

**NYP Holdings, Inc. v McClier Corp.**

2007 NY Slip Op 34111(U)

December 13, 2007

Supreme Court, New York County

Docket Number: 0601404/2004

Judge: Herman Cahn

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

PRESENT:

**HERMAN CAHN**

PART 49

Index Number : 601404/2004

NYP HOLDINGS

vs

MCCLIER

Sequence Number : 016

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

C

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE**

**FILED**

DEC 18 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: December 13, 2007

*Herman Cahn*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

[\*2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
NYP HOLDINGS, INC.,

Plaintiff,

-against-

Index No. 601404/04

McCLIER CORPORATION, LEONARD J. SKIBA, FRANCIS  
N. CAVALIER, CONSOER TOWNSEND ENVIRODYNE  
ENGINEERS, INC., TOWNSEND ENVIRODYNE  
ENGINEERS OF NEW YORK, INC., SERGIOS DE LOS  
REYES and MICHAEL LORCZAK,

Defendants.

-----X  
McCLIER CORPORATION, LEONARD J. SKIBA, FRANCIS  
N. CAVALIER,

Third-party Plaintiffs,

-against-

RUTURRA & SONS CONSTRUCTION COMPANY, INC.,  
BOTTO MECHANICAL CORPORATION, FRED GELLER  
ELECTRICAL, INC., PILE FOUNDATIONS  
CONTRACTORS, INC., INTERSTATE IRON WORKS  
CORP., LYNBROOK GLASS & ARCHITECTURAL  
METALS CORP., PROTO CONSTRUCTION &  
DEVELOPMENT CORP., ASM MECHANICAL SYSTEMS,  
BASS MECHANICAL CORP., STALLONE TESTING  
LABORATORIES, INC., S.D.L. CONSTRUCTION CORP.  
f/k/a/ BLANDFORD LAND DEVELOPMENT CORP., FIRST  
WOMEN'S FIRE SYSTEMS CORP., ARCHITECTURAL  
ROOFING & SIDING, INC., and BAYSIDE FENCING, INC.,

Third-party Defendants.

-----X  
CAHN, J.

Motion sequence #014 and #016 are consolidated for disposition.

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**The Various Motions:**

In motion sequence #014, third-party plaintiffs (collectively, McClier) move for review and modification of the March 28, 2007 order of Judicial Hearing Officer Beverly S. Cohen, pursuant to CPLR 3104 (d). Third-party defendant Raturra & Sons Construction Company, Inc. cross-moves to compel McClier to furnish to the court a privilege log of documents prepared and submitted in connection with a mediation proceeding prepared in compliance with the court's order dated January 10, 2007, together with the documents referred to in the privilege log, for an *in camera* review by the court as to the claim of privilege. Raturra also seeks a further order directing McClier to furnish all documents that are determined not to be privileged, to all counsel in this action.

In motion sequence #016, third-party defendant Stallone Testing Laboratories moves for summary judgment, CPLR 3212, and for dismissal of the third-party complaint for failure to state a cause of action. Stallone also moves for sanctions on account of McClier's claimed failure to supplement its interrogatories, either striking the complaint, or precluding McClier from offering any evidence in support of its claims against Stallone at trial.

Third-party defendant Fred Geller Electrical, Inc. cross-moves for partial summary judgment, dismissing the third and fourth causes of action for common-law indemnification and contribution.

Third-party defendant First Women's Fire Systems Corp. cross-moves for partial summary judgment dismissing the first, second, third and fourth causes of action of the third-party complaint.

Third-party plaintiff McClier cross-moves to compel First Women's to give more specific responses to McClier's first set of interrogatories.

**Discussion:**

The motions directed to JHO Cohen's discovery order, dated March 28, 2007, present a threshold issue.

This main action states claims against McClier on account of claimed serious problems with a building built for plaintiff. McClier then commenced the third-party actions against the various subcontractors who were retained to do work on the building. Plaintiff and defendant (third-party plaintiff) thereafter apparently settled plaintiff's claim for a payment of \$23,000,000.00.

