

**Specialized Indus. Servs. Corp. v Carter**

2011 NY Slip Op 30492(U)

February 16, 2011

Supreme Court, Suffolk County

Docket Number: 16955/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 16955/2007

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

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SPECIALIZED INDUSTRIAL SERVICES  
CORP.,

Plaintiff,

-against-

BENJAMIN E. CARTER, ESQ.,

Defendant.

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BENJAMIN E. CARTER, ESQ.,

Third-Party Plaintiff,

-against-

VINCENT J. GRANDE, III, ESQ., DOUGLAS  
A. DURNIN, ESQ., ROBERT J. LaREDDOLA,  
ESQ., LaREDDOLA, LESTER &  
ASSOCIATES, LLP,

Third-Party Defendants.

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ORIG. RETURN DATE: APRIL 22, 2010  
FINAL SUBMISSION DATE: MAY 20, 2010  
MTN. SEQ. #: 006  
MOTION: MG

ORIG. RETURN DATE: APRIL 22, 2010  
FINAL SUBMISSION DATE: MAY 20, 2010  
MTN. SEQ. #: 007  
CROSS-MOTION: XMD

ORIG. RETURN DATE: MAY 20, 2010  
FINAL SUBMISSION DATE: MAY 27, 2010  
MTN. SEQ. #: 008  
MOTION: MG

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SPECIALIZED INDUSTRIAL SERVICES CORP. v. CARTER  
INDEX NO. 16955/2007

FARNETI, J.  
PAGE 2

**ATTORNEYS FOR THIRD-PARTY DEFENDANTS**  
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Upon the following papers numbered 1 to 20 read on these motions \_\_\_\_\_  
**TO DISMISS AND TO DISQUALIFY ATTORNEY** \_\_\_\_\_

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-motion and supporting papers 5-7; Memorandum of Law 8; Affirmation in Opposition and supporting papers 9, 10; Memorandum of Law 11; Reply Affirmation 12; Reply Memorandum of Law 13; Reply Memorandum of Law 14; Notice of Motion and supporting papers 15-17; Affirmation in Opposition 18; Memorandum of Law 19; Reply Affirmation 20; it is,

**ORDERED** that this motion (#006) by third-party defendants ROBERT J. LaREDDOLA, ESQ., and LaREDDOLA, LESTER & ASSOCIATES, LLP ("third-party defendants") for an Order, pursuant to CPLR 3211 (a) (7), dismissing the third-party summons and complaint in its entirety for failing to set forth a cause of action, or in the alternative, granting third-party defendants summary judgment dismissing the claims of third-party plaintiff BENJAMIN E. CARTER, ESQ. ("Carter") against them with prejudice, is hereby **GRANTED** as set forth hereinafter; and it is further

**ORDERED** that this cross-motion (#007) by Carter for an Order, pursuant to 22 NYCRR § 1200.29 and/or Disciplinary Rule 1.7 and Ethical Canons 5 and 9, disqualifying third-party defendants from representing plaintiff SPECIALIZED INDUSTRIAL SERVICES CORP. ("plaintiff") in this action, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this motion (#008) by third-party defendant DOUGLAS A. DURNIN, ESQ. ("Durnin") for an Order, pursuant to CPLR 3211 (a) (7), dismissing the third-party complaint of Carter on the grounds that the third-party complaint fails to state a cause of action, is hereby **GRANTED** for the reasons set forth hereinafter.

The Court has consolidated these three motions for the purpose of rendering the within decision and Order.

This action was filed by plaintiff against Carter for violation of Judiciary Law § 487, fraud and misrepresentation. The action arises from a prior action against plaintiff brought by Dave Sandel, Inc. ("Sandel, Inc."), a corporation represented by Carter, entitled *Dave Sandel, Inc. v. Specialized Industrial Services Corp.*, in which a default judgment was entered against plaintiff after an Inquest was held therein on November 3, 2005 (Index No. 16537/2004 [Werner, J.]). Plaintiff alleges that at the Inquest, Sandel, Inc. repudiated and unilaterally breached a barter agreement of the parties by procuring a judgment against plaintiff for the full amount of the services provided to plaintiff, without any offset for the services provided by plaintiff to Sandel, Inc. Plaintiff alleges that Sandel, Inc. used fabricated invoices to support its claim, which resulted in an excessive money judgment awarded to Sandel, Inc. against plaintiff in the amount of \$412,366.98. Sandel, Inc. claimed that the money judgment represented the rental charges and labor charges for cranes furnished, as well as the value of a man-lift, less storage charges owed by Sandel, Inc.

