

Bridlewood Constr. Corp. v Rosenblum

2011 NY Slip Op 32089(U)

July 12, 2011

Supreme Court, Nassau County

Docket Number: 000374/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

BRIDLEWOOD CONSTRUCTION CORP.,

Plaintiff,

- against -

TRIAL/IAS PART 7

INDEX NO.: 000374/2009
MOTION DATE: 5/20/11
SEQUENCE NO.: 02, 03, 04

JEFFREY M. ROSENBLUM, MERYL A.
ROSENBLUM, MARJAM SUPPLY CO., INC.,
ULTIMATE SWIMMING POOL & SPA
SERVICES, INC., FIRST CLASS CONCRETE
CORP., SEVEN STARS CONSTRUCTION, INC.,
N & p ENGINEERS & LAND SURVEYORS,
PLLC, d/b/a NELSON & POPE, and JOHN DOE
1 through JOHN DOE # 50,

Defendants.
Defendants.

JEFFREY M. ROSENBLUM and MERYL A.
ROSENBLUM,

Defendants and
Third-Party Plaintiffs,

- against -

GREAT NECK TEACHERS ASSOCIATION
BENEFIT TRUST FUND,

Third-Party Defendant.

The following documents were read on this motion:

Motion to Dismiss Third-Party Complaint	1.
Memorandum of Law in Support of Motion to Dismiss	2.
Memorandum of Law in Opposition to Motion to Dismiss	3.
Motion Sequence #3 to disqualify attorneys for Great Neck Teachers	4.
Cross-motion Sequence #4 to deny motion by Third-party Defendant and for Summary Judgment on third-party complaint	5.
Affirmation in Support of Motion to dismiss and reply to Defendants Rosenblum opposition to motion to dismiss	6.
Memorandum of Law in Support of Motion to Dismiss and in opposition to Third-party plaintiffs' motion for summary judgment	7.
Reply Affidavit of Jeffrey M. Rosenblum in further support of motion to deny Motion to dismiss and in support of motion for summary judgment in favor of Third-party plaintiffs.	8.
Reply Memorandum of Law in Further Opposition to Motion to dismiss and in Support of Cross-motion for Summary Judgment	9.
Sur-reply Affirmation on behalf of Great Neck Teachers' Association	10.

PRELIMINARY STATEMENT

There are three motions for determination. The first is on behalf of Great Neck Teachers Association Benefit Trust Plan (GNTA) to dismiss the third-party complaint, on the ground that the allegations of the third-party complaint are improper for an impleader or third-party action pursuant to CPLR § 1007.

Motions Sequence # 3 by Third-party plaintiffs seeks disqualification of the firm of Mirkin & Gordon, P.C. from representing GNTA, enjoining Mirkin & Gordon, P.C. from revealing movants' confidences to any attorney representing GNTA, and staying all discovery pending the determination of the motion to disqualify Mirkin & Gordon, P.C.

Motion Sequence # 4, also on behalf of third-party plaintiffs, seeks an order denying Motion Sequence # 1 on the ground of a failure to file a consent to substitution of attorney; summary judgment on the cross-motion; or, alternatively, permitting defendants to amend their third-party summons and complaint by converting them into a cross-claim against third-party defendant; or trying the third-party action separately from the

[* 3]
underlying action.

BACKGROUND

Defendant and third-party plaintiff Meryl A. Rosenblum is a member of the Great Neck Teachers' Association. One of the benefits of membership is legal representation in connection with certain matters. In this instance, the Rosenblums were sued by a contractor who performed work upon their home, alleging non-payment. The Rosenblums obtained the services of Mirkin & Gordon, P.C. through GNTA, but promptly found their services unsatisfactory. They now contend that GNTA has the obligation to provide them with substitute counsel to represent them in the defense of the action by Bridlewood.

Mirkin & Gordon, P.C. initially appeared on behalf of the third-party defendant, GNTA, but have been substituted by Addabbo and Greenberg.

DISCUSSION

The motion to dismiss the third-party action is granted. CPLR § 1007 provides as follows:

§ 1007. When third-party practice allowed

After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, by filing pursuant to section three hundred four of this chapter a third-party summons and complaint with the clerk of the court in the main action is pending, for which a separate index number shall not be issued but a separate index number fee shall be collected. . . .

