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

PRESENT: HON. RICHARD B. LOWE, III PART 54

Index Number : 602917/2004

MOUNTBATTEN SURETY

VS

ORISKA INSURANCE

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE 6/13/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/25/08

HON. RICHARD B. LOWE, III
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 56

THE MOUNTBATTEN SURETY COMPANY, INC.,

Index No.: 602917/04

Plaintiff, Action No. 1

- *against* -

ORISKA INSURANCE COMPANY and
FOLKSAMERICA REINSURANCE COMPANY,
Defendants.

METROPOLIS A.C. CORP.,

Index No.: 11705/03

Plaintiff, Action No. 2

- *against* -

THE MOUNTBATTEN SURETY COMPANY, INC.,
and NEW YORK CITY HOUSING AUTHORITY,
Defendants.

THE MOUNTBATTEN SURETY COMPANY, INC.,

Third-Party Index

Third-Party Plaintiff, No. 590020/08

- *against* -

DECISION/ORDER

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Defendant.

RICHARD B. LOWE, III, J.:

These actions for breach of contract, among other things, arise out of surety bond agreements issued by plaintiff/third-party plaintiff The Mountbatten Surety Company Inc. (Mountbatten) and defendants Oriska Insurance Company (Oriska) and Folksamerica Reinsurance Company (Folksamerica) in connection with a construction project for third-party

defendant New York City Housing Authority (NYCHA). In this motion, NYCHA seeks dismissal of the third-party complaint against it.

It is undisputed that in or around February 1999, NYCHA entered into a construction contract with non-party Jodinan Plumbing and Heating Corp. (Jodinan) for steam and hot water heating, ventilation, and air conditioning work on a NYCHA public housing development project (the HVAC contract, see Ex. 2 and 3 to Mialkowski Aff. In Support of NYCHA's Motion). The HVAC contract required Jodinan to provide a performance bond, which was issued by Mountbatten on behalf of Jodinan and in favor of NYCHA. Performance Bond, Ex. 4 to Mialkowski Aff. In Support. In November 2001, NYCHA declared Jodinan to be in default of the HVAC contract and demanded that Mountbatten, pursuant to its obligations as surety under the bond, complete performance of the contract. Nov. 7, 2001 letter, Ex. 5 to Mialkowski Aff. In Support. Mountbatten then contracted with plaintiff Metropolis A.C. Corp. (Metropolis), in February 2002, to complete the construction work remaining under the Jodinan contract. Agreement for Completion, Ex. 6 to Mialkowski Aff. In Support (completion contract). To secure its obligations to Mountbatten, Metropolis was required to provide performance and payment bonds (id., ¶ 7), for which Oriska and Folksamerica were the sureties. In June 2003, NYCHA notified Mountbatten that Metropolis had failed to complete work and meet deadlines, and it directed Mountbatten to terminate Metropolis and provide a new completion contractor. June 9, 2003 Letter, Ex. 7 to Mialkowski Aff. In Support. After contacting Metropolis' sureties, Oriska and Folksamerica, and at their request, Mountbatten proposed to NYCHA that Metropolis be allowed to return to the construction site and complete its work. July 1, 2003 Letter, Ex. F to Bondy Aff. In Opp. NYCHA rejected this proposal. July 7, 2003 Letter, Ex. G to Bondy Aff. In

Opp. Mountbatten then contracted with C & S Building Services, Inc. (C & S) to complete the construction work. Completion Agreement, Ex. 8 to Mialkowski Aff. In Support.

In July 2003, following its termination from the NYCHA construction project, Metropolis commenced an action in Westchester County against Mountbatten and NYCHA for breach of contract, unjust enrichment, and conspiracy, among other things (Action No. 2). By order of the court dated September 25, 2003 (Rudolph, J.), Metropolis' complaint as against NYCHA was dismissed. In September 2004, Mountbatten commenced an action in New York County (Action No. 1) to recover damages for breach of contract based on the failure of defendants Oriska and Folksamerica to comply with their obligations as sureties in connection with the contract between Mountbatten and Metropolis. Mountbatten moved to remove Action No. 2 to New York County and join it with Action No. 1, which motion was granted in June 2007. In January 2008, Mountbatten commenced the instant third-party action seeking indemnification from NYCHA. NYCHA now makes this pre-answer motion to dismiss the third-party complaint, pursuant to CPLR 3211(a)(1) and (7), on the grounds that Mountbatten failed to timely serve a notice of claim as required under the terms of the performance bond, and that Mountbatten has no contractual or common-law right to indemnification from NYCHA.