The judgment after Inquest was vacated by Order dated January 27, 2006 (Werner, J.). That Order was then appealed to the Appellate Division, Second Department, and by decision and Order dated December 26, 2006, the Appellate Division reversed the Order on the law and denied the motion to vacate the judgment and for leave to serve a late answer (*see Dave Sandel, Inc. v. Specialized Indus. Servs. Corp.*, 35 AD3d 790 [2006]). The Appellate Division found that the defendant (the plaintiff herein) failed to proffer a reasonable excuse for its default given the history of neglect on the part of its prior attorney. Plaintiff's motion for leave to appeal to the Court of Appeals was thereafter dismissed upon the ground that the Order sought to be appealed from did not finally determine the action within the meaning of the Constitution (*see Dave Sandel, Inc. v. Specialized Indus. Servs. Corp.*, 9 NY3d 914 [2007]).

In this action, plaintiff now claims that Carter knowingly introduced the fraudulent documents at Inquest, and that this was not merely in the context of that action but was part of a larger fraudulent scheme encompassing other lawsuits which, it claims, were patently without merit against other corporations and individuals through the use of fabricated evidence as well as the suborning of perjury with the intent to create and/or inflate damages.

By Order dated July 23, 2008 (Jones, J.), the Court decided a motion herein by Carter to dismiss plaintiff's complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (7), and for the imposition of sanctions, pursuant to 22 NYCRR §

130-1.1, as well as a cross-motion by plaintiff seeking various relief. Specifically, the Court denied Carter's application to dismiss plaintiff's first cause of action alleging violation of Judiciary Law § 487, granted the application to dismiss the second and third causes of action sounding in fraud and misrepresentation, and denied the application for sanctions. This Order was affirmed by the Appellate Division by decision and Order dated December 1, 2009 (*see Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750 [2009]).

Thereafter, by verified third-party complaint filed on January 21, 2010, Carter commenced the instant third-party action asserting causes of action against all third-party defendants for contribution pursuant to CPLR 1401, and for apportionment if Carter is found liable for any damages sustained by plaintiff. Carter claims, among other things, that although plaintiff alleged that the default judgment was procured through fraudulent evidence, Durnin moved to vacate the judgment solely pursuant to CPLR 5015 (a) (1), and not pursuant to CPLR 5015 (a) (3), which permits a party to be relieved from a judgment upon the grounds of "fraud, misrepresentation, or other misconduct of an adverse party." However, Carter acknowledges that Durnin alleged fraud in the underlying moving papers. As discussed hereinabove, that motion was granted by Order dated January 27, 2006 (Werner, J.), but then reversed by the Appellate Division (*see Dave Sandel, Inc. v Specialized Indus. Servs. Corp.*, 35 AD3d 790, *supra*). In addition, Carter alleges that when third-party defendants were retained and subsequently moved in the Appellate Division for leave to renew and/or to appeal to the Court of Appeals, they improperly claimed for the first time that plaintiff was entitled to relief under CPLR 5015 (a) (3). That motion was denied by the Appellate Division by decision and Order dated June 1, 2007, without any reasoning given therefor. Moreover, Carter claims that third-party defendants counseled plaintiff to pay the entire amount of the judgment, which extinguished plaintiff's right to challenge the judgment pursuant to CPLR 5015 (a) (3).

Third-party defendants and Durnin have now filed these pre-answer motions to dismiss Carter's third-party summons and complaint as asserted against them, pursuant to CPLR 3211 (a) (7), for failing to set forth a cause of action. In the alternative, third-party defendants seek summary judgment dismissing the claims of Carter. In addition, Carter has filed the instant cross-motion to disqualify third-party defendants from representing plaintiff in this action.

