealing any purported secrets regarding the action on which the parties were jointly represented must fail.

Similarly, any claim that Tadco raises regarding an alleged breach of attorney-client privilege is without merit, since third-party defendants represented both Tadco and Centennial. Under these circumstances, Centennial, as a client in the *Racanelli* action, was entitled to the file

in the *Racanelli* action after paying the amount of the retaining lien, and any communications to Centennial regarding the *Racanelli* action were not subject to any privilege. Thus, the second cause of action is dismissed.

Breach of Disciplinary Rule

In the first cause of action, Tadco seeks damages based upon third-party defendants' alleged breach of the Disciplinary Rules that require an attorney to preserve client secrets and confidences. Third-party defendants seek dismissal of this cause of action both because there was no such violation and because allegations of violations of the Disciplinary Rules do not provide an independent cause of action. *Shapiro v McNeill*, 92 NY2d 91, 97 (1998). Tadco does not dispute either of third-party defendants' arguments. Accordingly, the first cause of action is dismissed.

Third cause of action

While the third-party complaint contains what purports to be a third cause of action, that cause of action does not allege anything. Tadco merely "repeats, reiterates and realleges" each of the allegations that came before, and numbers an additional paragraph that contains no text. Thus, the third cause of action does not allege anything or seek any relief other than that which was already raised in the first two causes of action. For that reason, alone, it must be dismissed.

Nonetheless, third-party defendants treat the third cause of action as if it were one for malpractice. However, as third-party defendants point out, Tadco does not adequately allege the elements of legal malpractice.

Tadco maintains that it has adequately stated a cause of action for legal malpractice with respect to third-party defendants' handling of the Nassau County matter. Tadco contends that

third-party defendants failed to appeal a determination finding that Tadco was a non-responsible bidder on a road improvement project in Nassau County. Third-party defendants deny that Tadco instructed them to file such an appeal, and maintain that, in any event, Tadco has not adequately pleaded legal malpractice.

To state a cause of action for legal malpractice, a plaintiff must allege that the attorney was negligent, that the negligence was a proximate cause of the plaintiff's losses, and proof of actual damage. *Bishop v Maurer*, ___ AD3d ___, NYLJ, Oct. 26, 2006, at 31, col 3, 2006 WL 3007824 (1st Dept 2006); *Brooks v Lewin*, 21 AD3d 731, 734 (1st Dept 2005). To establish proximate cause, the plaintiff must allege specific facts showing that but for the attorney's negligence, the plaintiff would have had a better result in the underlying action. *Id.*; *Hutt v Kanterman & Taub, P.C.*, 280 AD2d 379 (1st Dept 2001). Here, Tadco has failed to make any factual allegations to support a finding that, but for third-party defendants' actions, it would have had a better result in the *Racanelli* action. Even in its memorandum of law, no such factual assertions appear, despite the fact that the memorandum contains many factual assertions that are not included in the third-party complaint. Instead, it speculates that it might have been successful on appeal or might have been able to negotiate a more favorable outcome had an appeal been filed in the Nassau County matter.

Citing federal cases, Tadco argues that it is not required to allege but for causation, only that the alleged breach was a substantial factor in its injury. *See Milbank, Tweed, Hadley & McCloy v Boon*, 13 F3d 537, 543 (2d Cir 1994); *ABKCO Music, Inc. v Harrisongs Music, Ltd.*, 722 F2d 988, 996 (2d Cir 1983). These cases do not adequately support Tadco's position. First, the cases cited by Tadco involve breach of fiduciary duty, not malpractice. Second, the Second

Circuit subsequently stated that, in New York, the “substantial factor” standard is applied only where the plaintiff seeks restitution to prevent the fiduciary’s unjust enrichment resulting from his ill-gotten gains. *LNC Investments, Inc. v First Fidelity Bank, N.A.*, 173 F3d 454, 465 (2d Cir 1999), *cert denied* 538 US 1033 (2003). Here, there is no allegation of such unjust enrichment.

Further, the First Department has specifically declined to apply the less rigorous “substantial factor” standard in legal malpractice claims, and has stated that the but for standard applies to both legal malpractice and breach of fiduciary duty in the context of attorney liability causes of action. *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-72 (1st Dept 2004). Thus, the appropriate standard is but for causation. Tadco has not alleged such causation with respect to third-party defendants’ handling of either the *Racanelli* action or the Nassau County matter. Accordingly, even if the third cause of action were construed to allege a cause of action for legal malpractice, it would be dismissed for failure to allege but for causation.

Tadco’s assertion of bad mouthing

In its opposition to the motion, Tadco maintains that third-party defendants improperly bad mouthed Tadco to Centennial, which resulted in Centennial retaining separate counsel to represent it in the *Racanelli* action, setting a reserve and demanding \$200,000 in collateral from Tadco for that action, and in filing this main action. Tadco contends that third-party defendants’ actions were a substantial factor in causing the adverse action, and that, therefore, the breach of fiduciary cause of action should continue.

Initially, the court notes that Tadco did not raise this issue in the complaint, but only in opposition to the motion to dismiss. Further, as discussed above, the substantial factor standard

is not the appropriate standard by which to ascertain whether third-party defendants are liable to Tadco. Finally, the allegations combined with the documentary evidence before the court do not support Tadco's assertions that Centennial's actions resulted from any "bad mouthing" by third-party defendants. There is no evidence or allegation that third-party defendants said anything to Centennial prior to Centennial retaining separate counsel. There are also no factual allegations to support Tadco's speculation that anything that third-party defendants communicated caused Centennial to set a reserve or demand collateral. The only specific factual allegation is in reference to a comment made after those actions had been taken.¹ Additionally, at deposition, Centennial stated that a number of factors went into its decision to assert its right to the reserve and collateral. None of them were related to any actions or statements by third-party defendants, but were based upon factors involving the progress of the *Racanelli* litigation. Thus, Tadco's assertions amount to no more than speculation and cannot support a cause of action.

Propriety of the third-party action

Third-party defendants maintain that since the main action on which this third-party action is based was settled, Tadco cannot bring a third-party action for contribution to the liability that it owes to Centennial. *See Mitchell v New York Hosp.*, 61 NY2d 208, 216 (1984). Additionally, the main action sounds in breach of contract; therefore, contribution is not available. *See Rockefeller Univ. v Tishman Constr. Corp.* of N.Y., 240 AD2d 341, 343 (1st Dept

¹ The comment was in a faxed letter from defendant Michael Galina to Centennial's new counsel, with reference to a case related to the *Racanelli* action. It states:

Please do not send me anything related to this case. I have never appeared for any defendants in the case (have never even seen the complaint) and any memories of Tadco give me the shakes. Save the tree and don't send me any paperwork on the case. Even had it been made before Centennial made its demands on Tadco, the comment could not be construed as causing Centennial to take adverse action.

1997).

Tadco contends that the main action did not settle. Rather, Centennial's motion for summary judgment on the first, second, fifth and sixth causes of action was granted on default. The third and fourth causes of action remain open, and the amount of damages is yet to be determined. Tadco further maintains that it can seek indemnification based upon a breach of contract claim in the main action.

Third-party defendants reply that any liability Tadco has to Centennial flows from the surety bond and related indemnity contract. To the extent that Tadco may not have been obligated to pay Centennial the amounts demanded, any damage resulted from Tadco's former attorney's failure to oppose the summary judgment, not to any actions by third-party defendants.

Third-party defendants also contend that the third-party action was not properly brought because, pursuant to CPLR 1007, a third-party action must arise from the liability being asserted against the third-party plaintiff in the main action. *See BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 93 (1st Dept 1985) ("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"); *see also Warner v Levinson*, 188 AD2d 268 (1st Dept 1992). Here, there is no basis to claim that third-party defendants are liable to Tadco for all or part of Centennial's claim against Tadco, which arises out of Tadco's obligation to post collateral required under a bond with respect to the *Racanelli* action. Therefore, it is an improper third-party action.

Tadco maintains that the main action also seeks recovery for all damages allegedly sustained by Centennial and all fees, costs and expenses allegedly incurred by Centennial in connection with the bond that it issued for the Department of Transportation project. Tadco

asserts that it is seeking indemnification for such damages, fees, costs and expenses, if any, for which Tadco may be found liable.

In the main action, Centennial seeks to enforce terms of the surety bond and indemnity agreement. Third-party defendants do not have any connection with those agreements, nor do they have any obligation to Tadco with respect to them. The fact that Centennial also seeks fees, costs and expenses, as provided for in the agreements between Tadco and Centennial, does not implicate third-party defendants. Therefore, Tadco's liability does not give rise to any obligation on the part of third-party defendants, and any third-party claim on that basis is improper.

Tadco's (unstated) claim against third-party defendants is basically a claim of legal malpractice. However, the alleged malpractice concerns the Nassau County matter, not the *Racanelli* action. Accordingly, there is no basis upon which Tadco can assert it in this action, in which Centennial seeks collateral based upon the bond underlying the project out of which the *Racanelli* action arose. Tadco has not offered any cognizable basis for asserting a third-party claim against third-party defendants. Thus, the third-party complaint was improperly commenced, and must be dismissed.

Leave to replead or amend the complaint

Tadco requests that this court grant it leave to replead. However, it did not cross-move for such relief, nor did it attach a proposed amended complaint to its papers. Therefore, the request to replead is not properly before the court. In any event, as discussed above, Tadco has not demonstrated any grounds for bringing its claims against third-party defendants as a third-party action. Thus, even if Tadco had demonstrated any cognizable claim, it would not be appropriately brought as a third-party action.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendants as taxed by the Clerk of the court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 15, 2006

ENTER:



J.S.C.

HON. RICHARD B. LOWE, III

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NOV 28 2006
NEW YORK
COUNTY CLERKS OFFICE