Ruturra has been seeking to have McClier produce the claim and underwriting files of Lloyd's of London, its insurer, so that Ruturra can determine how McClier apportioned the settlement it reached with plaintiff, between design errors and construction defects.

This information may be relevant to the settlement posture and possibly to the defense of each of the third-party defendants. At the very least, it may be the basis for a claim limiting the damages for which each of the third-party defendants is liable.

McClier asserts that on November 6, 2006, JHO Cohen directed it to produce Lloyd's

insurance claim and underwriting file for an *in camera* review. On December 19, 2006, McClier complied with this order, and provided JHO Cohen with the file and a privilege log. After ordering disclosure of many documents on February 15, 2007, J.H.O. Cohen agreed to review her findings, and to issue a final order.

In an order dated March 28, 2007, J.H.O. Cohen found that the documents that were sought were created, for the most part, by an attorney, whose firm had also been the designated claims adjuster for plaintiff's insurer, Lloyd's of London. Relying on *Brooklyn Union Gas Co. v American Home Assurance Co.* (23 AD3d 190 [1st Dept 2005]), J.H.O. Cohen held that the documents prepared by the insurer that pertained to plaintiff NYP Holdings "were prepared in the course of the insurers' business, that is, evaluating the claim of its insured and determining the extent of the damages claimed against its insured" and were not privileged. She further found that statements that had been made by the author of the document, who was acting as claims adjuster and as legal counsel to the insurer at different times, were privileged. It was further found that McClier had not waived the attorney-client privilege by disclosing the advice it had received from its attorneys to its carrier for the purpose of obtaining coverage. As to opinions of McClier's experts, as disclosed by the adjuster, J.H.O. Cohen held they were not available for disclosure to the third-party defendants since this information constituted attorney work-product.

J.H.O. Cohen further stated:

[T]here are no documents referring to the allocation by McClier and Lloyds [sic] of liability between design defects and construction defects.

McClier seeks modification of the order based on its claim that the sought-after documents are irrelevant, in the wake of J.H.O. Cohen's holding that none of them address the issue of the allocation of liability between design and construction defects, or are privileged, based on attorney-client privilege, or are conditionally privileged as prepared in anticipation of litigation. Also, claims McClier, the third-party defendants cannot overcome the conditional privilege since they cannot demonstrate a substantial need for the documents, nor can they show that they cannot obtain a substantial equivalent of the information contained in the documents without undue hardship. Further, some of the documents are claimed to contain information about legal fees, Lloyd's settlement strategy with the third-party defendants, McClier's legal strategy, or were created by Lloyd's after it settled with plaintiff.

Although this court previously held that it would not direct an *in camera* review of the sought-after documents, in order to maintain the confidentiality of submissions and statements made during mediation proceedings, and in accordance with the rules of the Commercial Division, the court notes that here it is the owner of the documents who is now seeking review of the disclosure order, and has volunteered to submit them to the court for an *in camera* inspection. Mellon, Esq., Aff. at ¶ 12. Rutturra has cross-moved for the identical relief. The court therefore directs McClier to deliver the privilege log,

and all documents ordered turned over by J.H.O. Cohen's March 28, 2007 order and specifically the settlement agreement entered into between plaintiff and defendant, to chambers for an *in camera* inspection, as further directed herein. The motion and cross-motions in motion sequence #014, addressed to modification of J.H.O. Cohen's order, are held in abeyance pending the *in camera* review.

McClier's third-party complaint alleges five causes of action. The first and fifth causes of action allege claims for breach of contract against all third-party defendants. The second is based on contractual indemnification. McClier has agreed to withdraw this claim, thus rendering further discussion of this claim moot. The third alleges a claim for common-law indemnification against all third-party defendants, and the fourth alleges a claim for contribution.

Stallone moves to dismiss McClier's third-party complaint, for failure to state a cause of action, or for summary judgment. It is well-settled that on a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2d Dept 1999). A complaint should not be dismissed so long as a cause of action exists. *Id.*

In support of dismissal, Stallone argues that the complaint violates basic legal principles, including the statute of frauds and public policy; violates statutory and case law limitations on a settling defendant recovering in contribution or indemnification; and

fails to sufficiently particularize the oral contract or warranty alleged to have been breached, and the nature and circumstances of the breach.

The portion of the motion which seeks dismissal based on the statute of frauds is denied. An obligation which is implied in law, to reimburse or indemnify a party, is not a promise “to answer for the debt, default or miscarriage of another person,” General Obligations Law § 5-701 (a) (2), but rather the promisor’s own debt. “[T]he obligation, whether implied in law or in fact, is not required to be in writing by the Statute of Frauds.” *Barr v Raffe*, 97 AD2d 696, 696 (1st Dept 1983).

Stallone has not elucidated which public policy would be violated by permitting McClier to interpose its claims. This reason for dismissal need not be given serious consideration.

Stallone argues that McClier’s claims for contribution and indemnification must be dismissed based on the holding in *County of Westchester v Welton Becket Assocs.* (102 AD2d 34 [2d Dept 1984]). In *Welton Becket*, the Court discussed the interplay between General Obligations Law § 15-108 (b), which prevents nonsettling tortfeasor-defendants from asserting contribution claims against settling tortfeasor-defendants, and CPLR 1401, which codified the common-law rules permitting contribution between tortfeasors.

In *Welton Becket*, the Court had to determine whether the nonsettling defendants, who were seeking contribution from the settling defendants, had sufficiently alleged a claim for indemnification so as to allow the nonsettling defendants to keep the parties

who had already settled, in the pending lawsuit. The court broadly defined GOL § 15-108 as a bar to both contribution and indemnification claims against settling tortfeasors, parsing the language of CPLR 1401, and finding that CPLR article 14 does not expressly refer to “tortfeasor” liability but, rather, concerns apportionment of liability against persons who are liable for personal injury, injury to property or wrongful death, and that, when read together with GOL § 15-108 (b), it acts to bar contractual claims for indemnification, as well as claims for contribution, against settling defendants by nonsettling defendants.

The Court went on to find that the nonsettling defendants had failed to allege a “viable” claim against the settling defendants for indemnification. The third-party claim was based solely on a theory of contribution, regardless of the terminology used in the pleadings, since the main claim in the first-party action had not alleged that the subcontractors were vicariously liable for any wrongs that had been committed by the design professionals. The settling defendants were permitted to withdraw from the lawsuit since they had “purchased their peace.” However, the nonsettling defendants reserved the right to prove, at trial, that the plaintiff’s damages were the result of the settling defendants’ wrongful conduct.

Stallone claims that the holding in *Welton Becket* precludes McClier, the settling defendant in the main action, from pursuing contribution or indemnification claims against it, since it is a nonsettling third-party defendant. This is a misreading of the

holding in *Welton Becket*. The Court was deciding whether the settling defendant could be sued by nonsettling defendants. Nothing in the decision precludes a settling defendant from asserting claims for either contribution, or indemnification, against the nonsettling defendants, such as Stallone.

GOL § 15-108 (c) states that a tortfeasor who has obtained a release from liability is not entitled to contribution from any other person, requiring the dismissal of McClier's claims for contribution.

The Court in *Welton Becket* suggested that the language of GOL § 15-108 (b) is broad enough to encompass contractual claims as well as claims for contribution based on tortious conduct. However, this is not the settled law in the First Department, and this decision does not require the dismissal of McClier's contract and warranty claims, at this phase of the litigation.