Third-party defendants argue that when there are a number of different options available to litigant and its attorney, the selection of one among several reasonable courses of action does not constitute malpractice. Therefore, plaintiff's decision to satisfy the judgment, allegedly for business reasons alone, and then to pursue plenary actions against Sandel, Inc., Sandel individually, Vincent J. Grande, III, Esq., and Carter, was one of the reasonable courses of action. Third-party defendants indicate that it was plaintiff, not third-party defendants, which made the decision to satisfy the judgment in order to stave off a sale of its real property by the Suffolk County Sheriff. Moreover, third-party defendants allege that, contrary to Carter's contention, they had no duty to file another motion at the trial court level, as opposed to in the Appellate Division, pursuant to CPLR 5015 (a) (3). As such, third-party defendants argue that they committed no malpractice after being retained by plaintiff, and therefore are not liable to Carter for contribution herein.

Carter has filed the instant cross-motion in opposition to third-party defendants' motion and to disqualify third-party defendants from representing plaintiff in this action pursuant to the advocate-witness rule and/or pursuant to Disciplinary Rule 1.7 and Ethical Canons 5 and 9. Initially, Carter opposes a conversion of third-party defendants' motion to dismiss into a motion for summary judgment (see CPLR 3211 [c]), arguing that third-party defendants do not seek such conversion, and that a motion for summary judgment may only be made after issue is joined (see CPLR 3212).

Carter alleges that it is undisputed that plaintiff never filed a motion with the trial court to vacate the judgment pursuant to CPLR 5015 (a) (3), "as it was required to do," which demonstrates ignorance of the rules of practice, and resulted in none of the courts involved actually considering plaintiff's allegations of fraud. Therefore, Carter argues that if plaintiff's allegations against him in the instant action are proven, plaintiff would have prevailed on a proper application pursuant to CPLR 5015 (a) (3). Accordingly, Carter alleges that third-party defendants contributed to plaintiff's damages, and therefore their motion must be denied.

With respect to disqualification pursuant to the advocate-witness rule, Carter argues that Mr. LaReddola is the only party capable of testifying as to why plaintiff chose to satisfy the default judgment without attempting to vacate it pursuant to CPLR 5015 (a) (3). In the alternative, Carter seeks disqualification of third-party defendants pursuant to Disciplinary Rule 1.7 and Ethical Canons 5 and

9, in that as parties herein their interests as an advocate are directly at odds with their interests as third-party defendants.

Durnin has also filed a motion to dismiss the third-party complaint as asserted against him, pursuant to CPLR 3211 (a) (7). Carter alleges that Durnin negligently moved to vacate the allegedly fraudulent judgment based upon excusable neglect, rather than fraud. Carter asserts that, if plaintiff succeeds in establishing that Carter violated Judiciary Law § 487 by submitting false invoices, then Durnin was negligent for not having the judgment vacated based upon those false invoices pursuant to CPLR 5015 (a) (3).

Durnin argues that the treble damages plaintiff seeks against Carter pursuant to Judiciary Law § 487 are punitive in nature, and therefore Carter does not have the right to contribution from any of the third-party defendants. As such, Durnin contends that Carter cannot "lay blame at the feet of the third-party defendants for their alleged failure to stop him from succeeding with his fraud." For the same reasons, Durnin alleges that Carter's cause of action for apportionment cannot be maintained. Further, Durnin argues that even if Carter had a right of contribution, he would still not be able to recover against Durnin because he cannot establish that any alleged negligence on the part of Durnin caused plaintiff's damages.

Moreover, Durnin contends that even if Carter could seek contribution for the damages for which he is potentially liable, his third-party complaint still fails to state a cause of action against Durnin, as successor counsel, i.e., third-party defendants, could have done that which Carter claims Durnin should have done. Thus, Durnin argues that any alleged negligence on his part was not the proximate cause of plaintiff's damages.

In opposition to Durnin's motion, Carter argues that although a party may not recover in contribution for punitive damages, treble damages are inherently one-third compensatory in nature, and that a defendant in an action pursuant to Judiciary Law § 487 may seek contribution from other parties with respect to any compensatory damages that may be awarded. Carter claims that he only seeks contribution from Durnin with respect to the compensatory damages sought against Carter by plaintiff, to wit: \$412,366.98, and that CPLR 1401 does not explicitly make contribution unavailable in an action such as this. Regarding Durnin's argument that third-party defendants could have rectified any

alleged negligence on the part of Durnin, Carter alleges that discovery is needed on this issue.