The third-party complaint does not allege that the third-party defendant may be responsible to the plaintiff for all or part of the plaintiff's claim against the defendants. Rather, it claims that third-party defendant is obligated to provide substitute counsel to represent defendants under the GNTA Benefits Booklet, and for treble damages for the cost of retention of counsel in lieu of that provided by GNTA. It does not claim, nor could

it legitimately contend, that GNTA is responsible for the payment of the costs incurred by them in the construction work performed at their home.

Third-party plaintiffs' request to convert the third-party action to a cross-claim or counterclaim is denied. GNTA would be an inappropriate co-defendant subject to a cross-claim, since plaintiff has no claim against them. Neither is GNTA a plaintiff in this action for unpaid construction costs, for whom a counterclaim would be appropriate. The substitution of a form of action to which third-party plaintiffs allude would be the reverse of what they request. If a co-defendant against whom another defendant has a cross-claim is dismissed from the action, the remaining defendant can have its cross-claim converted to a third-party action. A cross-claim is for contribution or indemnification against a fellow defendant. Under no circumstances is GNTA obligated to contribute to or indemnify defendants Rosenblum for any damages for which they are found liable to plaintiff.

To the extent defendants and third-party plaintiffs rely upon cases in which insurers, who have a duty to defend and indemnify, as opposed to provide counsel only, their reliance is misplaced. Based upon a contract of insurance an insurer may well be obligated to pay all or part of the damages sustained by the plaintiff at the hands of the defendant. There is no such contract of indemnity in this action.

The application to disqualify Mirkin & Gordon from representing GNTA, is denied as moot, both because of the voluntary substitution of counsel on behalf of GNTA, and the dismissal of the third-party action. The Court need not issue a directive precluding Mirkin and Gordon from revealing confidential material acquired from defendants and third-party plaintiffs in their capacity of prior counsel in this matter and in some five other matters in which they have provided legal services to them, as the rules governing release of confidential information are well established in the Rules of Professional Conduct.

The Rosenblums may believe themselves entitled to the provision of legal counsel satisfactory to them as a consequence of the Legal Services Program of the Great Neck

Teachers' Association. They are free to commence an independent action for damages as a result of the alleged refusal of the Trust Fund to do so. This issue does not belong in an action for claimed breach of contract to pay for services provided by Bridlewood Construction Corp. GNTA is not a party to the action and the issues concerning the obligations of the Trust Fund under the terms of the agreement with members of the Association are irrelevant to the issues presented in the case pending before the Court.

Whether or not actions should be consolidated, or tried jointly, is governed by CPLR § 602 (a), which provides as follows:

§ 602. Consolidation

(a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The statute authorizing consolidation, or the closely related joint trial, requires that there be common questions of law or fact. There are none in the claim for payment of construction costs and the claim for entitlement to counsel under an unrelated contract.

CONCLUSION

The motion by Great Neck Teachers Association to dismiss the third-party complaint is granted. The application of defendants and third-party plaintiffs to convert the third-party action to a cross-claim or counterclaim is denied.

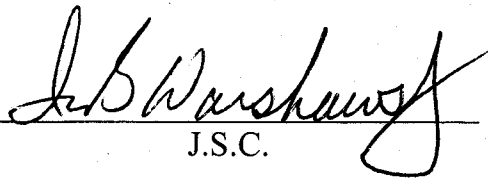
The motion to disqualify Mirkin and Gordon, P.C. as counsel for Great Neck Teachers Association and to preclude them from divulging confidential information from their previous representation of movants are denied as moot.

The motion by defendants and third-party plaintiffs to deny the motion to dismiss the third-party complaint on the ground that counsel for third-party defendant has failed to file a consent to change attorney is denied. Third-party plaintiff has been fully apprised of

the identity of counsel who have replaced the counsel whom he sought to disqualify. Substitute counsel for GNTA has annexed to the Affirmation of Todd D. Greenberg in reply to the opposition to the motion to dismiss the Notice of Appearance and Consent to Change Attorney dated March 4, 2011. The application to amend the third-party summons and complaint to convert the third-party complaint to a cross-claim or counterclaim is denied.

This constitutes the Decision and Order of the Court.

Dated: July 12, 2011


J.S.C.

ENTERED
JUL 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE