

Puccio v Fontana

2009 NY Slip Op 30856(U)

April 8, 2009

Supreme Court, Richmond County

Docket Number: 101217/07

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND DCM PART 3

Index No. 101217/07
 Motion No.: 002

JOSEPH PUCCIO and
 VITA PUCCIO,

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

NICOLE FONTANA,

Defendants

NICOLE FONTANA

Third-Party Plaintiff,

against

GREGORY AMATO,
 MARISA AMATO, and
 AMATO CONTRACTING, INC.,

Third-Party Defendant,

The following items were considered in the review of the following motion to dismiss the third party complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Third-party defendants, Gregory Amato, Marisa Amato and Amato Contracting, Inc. move pursuant to CPLR § 3211(a)(5) and (7) dismissing the third party complaint for failure to state a cause of action and being barred pursuant to the applicable statute of limitations. The third-party defendants' motion is granted in part and denied in part.

Facts

The plaintiffs, Joseph and Vita Puccio, commenced this action against the defendant by serving a complaint on or about February 15, 2007. The plaintiffs allege the following pertinent claims against the defendant: 1) that the defendant encroached on their property by erecting a fence blocking an easement on to the plaintiff's property, and 2) that the defendant used a plastic hose to drain raw sewage from basement of the structure erected on the plaintiff's property on to the plaintiffs' land. The defendant answered the plaintiffs' complaint on or about June 15, 2007.

In their answer the defendant alleges various affirmative defenses and counterclaims against the plaintiffs that include the affirmative defense of failing to join a necessary party. On or about July 22, 2008 the defendant commenced a third-party action against the above named third-party defendants after the plaintiffs submitted to an examination before trial.

During their examination before trial, each plaintiff acknowledged that seepage and water damage occurred after the third-party defendants began constructing a home. Each of the plaintiffs testified that the construction of the third-party defendants home commenced in either 2002 or 2003. In addition, the examination before trial of Vita Puccio reveals that Gregory Amato's father is Vita Puccio's mother's second cousin.

Fontana's third party complaint alleges that the third-party defendants commenced the demolition of an existing structure on or about July 1, 2001 and began to construct a new residential dwelling in its place. According to records submitted by the third-party defendants the construction project concluded on March 25, 2004 when the New York City Department of Buildings issued a certificate of occupancy. Fontana alleges that as a result of the actions taken by the third-party defendants the sewage system that serviced her home was damaged. As a result of the third-party defendants' actions, Fontana alleges causes of action sounding in indemnity and contribution for damages to the, sewage system stemming from the alleged actions taken by the third-party defendants.

Discussion

Statute of Limitations

Fontana's property damage claims are governed by the three year statute of limitations pursuant to CPLR § 214(4). As a consequence the latest date on which Fontana could have brought an action for property damage against the third-party defendants would have been March 25, 2007. Since this action was commenced on or about July 22, 2008, Fontana's claims for property damage are dismissed as being time barred.

Indemnity/Contribution

The scope of a court's inquiry on a motion to dismiss under CPLR § 3211 is narrowly circumscribed. The court must accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory. The court must accept as true not only the complaint's material allegations but also whatever can be reasonably inferred therefrom in favor of the pleader. In ruling on a motion to dismiss the court is not authorized to assess the merits of the complaint or any of its factual allegations but only to determine if, assuming the truth of the facts alleged, the complaint states elements of a legally cognizable cause of action.¹

In this case Fontana's third party complaint alleges at paragraph 12:

That during the progress of Third-Party Defendants Work, Third-Party Defendants, their agents, contractors, subcontractors and others acting on their behalf, intentionally interfered with and damaged the existing sewage disposal system(s) servicing Plaintiffs' and Defendant/Third-Party Defendants (sic) property, cutting and/or damaging the existing waste/sewage pipes existing upon and/or servicing Plaintiff's and/or Defendant/Third-Party Defendants'(sic) properties, *and/or altering the natural flow of*

¹ *P.T. Bank Central Asia v. ABN Amro Bank N.V.*, 301 AD2d 373, [1st Dep't 2002]; *See also, Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co.*, 5 AD3d 352, [2d Dep't, 2004].

water and/or waste disposal servicing Plaintiffs' and/or Defendant Third-Party Defendants'(sic) properties. (Emphasis added)

This contrasts with the plaintiff's complaint in the primary action wherein the plaintiffs Vita and Joseph Puccio allege at paragraphs 7 and 8 that

7. The Defendant has at various times taken a plastic hose and drained raw sewage from the basement of the structure erected on the Defendant's property and discharged said fluid waste upon the property of the Plaintiffs herein.

