

Fidelity & Deposit Co. of Maryland v Levine, Levine & Meyrowitz, CPAS, P.C.
2008 NY Slip Op 32101(U)
July 23, 2008
Supreme Court, New York County
Docket Number: 0604210/2005
Judge: Milton A. Tingling
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. MILTON A. TRINER
Justice
J.S.C.

PART 14

Index Number : 604210/2005
FIDELITY & DEPOSIT CO.
vs
LEVINE, LEVINE MEYROWITZ,
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE 7/25/02
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is decided in accordance
with the annexed decision

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

FILED
JUL 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/23/02

gmat
J.S.C.

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Check if appropriate: DO NOT POST REFERENCE

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

-----X
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Plaintiff,

-against-

LEVINE, LEVINE & MEYROWITZ, CPAS, P.C. et al.

Defendants.

-----X
LEVINE, LEVINE & MEYROWITZ, CPAS, P.C. et al.

Third- Party Plaintiff,

-against-

LOCAL 522 INTERNATIONAL BROTHERHOOD OF
TEAMSTERS et al.

Third-Party Defendant.

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Index No.: 604210/2005

FILED
JUL 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Third Party Index No.:
590075/2007

DECISION AND ORDER

Third-Party Defendant, Local 522 International Brotherhood of Teamsters ("Local 522"), moves the court for a dismissal of all claims brought by Levine, Levine & Meyrowitz, CPAS, P.C. ("LLM") pursuant to CPLR 3211(a). Local 522's motion to dismiss is granted.

Local 522 is a labor union which has established the following benefit funds to provide pension and welfare benefits to its membership: Teamsters Local 522 Pension Fund, Teamsters Local 522 Welfare Fund of New York and New Jersey, Teamsters Local 522 Pension Fund-Roofers Division and Teamsters Local 522 Independent Roofing and Sheet Metal Crafts Welfare Fund (collectively, "the Funds").

From January 1995 through January 2003, the Funds retained Defendant-Third Party Plaintiff LLM as independent certified accountants and auditors. As accountants to the Fund,

LLM was responsible for auditing, reviewing, supervising and maintaining the books and records of the Funds as well as calculating and verifying the allocation and payments made by the Funds to Local 522 for expenses such as rent, administrative services, telephone services and building expenses. Further duties included preventing and detecting fraud. LLM conducted and compiled surveys to determine the amount the Funds should reimburse Local 522 for such expenses. These surveys reported and allocated percentages for the time and expenses incurred by Local 522 and its employees on behalf of the Funds. LLM also regularly prepared reconciliations of the surveys against the actual expenses to determine the amount of reimbursement or refund due from or to Local 522.

However, the original complaint, file by Fidelity, alleges these expenditures incurred by Local 522 were improper, as the Funds did not actually incur any expenses. In February 1996, the Funds entered into an Administrative Service Agreement with Benserco, Inc. ("Benserco") to perform all of the administrative functions necessary for the complete operation and administration of the Funds. As of January 1996, Local 522 would no longer provide administrative serves to the Funds. LLM nevertheless approved the expenditures by relying upon inaccurate data and information. The Complaint alleges because of LLM's misconduct, the Funds improperly reimbursed Local 522 \$1, 354, 233.10 in expenditures, which it did not incur.

LLM filed a Third-Party Complaint against Local 522 as well as former trustees of the Funds and Glanstein who provided legal services to the Funds. LLM asserts claims for contribution and indemnity against Local 522 in the event LLM is found liable to the Plaintiff. Additionally, LLM asserts the following causes of action, unjust enrichment, conversion and constructive trust, against Local 522.

“[An] Impleader is only appropriate when the defendant in the primary action is proceeding ‘against a person not a party who is or may be liable to *him for all or part of the plaintiff’s claim against him.*’” See *Zurich Ins. Co. v. White* 129 A.D.2d 388, 390 (N.Y.A.D. 1987) (See CPLR 1007). “[T]he impleader statutory language requires some minimal relationship between the liability of the defendant asserted in the main action and the liability over claim in the third-party complaint.” *Id.* “[T]he 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.” *Id.* at 390. (*see also BBIG Realty Corp. v. Ginsberg*, 111 AD2d 91, 93 [emphasis supplied]; *see*, Siegel, NY Prac § 157, at 201). “[T]he true test is simply whether the third-party defendant may be liable to defendant- third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff.” *Norman Co. v. Nassau County*, 63 Misc.2d 965, 969 (N.Y.Sup. 1970). “A sufficient relationship between the controversies exists when the acts of third-party defendant have exposed defendant to judgment for damages for which the third-party defendant can be required to answer to defendant.” *Id.* at 970. (*B.M.C. Mfg. Corp. v. Tarshis*, 278 App. Div. 266, 269, mot. for lv. to app. den. 278 App. Div. 986).

To determine whether LLM can properly implead Local 522, the following issue must be addressed: whether Local 522 receiving money for expenses, improperly allocated by LLM from the Funds, rises to the level of exposing LLM to liability or causing Local 522 to be liable to LLM for the improperly allocated funds. The answer is no. Local 522’s actions did not expose LLM to liability or cause Local 522 to be liable to LLM. Although, there is a sufficient connection between the controversies limited to LLM’s improper allocation of the Funds’ money

to Local 522, LLM's oversight, for seven years, is the true reason why LLM is exposed to liability.

From January 1995 through January 2003, the Funds retained Defendant-Third Party Plaintiff LLM to calculate and verify the allocations and payments made by the Funds to Local 522 for expenses as well as to prevent and detect fraud. In February 1996, the relationship between the Funds and Local 522 ended when Benserco was contracted to provide administrative services. At that point, LLM should have realized that it no longer needed to pay Local 522 for its services. However, LLM continued to verify the payment made to Local 522 for an additional seven years. LLM asserts that Local 522 should be required to repay the money if the court finds it liable to the plaintiff. LLM makes several arguments for relief, the first of which is contribution.

"CPLR 1401 provides, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

See Rothberg v. Reichelt, 270 A.D.2d 760, 762 (N.Y.A.D.,2000). (*see also*, *Board of Educ. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26). The Court of Appeals has made it clear; "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of ... CPLR 1401." *Id.* "[A] defendant may not seek contribution from other defendants where the alleged 'tort' is essentially a breach of contract claim." *Id.* (*see also*, *Tempforce, Inc. v Municipal Hous. Auth.*, 222 AD2d 778, 779, *lv denied* 87 NY2d 811).

The court in *Sargent, Webster, Crenshaw & Folley* was not persuaded to create a common-law right of contribution in contract actions. *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 29 (N.Y. 1987). "Parties to a

contract have the power to specifically delineate the scope of their liability at the time the contract is formed.” *Id.* Furthermore, “there is nothing unfair in defining a contracting party’s liability by the scope of its promise as reflected by the agreement of the parties.” *Id.*

Rothberg parallels this case. In both cases, “plaintiff[s] [are] seeking the benefit of [its] contractual bargain and, as such, no claim for contribution lies.” *Rothberg*, 270 A.D.2d at 762 (see, *Wecker v Quaderer*, 237 AD2d 512, 513; *Tempforce, Inc. v Municipal Hous. Auth.*, *supra*). In *Rothberg*, the plaintiff sought the cost of repairs and the difference in value between what defendants were contractually obligated to provide and what plaintiff actually received. *Id.* In this case, the Plaintiff is seeking to recover funds wrongfully paid to Local 522, as Benserco now perform the duties once performed by Local 522. Accordingly, plaintiffs are seeking to recover purely economic loss due to breaches of contractual duties. Therefore, based on the aforementioned caselaw, LLM’s claim for contribution is denied.

LLM also asserts a claim for subrogation. “[S]ubrogation may arise when one party uses his [own] money to discharge the obligation of another to a third person.” *Salzman v. Holiday Inns, Inc.*, 48 A.D.2d 258, 262 (N.Y.A.D., 1975) (see also, 57 NY Jur., Subrogation, § 1; Restatement, Restitution, § 162). Moreover, the person who actually paid the debt steps into the shoes of the person whose debt was discharged and acquires his rights against another. *Id.* “The essential element to acquiring a right of subrogation is the person seeking subrogation must have made a payment, or had his funds or other property applied to discharge another’s obligation.” *Id.* (see also *Gerseta Corp. v Equitable Trust Co.*, 241 NY 418; *American Sur. Co. v Palmer*, 240 NY 63).

The caselaw discussed above describe the relationship that exist between the Funds and Fidelity not Local 522 and LLM. The instant case is analogous to *Salzman*. *Id.* In *Salzman*,

Holiday Inn did not make a payment to LS & G. LLM made no payments of its own money to Local 522. LLM only determined how much the Funds should pay Local 522 based on surveys and reconciliations prepared by LLM. In both case, the Defendant Third-Plaintiff were simply incidental beneficiaries contracted to perform services. Therefore, LLM's request for subrogation is denied.

LLM further claims indemnification against Local 522 if found liable to Plaintiff. "Indemnity may be distinguished from subrogation in that in an indemnity situation an obligor pays his own debt and then seeks reimbursement from a third party who, by express or implied obligation, may be the one actually responsible for its incurrence." *See Salzman v. Holiday Inn, Inc.*, 48 A.D.2d at 262. (*Brown v Rosenbaum*, 287 NY 510; Restatement, Restitution, § 76). "The right to indemnity... springs from a contract, express or implied, and full, not partial, [where] reimbursement is sought." *See McDermott v. City of New York*, 50 N.Y.2d 211, 216 (N.Y. 1980) (also see *McFall v Compagnie Maritime Belge [Lloyd Royal]*, S. A., 304 NY 314, 327- 328; accord, e.g., *Riviello v Waldron*, 47 NY2d 297, supra.;; *Rock v Reed-Prentice Div. of Package Mach. Co.*, supra, at pp 38-39). "The principle upon which it rests is that the true wrongdoer should bear the ultimate burden of payment." *Salzman*, 48 A.D.2d at 262. (*Dunn v Uvalde Asphalt Paving Co.*, 175 NY 214). "Under the theory of *Dole v Dow Chem. Co.* (30 NY2d 143) and *Kelly v Long Is. Light. Co.* (31 NY2d 25), it is enough for third-party plaintiff to show that part of the original plaintiff's injury was due to third-party defendant's additional wrongdoing." *Id.*

Here, however, the wrongdoing contemplated by LLM is Local 522 passively accepting funds improperly allocated. The active wrongdoing was LLM's oversight during the survey and verification stages of determining expenses due to Local 522. Therefore, if LLM is found liable

it would be due to its own culpable conduct. Furthermore, there is no contract between the parties stating that Local 522 will indemnify LLM for any reason. For these reasons, LLM's claim for indemnity is denied.

LLM's final assertion is for the court to imply indemnity. "[I]mplied indemnification finds its roots in the principles of equity." *McDermott*, 50 N.Y.2d at 217. "[A] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity." *Id.* (see also Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs. *Id.* (see, e.g., *Dunn v Uvalde Asphalt Paving Co.*, 175 NY 214, 217-218; *Oceanic S. N. Co. v Compania Transatlantica Espanola*, 134 NY 461, 465-468; *City of Brooklyn v Brooklyn City R. R. Co.*, 47 NY 475, 486-487). Thus, the rule developed that "[w]here payment by one person is compelled, which another should have made, a contract to reimburse or indemnify is implied by law." (*Brown v Rosenbaum*, 287 NY 510, 518-519; *Dunn v Uvalde Asphalt Paving Co.*, *supra*, at pp 217-218). This implied in law contract covers liability as well as loss or damages. *Id.* (*Dunn v Uvalde Asphalt Paving Co.*, *supra*, at p 218; Occhialino, Contribution, Nineteenth Ann Report of NY Judicial Conference, 1974, pp 217, 229).

As originally pled, the third-party complaint does not allege facts showing LLM was required to discharge a duty that should have been discharged by Local 522, such that a contract to indemnify should be implied by law. *Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d at 29 (see, *McDermott v City of New York*, 50 NY2d 211, 216-217, *supra*; Restatement of Restitution § 76). LLM merely pled if found liable, it wants to indemnify Local 522. Hence, its claim would not be ripe for review until after LLM is found liable to the plaintiffs.

Furthermore, if the court chose to imply indemnity, at what point will LLM be held responsible for its action if found liable to the Plaintiffs? Moreover, at what point during those seven years was LLM suppose to determine that the Funds no longer needed to pay Local 522 for service? Based on these survey reports LLM performed, it was responsible for determining the allocated percentages for the time and expenses incurred by Local 522 and its employees on behalf of the Funds. LLM was also contracted to prevent and detect fraud. LLM regularly prepared reconciliations of the surveys against the actual expenses to determine whether reimbursements or refunds were due. The purpose of the Funds' contract with LLM was to prevent situations like this. "But for" LLM's own culpable conduct, Local 522 would not have received money from the Funds. Therefore, the court declines to imply indemnity for all the aforementioned reasons.

Now we direct our attention to the other claims of conversion, constructive trust, and unjust enrichment. "[A] constructive trust may be imposed '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.'" *Sharp v. Kosmalski*, 40 N.Y.2d 119, 120 (N.Y. 1976). (*Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386; 1 Scott, *Trusts* [3d ed], § 44.2, p 337; 4 Pomeroy's *Equity Jurisprudence* [5th ed], § 1053, p 119). To show a constructive trust, the following four elements must exist: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. *Id.* (see *Janke v Janke*, 47 AD2d 445, affd 39 NY2d 786; *Vassel v Vassel*, 40 AD2d 713, affd 33 NY2d 533; *Foreman v Foreman*, 251 NY 237; *Sinclair v Purdy*, 235 NY 245; *Ahrens v Jones*, 169 NY 555; *Matter of O'Hara*, 95 NY 403). However, LLM has not shown any of the elements existed between itself and Local 522. Therefore, the LLM claim for constructive trust is denied.

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.” See *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (NY2006). (see also *State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]). However, LLM assets Local 522 exercised control and dominion over money belonging to the Funds, not its money. Therefore, LLM cannot assert a claim for conversion unless the property in question is its property. LLM claim for conversion and constructive trust is denied.

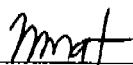
“A cause of action for unjust enrichment is where ‘plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs.’” See *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 119-120 (N.Y.A.D. 1998). (also see *Tarrytown House Condominiums v Hainje*, 161 AD2d 310, 313). “Where defendants have reaped such benefit, equity and good conscience require that they make restitution.” *Id.* In *Wiener*, the court dismissed the claim for unjust enrichment, finding that plaintiffs had failed to show how any enrichment had been at plaintiffs' expense, as here. *Id.*

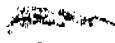
LLM did not sustain any injuries due to Local 522 accepting the money, and therefore do not have standing to bring this claim. Fidelity, acting on behalf of the Funds, is the injured party and may bring this claim against Local 522 for the return of the money if it chooses to do so. However, Fidelity chose not to bring a claim against Local 522, nonetheless, LLM cannot step into Fidelity's shoes in order to recoup funds it may have to repay to Fidelity if found liable. Therefore, the LLM claim for unjust enrichment is denied.

Additionally, the issue as to whether the complaint was properly pled under NY CLS Gen Assn §13 is moot as the Third-Party Defendant's motion to dismiss is granted pursuant to CPLR 3211(a).

Accordingly, the Third Party Defendant motion to dismiss is GRANTED. Hereby the Third Party Complaint, against Local 522, is DISMISSED.

Date: July 21, 2008



JSC

JUDGE MILTON A. TINGLING

FILED
JUL 28 2008
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