In reply, Durnin alleges that if Carter is found to have violated Judiciary Law § 487, he cannot avoid the penalty by seeking contribution in the instant third-party action. Further, Durnin argues that despite Carter's contention, courts have repeatedly held that punitive damages are in the nature of a penalty and not subject to contribution principles. Finally, Durnin alleges that Carter's statement in the third-party complaint that third-party defendants were permitted to make a motion to vacate the default judgment pursuant to CPLR 5015 (a) (3) is an admission that third-party defendants could have done that which Carter alleges Durnin should have done. Therefore, Durnin argues that there is no need to delay dismissal of the third-party complaint against Durnin until after discovery.

Judiciary Law § 487, entitled "[m]isconduct by attorneys," provides in pertinent part:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party

\* \* \*

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action

(Judiciary Law § 487 [1]).

The operative language of Judiciary Law § 487 - "guilty of any deceit" - focuses on the attorney's intent to deceive (see *Amalfitano v Rosenberg*, 12 NY3d 8 [2009]), and subjects the attorney to a possible misdemeanor conviction as well as treble damages. Such an award of treble damages under section 487 is punitive in nature (see *Amalfitano v Rosenberg, supra*; *Jorgensen v Silverman*, 224 AD2d 665 [1996]; see generally *Cox v Microsoft Corp.*, 290 AD2d 206 [2002]), and "are not designed to compensate a plaintiff for injury to property or pecuniary interests" (*Jorgensen v Silverman, supra* at 666; see *Mccabe v St. Paul*

*Fire & Mar. Ins. Co.*, 2010 NY Slip Op 9633 [4th Dept]). As the punitive damages awarded pursuant to section 487 are in the nature of a penalty, they are not subject to the principle of contribution (see *Felice v Delporte*, 136 AD2d 913 [1988]; *Smith v Guli*, 106 AD2d 120 [1985]), and Carter has not proffered any state court authority to the contrary.

Furthermore, the policy of the law, as declared by the Legislature in CPLR 1401, is to allow contribution “unless it is clear that the legislative policy which led to the passage of the statute would be frustrated by the granting of contribution in favor of the person who violated the statute” (12th Ann Rep of NY Judicial Conference on CPLR, reprinted in 20th Ann Rep of NY Judicial Conference, 1975, at 216, and in 1974 McKinney’s Session Laws of NY, at 1808; see *Zona v Oatka Restaurant & Lounge, Inc.*, 68 NY2d 824 [1986]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). On such a motion, the court may consider affidavits for the limited purpose of remedying any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

Based upon the foregoing, and favorably viewing the facts alleged as amplified and supplemented by Carter’s opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording Carter “the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that Carter has failed to state causes of action against the moving third-party defendants for contribution or apportionment.

Accordingly, the motions by third-party defendants and Durnin to dismiss are both **GRANTED**.

With respect to Carter’s cross-motion to disqualify third-party defendants from representing plaintiff, courts, in determining whether a party’s

lawyer, at its adversary's instance, should be disqualified during litigation, must also consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1987]).

Further, disqualification of counsel may be required only when it is likely that the testimony to be given by the witness is necessary, and that such testimony is or may be prejudicial to the client (see *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Goldberger v Eisner*, 21 AD3d 401 [2005]; *Daniel Gale Assoc. v George*, 8 AD3d 608 [2004]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Matter of Porter*, 35 AD3d 477 [2006]).

After reviewing the papers submitted, and balancing the aforementioned factors, the Court finds that disqualification of third-party defendants is not warranted herein. As the Court has now dismissed the third-party complaint as asserted against the third-party defendants, Carter's argument under Disciplinary Rule 1.7 and Ethical Canons 5 and 9 is now moot. In addition, the Court finds that Mr. LaReddola is not a necessary witnesses in this action, in that testimony regarding plaintiff's motivation for satisfying the judgment could be obtained from a member of plaintiff itself, not solely from Mr. LaReddola, to the extent it is still relevant given the Court's ruling herein.

Accordingly, Carter's cross-motion to disqualify third-party defendants from representing plaintiff in this action is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: February 16, 2011

  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION