

Nair v Parappurath

2007 NY Slip Op 30073(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0113910

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

MADHU NAIR,

Plaintiff,

- v -

SABASTIN PARAPPURATH a.k.a. P. J. SABASTIN
and GREENPOINT SAVINGS BANK,

Defendants.

(And a Third-Party Action)

INDEX NO. 113910/04
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

The following papers, numbered 1 to 4 were read on this motion to/for : dismiss thrd-party action.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4
Cross Motion: [] Yes [X] No	

Upon the foregoing papers, it is ordered that this motion¹ is granted, to the extent set forth below.

Background

This action concerns a property located at 4026 Bronx Boulevard, Bronx, New York (the Property). Plaintiff Madhu Nair (M. Nair) and defendant Sabastin Parappurath a.k.a. P. J. Sabastin (Sabastin) each own an undivided 50% interest in the Property. In or about February 25, 2003, the Property was substantially destroyed by fire. The loss was not covered by insurance, as the homeowner's insurance policy for the Property had been cancelled due to non-payment of the premium.

The main action concerns a dispute between plaintiff M. Nair and defendant Sabastin as to

¹ This motion was repeatedly adjourned, as plaintiff sought to have the case referred to the Supreme Court, Bronx County, and all proceedings were stayed.

who was responsible for paying the premium for the homeowner's insurance policy and, thus, who is responsible for the uninsured damage to the Property. In or about October 2004, plaintiff brought the main action against defendants Sabastin and Greenpoint Savings Bank. In the complaint, which has not been included with the parties' submissions on the instant motion, plaintiff allegedly asserted claims against Sabastin for partition of the Property and for negligence due to Sabastin's failure to maintain insurance on the Property, resulting in an uninsured loss.

Sabastin served a verified answer asserting counterclaims against plaintiff M. Nair (Affirmation of Joseph A. Altman, Esq. in Opposition [Altman Aff. in Opp.], Ex. B [Sabastin's Answer and Counterclaims]). Sabastin asserts that plaintiff M. Nair and he each owned an undivided 50% interest in the Property since in or about October 1990. According to Sabastin, he was responsible for maintaining the Property, including paying the premiums for the homeowner's insurance, until January 2000 (*id.*). Sabastin alleges that, in or about January 2000, plaintiff M. Nair assumed responsibility for maintaining the Property, including paying the insurance premiums. Sabastin asserts that plaintiff failed to maintain the property and, at one point, was allegedly living in India and authorized his son, Unni Krishnan Nair (U. Nair), to assume day-to-day control over the Property (*id.*). Sabastin alleges that he forwarded the invoice for the homeowner's insurance premium to plaintiff in November 2002, which plaintiff failed to pay, resulting in the cancellation of the policy prior to the February 25, 2003 fire. Sabastin's first counterclaim seeks a judgment directing plaintiff M. Nair, at his sole cost and expense, to restore the Property to its condition prior to the fire. Following the restoration, Sabastin seeks a court-ordered partition and sale of the Property, including an accounting of the parties' respective interests in the Property, their expenditures for the upkeep and maintenance and their entitlement to shares of the proceeds of the sale (*id.*). Sabastin's second counterclaim asserts that plaintiff M. Nair negligently failed to pay the premium for the insurance policy covering the property, resulting in an uninsured fire loss. Accordingly, Sabastin seeks to recover from plaintiff the replacement cost of the property.

Defendant Sabastin's motion seeks dismissal of a subsequent pleading, denominated as a

third-party complaint. The third-party complaint concerns a contract of sale, dated November 18, 2005, in which plaintiff M. Nair and defendant Sabastin agreed to sell the Property to M. Nair's son, U. Nair, for a purchase price of \$329,600, including a deposit of \$5,000. The sale, if consummated, was intended to resolve the main action (*see* Affirmation of Brad D. Rabinowitz, Esq. in Support of Motion [Rabinowitz Aff. in Support, Ex. A [Third-Party Complaint]; Altman Aff. in Opp., Ex. C [Contract of Sale]). Plaintiff M. Nair and his son, U. Nair, a non-party to the main action, brought the third-party action against defendant Sabastin and the law firm of Calotta Levine Samuel, LLP, Sabastin's attorneys (the law firm). The law firm is named in the third-party action solely in its capacity as the escrow agent for the \$5,000 deposit, pursuant to the contract of sale (Third-Party Complaint, at ¶ 8). The third-party complaint asserts, among other things, that Sabastin breached the contract of sale, by attempting to declare it null and void prior to the closing.

According to the third-party complaint, Sabastin improperly attempted to set a "time of the essence" closing date, on which he failed to appear for the closing as he was allegedly out of the country. In a letter dated February 6, 2006, Sabastin's attorneys declared the contract of sale null and void, asserting that U. Nair failed to appear on the "time of the essence" closing date. Sabastin's attorneys also returned their escrow check for \$5,000, representing the contract deposit (Altman Aff. in Opp., Ex. D). U. Nair's attorneys, however, returned and rejected the deposit check, advising Sabastin's attorneys that the contract of sale did not authorize the purported cancellation, and attempted to set another closing date. In subsequent conversations and correspondence, Sabastin's attorneys allegedly advised U. Nair's attorneys that Sabastin did not wish to "do the deal" and wanted to litigate the main action. Accordingly, U. Nair's attorneys wrote to Sabastin's attorneys to declare that Sabastin was in willful default of the contract of sale (Third-Party Complaint, at ¶ ¶ 18-20).

