

Saxony Ice Co. v Femme Fatale Inc.

2011 NY Slip Op 33013(U)

November 14, 2011

Sup Ct, NY County

Docket Number: 109130/10

Judge: Joan M. Kenney

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

JOAN M. KENNEY

J.S.C.

PART 8

Index Number : 109130/2010

SAXONY ICE CO.

VS.

FEMME FATALE INC

SEQUENCE NUMBER : 001

DISMISS

INDEX NO.

109130/10

MOTION DATE

9/14/11

MOTION SEQ. NO.

001

MOTION CAL. NO.

this motion to/for dismissing 3rd party Action
against 1st 3rd party defendant

PAPERS NUMBERED

1-3

4-13

14

15

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits X Motion + MEMO of LAW

Replying Affidavits to Motion

Repy to X motion

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In this breach of contract action, third-party defendant Lewis Black (Mr. Black), seeks an Order, pursuant to CPLR 3211(5) and (7), dismissing the third party action against him. Mr. Black also seeks costs for actual expenses incurred, including reasonable attorneys fees, in having to defend the within purported frivolous third-party action, pursuant to 22 NYCRR 130-1.1-a.

The third-party plaintiff, Emma P. Cleary (Ms. Cleary), cross-moves for an Order, pursuant to CPLR 602(a), consolidating the within action with another action pending in Supreme Court, New York County, entitled Femme Fatale Inc., individually & as sole shareholder of the Mott Group LTD. & Frederick Loh & Lewis Black as Shareholder of Femme Fatale vs. Emma Cleary (Index 602092/2009; the Tort Action).

FILED

NOV 17 2011

Dated: November 14, 2011

NEW YORK COUNTY CLERK'S OFFICE

JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

FACTUAL BACKGROUND

Briefly, it is alleged in the complaint that plaintiff, Saxony Ice Co., Division of Springdale Ice Co., Inc. (Saxony), is in the business of leasing ice making and storage equipment. On or about June 8, 2009, plaintiff and defendant, Femme Fatale, Inc. d/b/a Lucky's Eleven & The Mott d/b/a COME (the corporate defendants) entered into a written lease agreement for an ice making equipment (the lease agreement). The lease agreement was executed by defendant, Ms. Cleary, who was the manager of the corporate defendants. Ms. Cleary also personally guaranteed the lease agreement.

It is alleged in the complaint that defendants failed and refused to pay plaintiff for the rental of the aforesaid equipment, in the amount of \$2,640.45 (breach of contract; 1st cause of action). Plaintiff claims that the lease agreement further provides that in the event of a breach on the part of defendants, the entire amount due under the lease agreement becomes due and payable to plaintiff. The lease agreement term ends on June 2, 2014, and, therefore, the sum of \$35,686.98 is claimed due and owing by plaintiff (acceleration clause; 2nd cause of action). Plaintiff also seeks payment of attorneys' fees in the amount of \$12,648.05, pursuant to the terms of the same lease agreement (3rd cause of action).

It is not clear to this Court whether or not the corporate defendants ever filed a responsive pleading to the complaint. The Court records do indicate, however, that the individually named defendant, Emma P. Cleary, filed an answer to the complaint where she asserts a general denial to the complaint and an affirmative defense that a "[p]rior action pending in Supreme Court captioned Femme Fatale Inc. et al. v. Emma Cleary, Index Number 602092/09" (1st affirmative defense).

In addition to filing an answer to the complaint, Ms. Cleary commenced a third-party action

against the two individual shareholders of defendant Femme Fatale, Frederick Loh and Lewis Black (the third-party defendants). In particular, Ms. Cleary asserts that in the event judgment is obtained by plaintiff in the main action against Ms. Cleary, then Ms. Cleary is seeking both contribution (1st cause of action) and indemnification (2nd cause of action) against the third-party defendants.

ARGUMENTS

Now, the third-party defendant, Mr. Black, seeks to dismiss the third-party complaint on grounds that: (1) a claim for contribution cannot be raised in a breach of contract action, but rather only in actions sounding in tort; and (2) indemnification is only available where there is an express written agreement to indemnify, as required by General Obligations Law (GOL) §5-701, and no such agreement exists here.

In opposition, Ms. Cleary asserts that she has asserted tort actions against the individually named third-party defendants, as counterclaims in the Tort Action. Ms. Cleary admits that the claim for contribution is admittedly not dependant on the lease agreement, but rather grounded in the fraud claims alleged in the Tort Action. Furthermore, Ms, Cleary asserts that there was an implied duty to indemnify her in light of the fact that the third-party defendants were unjustly enriched by the receipt and use of the rental equipment and at her expense, since she was “unlawfully stripped” of her interest in the defendant corporation - a claim also asserted against the third-party defendants in the Tort Action. For these, and other reasons, Ms. Cleary contends that this action should be consolidated with the Tort Action since both involve common questions of fact and law.

DISCUSSION

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all

factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). In this case, Ms. Cleary did state a cause of action for contribution and indemnification and nothing in the third-party complaint can reasonably mislead the third-party defendant as to the claims sought against him. Indeed, Mr. Black addresses the common law indemnification and contribution claims against him thoroughly in his motion papers - enough so that he has been apprised of the claims as plead. Therefore, movant is not entitled to dismissal of the complaint pursuant to CPLR 3211(a)(7).

Movant's motion to dismiss the third-party complaint for failure to comply with the statute of frauds, pursuant to CPLR 3211(a)(5) and the General Obligations Law is, however, granted. Ms. Cleary has plead, in the third-party action, a claim for contribution which cannot be raised in this breach of contract action and a claim for indemnification which is only available where there is an express written agreement to indemnify, as required by General Obligations Law (GOL) §5-701, and no such agreement has been presented herein as against third-party defendant, Lewis Black. Therefore, movant's motion, pursuant to CPLR 3211(a)(5), must be granted. The dismissal of the third-party action, however, is without prejudice to Ms. Cleary interposing said claims against Lewis Black in the Tort Action, if applicable.

Although Ms. Cleary asserts that to not only preserve the third-party complaint, but precisely because the final determination of this third-party action is contingent upon the determination of the Tort Action, this Court must grant her cross motion application seeking to consolidated this action with the Tort Action. However, the within action involves a breach of contract claim between

plaintiff and defendants. Whereas the Tort Action involves a claim sounding in breach of a shareholder agreement, fraud, fraud in the inducement, libel and defamation, amongst other tort claims, solely between the named defendants. To consolidate both actions would prejudice the plaintiff in the main action herein since both discovery, the facts and the legal issues attendant hereto differs from that of the Tort Action. It is noted, however, that the third-party action herein is intertwined with the Tort Action. Nevertheless, within this Court's discretion, the main action herein will not be consolidated with the Tort Action. Accordingly, it is

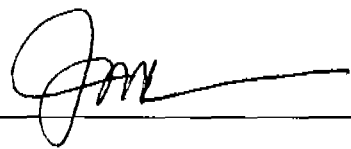
ORDERED that Lewis Black's motion is granted and the Clerk of the Court shall enter judgment against third-party plaintiff, Emma P. Clearly and in favor of third-party defendant, Lewis Black, dismissing the third-party complaint as against third-party defendant, Lewis Black only; and it is further

ORDERED that Lewis Black's application for attorneys' fees, is denied, within this Court's discretion; and it is further

ORDERED that Emma P. Clearly may assert a claim for contribution and/or indemnification in the Tort Action, if applicable; and it is further

ORDERED that the remaining parties are to appear for a preliminary conference on December 15, 2011 at 10:00 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.

ENTER: *November 14, 2011*



Joan M. Kenney, J.S.C.

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