8. Upon information and belief, said fluid waste discharge from the basement of the structure located on Defendant's property contains raw sewage and untreated fecal material as well as "gray water" discharge from a washing machine, dishwasher and the like.

In *Raquet v. Braun*, the Court of Appeals articulated the standards associated with maintaining claims for both common-law indemnity and contribution. In considering a cause of action for indemnification the Court of Appeals held:

. . . the key element . . . is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor' . . . The duty that forms the basis for the liability arises from the principle that 'everyone is responsible for the consequences of his own negligence, and if another person has been compelled . . . to pay damages which ought to have been paid by the wrongdoer, they may be recovered from him.' . . . (internal citations omitted)²

Here, the third-party complaint alleges that third-party defendants "and/or altering the natural flow of water and/or waste disposal servicing Plaintiffs' and/or Defendant Third-Party Defendants'(sic) properties." Given the facts alleged in Fontana's third-party complaint that aver that the third-party defendants constructed a new dwelling on adjacent property, her allegations concerning the alleged changes to the natural flow of water and waste disposal service are sufficiently supported. As such, the allegations contained in Fontana's third-party set forth a cause of action for indemnity against the third-party defendants.

²*Raquet v. Braun*, 90 NY2d 177, [1997].

Even assuming that the allegations in the underlying complaint are taken as true, Fontana's cause of action for indemnification will still survive. The Court of Appeals in *Public Service Mutual Insurance Company v. Goldfarb* evaluated indemnification in the context of intentional action. In that case, a defendant/third-party plaintiff dentist sought indemnification from his dental malpractice carrier after being sued for damages stemming from a sexual assault conviction. In that decision the Court of Appeals stated that

[o]ne who intentionally injures another may not be indemnified for any civil liability thus incurred. However, one whose intentional act causes an unintended injury may be so indemnified. (Citations omitted)³

In evaluating this factual situation the Court of Appeals stated that whether the insurer was obligated to pay any judgement for compensatory damages found against the defendant/third-party plaintiff hinged on a finding by the trier of fact that the "unintended injury occurred in the course of dental treatment."⁴ However, in the event that the trier of fact determined that the defendant/third-party plaintiff intended to injure the plaintiff, public policy would preclude indemnification.⁵

The court now turns its attention to Fontana's cause of action for contribution. The Court of Appeals in *Raquet* held that:

. . . a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule . . . A contribution claim can be made even when the contributor has no duty to the injured plaintiff. In such situations, a

³ *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 NY2d 392, [1981].

⁴ *Id.*

⁵ *Id.*

claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable. . . (internal citations omitted)⁶

Fontana's third-party complaint asserts that the third-party defendants had a duty to demolish the existing structure and erect the new dwelling in such a manner that did not: 1) disturb the natural flow of water and 2) interfere with the waste disposal system.

Third-party defendants do not argue that they did not undertake the work alleged in Fontana's third-party complaint, they merely argue that her claims for personal property damage are barred. While Fontana's personal claims for property damage are barred by the statute of limitations, this court finds no reason why she may not allege these facts for a cause of action for contribution.

Conclusion

The third-party defendant's motion to dismiss the third-party plaintiff's 3rd, 4th, and 5th causes of action is granted, as CPLR § 214(4) sets forth a three year statute of limitations for property damage claims. However, the third-party defendant's motion to dismiss the third-party plaintiff's 1st and 2nd causes of action is denied. To determine a motion to dismiss a complaint for failure to state a cause of action, the court must accept the allegations therein as true, and must give them the benefit of every favorable inference. The motion is not dependent on the resolution of factual determinations to be made by a jury.⁷ A court must look only to determine whether a cause of action was properly pled. In this case, the court finds that the third-party plaintiff adequately set forth claims for indemnity and contribution.

⁶ *Raquet v. Braun*, 90 NY2d 177, [1997].

⁷ *Villarin v. Onobanjo*, 276 AD2d 479, [2d Dep't, 2000].

Accordingly, it is hereby:

ORDERED, that the Third-party defendants, Gregory Amato, Marisa Amato and Amato Contracting, Inc. motion pursuant to CPLR § 3211(a)(5) dismissing the third party complaint's 3rd, 4th and 5th causes of action as being barred pursuant to CPLR § 214(4) is granted; it is further

ORDERED, that the Third-party defendants, Gregory Amato, Marisa Amato and Amato Contracting, Inc. motion pursuant to CPLR § 3211(a)(7) to dismiss the third-party complaint's 1st and 2nd causes of action for failure to state a cause of action is denied; and it is further

ORDERED, that the parties return to DCM Part 3 on Thursday, May 7, 2009 at 9:30 A.M. for a compliance conference.

ENTER,

DATED: April 8, 2009

Joseph J. Maltese
Justice of the Supreme Court