The HVAC contract provided, with respect to claims against NYCHA by the contractor, Jodinan, that "the Contractor shall, within twenty days after such claim shall have arisen, file with the Authority written notice of intention to make a claim." NYCHA Contract, Sec. 23(a), Ex.3 to Mialkowski Aff. In Support. The HVAC contract further provided that "[t]he filing by the Contractor of a notice of claim ... within the time limited herein, shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding

or action to recover thereon." Id., Sec. 23(b). It is not disputed that Mountbatten was bound by the terms of the HVAC contract with respect to the contractor's obligations. See Memorandum of Law in Opp., at 5-6.

Mountbatten filed a notice of claim with NYCHA on April 18, 2007. NYCHA contends that Mountbatten's claim for indemnification in connection with Metropolis' claims accrued on June 9, 2003, when Metropolis' contract was terminated, or at the latest on July 23, 2003, when Metropolis commenced Action No. 2. See Mialkowski Aff. In Support, ¶¶ 20-22. NYCHA also contends that Mountbatten's claim for indemnification for expenses incurred in retaining C & S accrued on September 12, 2003, the date Mountbatten entered into a completion contract with C & S. NYCHA argues that Mountbatten's notice of claim therefore was untimely and, pursuant to the contract, Mountbatten is barred from bringing the instant action against NYCHA.

NYCHA further argues that, even if the notice of claim was not untimely, Mountbatten has no right to indemnification under the HVAC contract, and it has no right to common-law indemnification because there is an express indemnification agreement in favor of NYCHA; there is no privity or duty between NYCHA and Metropolis; and the matters for which Mountbatten seeks indemnification involve Mountbatten's own wrongdoing. Mountbatten does not seek contractual indemnification, but it contends that it is entitled to common-law indemnification because any liability it may have to Metropolis arises solely from NYCHA's directive to Mountbatten to terminate Metropolis.

Implied, or common-law, indemnification "finds its roots in the principles of equity. It is nothing short of simple fairness to recognize that '[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' (Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs." McDermott v City of New York, 50 NY2d 211, 216-217 (1980). As stated in City of New York v Lead Indus. Assn., 222 AD2d 119, 125 (1st Dept 1996)(internal citations omitted):

> The gravamen of an action for indemnity is that both parties, indemnitor and indemnitee, are subject to a duty to a third person under such circumstances that one of them, as between themselves, should perform it rather than the other. The classic situation giving rise to a claim for indemnity is where one, without fault on its own part, is held liable to a third party by operation of law (frequently statutory) due to the fault of another. It is the independent duty which the wrongdoer owes to prevent the other from becoming vicariously liable, and cast in damages, to the injured party that is the predicate for the indemnity action.

Common-law indemnification thus permits one held vicariously liable who has been compelled to pay for the wrong of another to shift the entire burden of loss to the actual wrongdoer. See D'Ambrosio v City of New York, 55 NY2d 454, 460 (1982); 17 Vista Fee Assocs. v Teachers Ins. & Annuity Assn. of Am., 259 AD2d 75, 80 (1st Dept 1999); Trustees of Columbia Univ. v Mitchell/Giurgola Assocs., 109 AD2d 449, 453 (1st Dept 1985). However, common-law indemnification is warranted only when "a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious. (Balladares v Southgate Owners Corp., 40 AD3d 667, 671 (2d Dept 2007); Bedessee Imports, Inc. V Cook, Hall & Hyde, Inc., 45 AD3d 792, 796 (2d Dept 2007) See Mas v Two Bridges Assocs., 75 NY2d 680, 690 (1990). A party which has actually participated to some degree in the wrongdoing is not entitled to indemnification. 17 Vista Fee Assocs., 259 AD2d at 80; Trustees of Columbia Univ., 109 AD2d at 453.

In the third-party complaint, Mountbatten alleges that, pursuant to its obligations as surety for Jodinan, it entered into a contract with Metropolis as a completion contractor (Third-Party Complaint, ¶¶ 5-7); that, after NYCHA directed it to terminate Metropolis, it declared Metropolis in default of the completion contract (id., ¶¶ 9-10); that it demanded that Metropolis' sureties complete the contract, and forwarded their proposal to allow Metropolis to return to complete the work, but NYCHA rejected the proposal (id., ¶¶ 11-14). Mountbatten also alleges that it was bound to obey NYCHA's directive to terminate Metropolis, and that if it is found liable to Metropolis, it will be solely because it obeyed NYCHA's express directive (id., ¶¶ 21-23).

Even accepting the facts as alleged in the third-party complaint as true, and according third-party plaintiff the benefit of every possible favorable inference, as the court must do on a motion to dismiss pursuant to CPLR 3211(a)(7) (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]), the court finds that Mountbatten has failed to set forth a sufficient basis for asserting a cause of action for indemnification. The allegations against Mountbatten cannot be sustained without a finding of fault. Metropolis is suing based on Mountbatten's alleged breach of the completion contract between them, and is not seeking to hold Mountbatten vicariously liable for any wrongdoing of NYCHA. See Edgewater Constr. Co. v 81 & 3 of Watertown, Inc., 252 AD2d 951, 952 (4th Dept 1998); Commissioners of State Ins. Fund v Tom L. LaMere & Assocs., Inc., 31 AD3d 1181, 1182 (4th Dept 2006). In its complaint, Mountbatten essentially acknowledged that it participated to some degree in the alleged wrongdoing, when it declared Metropolis to be in default under the completion contract. Third-Party Complaint, ¶ 10. Liability against

Mountbatten thus can only be found if it actually breached the completion contract. Under these circumstances, where the potential liability of Mountbatten is not derivative and an award of damages would not depend solely on a wrongful act or omission of NYCHA, implied indemnification does not apply. See Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 569 (1987); Gap, Inc. v Fisher Dev., Inc., 27 AD3d 209, 212 (1st Dept 2006); Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co., 38 AD3d 231, 233 (1st Dept 2007).

Further, implied indemnity claims generally require a showing that both the indemnitor and indemnitee owed a duty to a third party. See McDermott, 50 NY2d at 216-217 Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson, AIA, 294 AD2d 93, 99 (3d Dept 2002), affd 100 NY2d 202 (2003); City of New York v Lead Indus. Assn., 222 AD2d at 126-127; Kemron Envtl. Servs., Inc. v Environmental Compliance, Inc., 184 AD2d 755, 755-756 (2d Dept 1991). Additionally, a key element of a common-law indemnification claim is "a separate duty owed the indemnitee by the indemnitor (thus the indemnitee may recover for the wrong to it), because there is 'a great difference' in the gravity of the fault of the two tort-feasors, or because the duties owed to the injured plaintiffs and causing injury are disproportionate." Mas, 75 NY2d at 690; Raquet v Braun, 90 NY2d 177, 183 (1997). Here, Mountbatten makes no allegation that NYCHA owed a duty to Metropolis, or even that NYCHA owed it a separate duty. Notably, any claims by Metropolis against NYCHA were dismissed, in Action No. 2, in part based on a finding that NYCHA had no agreement with and no duty to Metropolis.

Although Mountbatten does not address its claim for indemnification based on Metropolis' causes of action for unjust enrichment and conspiracy, to the extent that it seeks

indemnification based on those claims, the complaint also cannot stand. NYCHA correctly contends that, as was found in Action No. 2, no claim for unjust enrichment lies where, as here, there is no bona fide dispute as to "the existence of a valid and enforceable written contract," between Mountbatten and Metropolis, which governs the particular subject matter of the complaint. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987). Nor do New York courts recognize a cause of action for civil conspiracy independent from an underlying tort claim. Steier v Schreiber, 25 AD3d 519, 522 (1st Dept 2006); Linden v Lloyd's Planning Serv., Inc., 299 AD2d 217, 218 (1st Dept 2002).

In view of the above findings, the court does not reach the branch of the motion which seeks dismissal based on an allegedly untimely notice of claim. The court notes, however, that it is well settled that a cause of action for indemnification generally does not arise until the party seeking indemnity has actually suffered a loss, that is, "accrual occurs upon payment by the party seeking indemnity." McDermott, 50 NY2d at 217; Tedesco v A.P. Green Indus., Inc., 8 NY3d 243, 247 (2007). See Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, 470 n 2 (1986). As there has been no finding of liability against Mountbatten and no loss has actually been sustained, the indemnification claim has yet to accrue. Contrary to NYCHA's argument, the court finds no basis for applying a different accrual date for purposes of the instant notice of claim requirement.

Accordingly, the motion of third-party defendant is granted and it is

ORDERED that the third-party complaint is dismissed and the Clerk shall enter judgment

accordingly.

Dated: September 25, 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III