The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. *17 Vista Fee Assocs. v Teachers Ins. and Annuity Assoc. of America*, 259 AD2d 75 (1st Dept 1999). The owner or contractor seeking to recover under the doctrine of implied indemnification must have delegated exclusive responsibility for the duties giving rise to the loss, to the party from whom indemnification is sought. *Id.*

In order to properly plead a claim for common-law indemnification, the pleader must allege that it was “unfairly required to discharge a duty that should have been discharged by another, such that a contract to indemnify should be implied in law.” *Id.* at 81 (1st Dept 1999) (citation omitted).

In order to determine whether a settling defendant, such as McClier, is entitled to indemnification from third-party defendants, the court must determine what obligations defendant was alleged to have been in breach of, and what portion of the settlement defendant now seeks indemnification for. *Id.* at 82 (1st Dept 1999). Defendant may seek indemnity for the loss for which it claims vicarious liability, despite its primary liability on related claims. *Id.* at 82.

The third-party defendants argue that McClier’s claim for common-law indemnification fails to state a cause of action since McClier will not be able to prove that it was free from fault for design and construction defects, citing *Edge Management Consulting, Inc. v Blank* (25 AD3d 364 [1st Dept 2006]). Third-party defendants’ argue that since the complaint in the main action alleged numerous design and construction deficiencies by McClier, and since McClier’s insurer ultimately paid plaintiff approximately \$23,000,000 to settle that litigation, McClier will not be able to prove its freedom from fault for design and construction defects at a trial. *Edge Management* holds that even a landlord may seek common-law indemnification, despite its potential liability under a statutory warranty of habitability, since the right to common-law indemnification

rests on whether the landlord, in fact, contributed to the condition complained of in the tenant's apartment. *Id.* at 367.

Relying on *17 Vista Fee Associates* (259 AD2d 75), it is apparent that even if the third-party defendants' statements were found to be factually true, these defendants have still failed to meet their burden of proving that the claim for common-law indemnification fails to state a claim upon which relief may be granted. There is no burden upon McClier to prove its freedom from primary liability in order to plead a claim for common-law indemnification. This branch of the motion for dismissal is denied. CPLR 3211 (a) (7).

That branch of the motion which seeks dismissal based on a failure to sufficiently particularize the oral contract or warranty is denied. Extensive discovery has already been, and continues to be conducted, and third-party defendants will be permitted to continue with such discovery until the facts underlying the pleadings have been fully disclosed.

The motion and cross-motions for summary judgment, or partial summary judgment, interposed by Stallone, Geller, and First Women's, in motion sequence #016, are denied.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

The third-party defendants have failed to establish a prima facie case of entitlement to summary judgment on McClier's two claims for breach of contract, or on the claim for common-law indemnification. Although these defendants argue that they are entitled to such relief based on legal impediments to McClier's claims, none of the alleged defects in McClier's case have proven sufficient to prevent McClier from proceeding to trial on the remaining three claims in the third-party complaint.

Accordingly, it is

ORDERED that the motion to modify the order of Judicial Hearing Officer Beverly Cohen, sequence #014, is held in abeyance, and third-party plaintiff McClier Corporation is directed to submit the privilege log and all documents listed therein that have not been produced to the undersigned for an *in camera* inspection within 15 days of service of a copy of this decision and order on its attorneys, and it is further

ORDERED that the branch of motion sequence #016 which seeks dismissal of the third-party complaint for failure to state a cause of action, is granted to the extent that the second cause of action for contractual indemnification has been withdrawn by the third-party plaintiff; and the fourth cause of action, for contribution, is dismissed for failure to state a cause of action, and that branch of the motion is otherwise denied with respect to the first, third and fifth causes of action which remain; and it is further

ORDERED that the branch of motion sequence #016, and all cross-motions, which seek summary judgment, or partial summary judgment, are denied; and it is further

ORDERED that the conduct of discovery, including the issue of sanctions for the third-party plaintiff's alleged failure to supplement its interrogatories, shall continue to be supervised by Judicial Hearing Officer Beverly Cohen.

Dated: December 13, 2007

ENTER:

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

**FILED**  
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NEW YORK  
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