The first cause of action in the third-party complaint seeks a judgment requiring defendant Sabastin to specifically perform all of his obligations under the contract of sale (Third-Party Complaint, at ¶ ¶ 21-27). The second cause of action, alleges, in the alternative, that if the court determines that Sabastin did not breach the contract of sale, then the court should issue a judgment

declaring the rights of the various parties under the contract (Third-Party Complaint, at ¶¶ 28-30).

Discussion

Defendant Sabastin moves to dismiss the third-party complaint and for related relief, including costs and sanctions. Sabastin asserts that the third-party complaint is improper pursuant to CPLR 1007, which provides, in pertinent part, as follows:

“After 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”

Sabastin emphasizes the fact that the purported third-party complaint was brought by plaintiff M. Nair and a non-party, U. Nair, against Sabastin, a party defendant in the main action, and his law firm, a non-party joined as a nominal third-party defendant. The proposed third-party plaintiffs, M. Nair and U. Nair, note that a plaintiff may bring a third-party action, where, as in the instant case, a defendant has asserted a counterclaim (citing CPLR 1011 and *Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp.*, 51 AD2d 140 [4th Dept 1976]).

CPLR 1011 provides, in pertinent part, “When a counterclaim is asserted against a plaintiff, he may proceed pursuant to section 1007 as if he were a defendant.” Accordingly, even if the third-party complaint is brought pursuant to CPLR 1011, it may only be brought by plaintiff, M. Nair, and not by a non-party, like U. Nair (*see also Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp.*, 51 AD2d at 146-147 [court concludes, in dictum, that the plaintiff may not assert a third-party claim for indemnity against a non-party to the main action where the defendant has not asserted a counterclaim against the plaintiff]).

Further, even if the plaintiff brings a third-party action, the third-party defendant must be a non-party to the main action, as required by CPLR 1007. Accordingly, the third-party complaint at bar is improper, as the primary third-party defendant is Sabastin, who is a defendant in the main action (*see McNamara v Banney*, 227 AD2d 892 [4th Dept 1996] [commencement of second third-party action against plaintiff was improper and court should have treated the pleading as a counterclaim]; *Warner v Levinson*, 188 AD2d 268 [1st Dept 1992] [dismissal of third-party complaint

proper, as one of third-party defendants was a party to the main action]). In this case, the proposed third-party complaint cannot be converted to a counterclaim, as it has been brought by a plaintiff, rather than a defendant.

Additionally, CPLR 1007 requires that the third-party defendant “is or may be liable to [the] defendant for all or part of the plaintiff’s claim against that defendant” (parenthetical supplied). The Court of Appeals has construed the requirements of impleader broadly to allow other theories of recovery besides strict indemnity, and to permit the third-party plaintiff to seek damages in excess of the damages sought by the plaintiff in the main action (*see Cohen Agency, Inc. v Perlman Agency, Inc.*, 51 NY2d 358,364-365 [1980]). Nevertheless, a third-party complaint must allege that the third-party defendant is responsible, at least in part, for the third-party defendant’s liability to the plaintiff, or in this case the defendant, in the main action, and the third-party complaint must involve some of the same factual issues as the main action (*see Cohen Agency, Inc. v Perlman Agency, Inc.*, 51 NY2d at 365-366; *Warner v Levinson*, 188 AD2d at 268 [third-party complaint properly dismissed against “a party whose liability could not arise from the liability asserted against the third-party plaintiffs in the main action”]; *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”]).

In this case, even assuming, for the sake of argument that defendant Sabastin is a proper third-party defendant, the third-party complaint is still improper. There are no allegations that Sabastin’s breach of the contract of sale, for which specific performance is sought, arises from or is conditioned on plaintiff M. Nair’s liability to Sabastin on the counterclaim for failing to maintain insurance coverage on the Property, resulting in an uninsured loss. The relationship between the counterclaim in the main action and the proposed third-party complaint is, at best, indirect, as the sale of the premises was allegedly intended to resolve the main action. In addition, although the main action and the third-party action both relate to the Property, they do not arise out of the same facts, as the fire resulting in the uninsured damage to the Property occurred prior to the contract of sale and Sabastin’s

alleged breach of that contract. Accordingly, the third-party-complaint is clearly an improper vehicle for the relief sought against defendant Sabastin concerning the contract of sale.

Nevertheless, Sabastin has presented no support for the assertion that the allegations in the third-party complaint, liberally construed in favor of M. Nair and U. Nair, state no legally cognizable cause of action (*see* CPLR 3211 [a] [7]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sanders v Winship*, 57 NY2d 391, 394 [1982]; *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). The unsubstantiated assertions of Sabastin's attorney that U. Nair, rather than his client, was responsible for breaching the contract of sale, do not challenge the validity of the pleading, itself. Accordingly, this Court exercises its discretion to dismiss the third-party complaint, without prejudice to allowing plaintiff M. Nair and U. Nair to commence an independent action against Sabastin asserting similar claims (*see* CPLR 1010).


Accordingly, it is

ORDERED that the motion of defendant Sabastin Parappurath to dismiss the third-party complaint is granted, to the extent of dismissing the third-party complaint, without prejudice to allowing plaintiff Madhu Nair and Unni Krishnan Nair to commence a separate action asserting similar claims, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that, within 30 days of entry, defendant Sabastin Parappurath shall serve upon all parties to this action, and upon the office of the New York County Clerk and the Clerk of the Trial Support Office, located at 60 Centre Street, New York, New York, a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 2/6/07

ENTER: 
Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST REFERENCE

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FILED
MAR 13 2007
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