

Tanger v Ferrer

2009 NY Slip Op 33437(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 116838/05

Judge: Marcy Friedman

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16

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

STEVEN TANGER,

Plaintiff,

- against -

ALFRED FERRER III, et al.,

Defendants.

_____ x

Index No.: 116838/05

DECISION/ORDER

x

ALFRED FERRER III, et al.,

Third-Party Plaintiffs,

- against -

DLA PIPER US LLP,

Third-party Defendant.

_____ x

Third-Party Index No.:
590531/08

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

In the main action, plaintiff Steven Tanger seeks damages against defendants/third-party plaintiffs Alfred Ferrer III and Eaton & Van Winkle, LLP (collectively "Ferrer") for legal malpractice. Third-party defendant DLA Piper US LLP ("DLA Piper") moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The third-party complaint alleges a first cause of action for contribution and a second cause of action

for common law indemnification.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].)

In moving to dismiss the indemnification claim, third-party defendant argues that because the complaint in the main action alleges that defendants/third-party plaintiffs themselves were negligent, defendants “do not have a viable claim” against third-party defendants for indemnification. (DLA Piper Memo. In Support at 3.) It is well settled that “in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law.” (Correia v Professional Data Mgt., Inc., 259 AD2d 60, 65 [1st Dept 1999]. See McDermott v City of New York, 50 NY2d 211 [1980], reargument denied 50 NY2d 1059; Barry v Hildreth, 9 AD3d 341 [2d Dept 2004], lv denied 4 NY3d 701.)

Here, there is no allegation in the main action or the third-party action that defendants/third-party plaintiffs are vicariously liable for the acts of DLA Piper. On the contrary, the main action alleges that defendant Ferrer, while representing plaintiff Tanger in a dispute with his landlord, committed malpractice by, among other acts, negligently preparing three

tenders pursuant to CPLR 3219. (Complaint, ¶¶ 34-37.) The main action clearly alleges negligence on Ferrer's part, although this negligence allegedly occurred in part while Ferrer was employed by DLA Piper. (See Third-Party Complaint, ¶ 17.)

The third-party action on its face therefore fails to state a cause of action for common-law indemnification. (See County of Westchester v Welton Becket Assocs., 102 AD2d 34 [2d Dept 1984], affd for reasons stated below 66 NY2d 642 [1985]; Board of Educ. of the City of New York v Mars Assocs., Inc., 133 AD2d 800 [2d Dept 1987].)

The court declines to determine, on this inadequately briefed record, whether the third-party action also fails to state a cause of action against DLA Piper for contribution. "In determining whether a valid third-party claim for contribution exists, the critical issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages." (Rosner v Paley, 65 NY2d 736, 738 [1985].) Here, the third-party complaint is based on the conclusory allegation that if plaintiff Tanger sustained damages, they were caused by the malpractice of third-party defendants. (Third-Party Action, ¶ 21.) DLA Piper unquestionably owed Tanger a duty to represent him in a non-negligent fashion while DLA Piper was Tanger's attorney of record. (See Schauer v Joyce, 54 NY2d 1 [1981]). Notably, however, third-party defendants do not submit any authority discussing the circumstances, if any, in which an attorney who is sued for malpractice may obtain contribution from the firm by which he was employed at the time of the alleged malpractice. Nor do third-party defendants address whether a defendant attorney may obtain contribution against the firm that employed him on a respondeat superior theory or whether the respondeat superior theory is available against the firm only to the plaintiff in the underlying malpractice action.

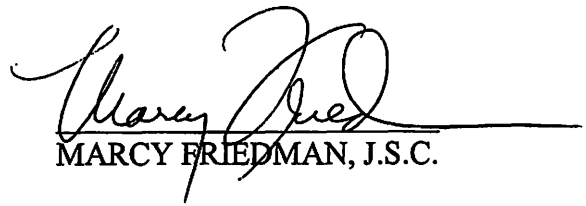
It is accordingly hereby ORDERED that third-party defendants' motion is granted to the extent of dismissing the second cause of action in the third-party complaint for indemnification; and it is further

ORDERED that third-party defendant is granted leave to serve a new motion to dismiss the first cause of action in the third-party complaint for contribution, on condition that such motion is brought by order to show cause within 20 days after service of a copy of this order with notice of entry, and is supported by a memorandum of law addressing the above-identified legal issues; and it is further

ORDERED that the parties shall appear for the previously scheduled discovery conference in Part 57 of this Court on September 3, 2009 at 2:30 p.m. In the interim, discovery shall proceed in the main action but not the third-party action.

This constitutes the decision and order of the court.

Dated: New York, New York
July 9, 2009


MARCY FRIEDMAN, J.S.C.

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