

277 Mott St., LLC v Fountainhead Constr., LLC

2012 NY Slip Op 31543(U)

June 7, 2012

Sup Ct, New York County

Docket Number: 603168/2008

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Index Number : 603168/2008
277 MOTT LLC
vs
FOUNTAINHEAD CONSTRUCTION LLC
Sequence Number : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

3rd party action dismissed

FILED

JUN 11 2012

NEW YORK COUNTY CLERK'S OFFICE

JUN 0 2012

Dated: _____

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER / JUDGE

SETTLE ORDER / JUDGE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
277 Mott Street, LLC,

Plaintiff (s),

-against-

Fountainhead Construction, LLC,
Steven Abrams and "John Does #1-10,"

Defendant (s).
-----X

Steven Abrams,

3rd-Party Plaintiff,

-against-

Joseph DiPalermo,

3rd Party Defendant.
-----X

DECISION/ ORDER

Index No.: 603168-08

Seq. No.: 004

PRESENT:

Hon. Judith J. Gische

J.S.C.

T.P. Index No.

590925/11

FILED

JUN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Palermo n/m (3212) w/JD affid, DEW affirm, exhs	1
Abrams opp w/JHL opp, exhs	2
Palermo reply	3
Various stips of adj	4

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from a letter of intent ("LOI") between plaintiff 277 Mott Street, LLC ("277 Mott" sometimes "owner") and defendant Fountainhead Construction, LLC ("FHC") to construct a building at 277 Mott Street, New York, New York ("the property"). Defendant Steven Abrams ("Abrams") was the managing member of FHC when the

LOI was made.

In connection with a prior motion by defendants, the court dismissed certain causes of action (Gische J., Order 7/2/09). Subsequently, plaintiff moved for and was granted summary judgment against defendant FHC (Gische J., Order, 12/17/10). The court directed entry of a money judgment in plaintiff's favor against FHC in the principal amount of \$1,533,839.00. On appeal, the Appellate Division, First Department reinstated the 1st and 5th through 9th causes of action that had been previously been dismissed by this court (277 Mott St. LLC v. Fountainhead Constr. LLC, 83 AD3d 541 [1st Dept 2011]). Plaintiff amended its complaint to assert new causes of action against Abrams and the court granted Abrams' motion for partial summary judgment, dismissing the 2nd cause of action against him for diversion of trust funds (Order, Gische, J., 1/24/12).

Prior to the court's January 24, 2012 decision, Abrams commenced a third party action against Joseph DiPalermo ("DiPalermo), another member of FHC. Although DiPalermo has answered, he is not moving for summary judgment, but specifically only seeks dismissal of the third party complaint pursuant to CPLR 3211 [a] [1] and [7]. Abrams is opposed.

Facts and Arguments

The following facts are asserted in the 3rd party complaint. For purposes of this motion only, these facts are accepted as true (CPLR § 3211 et seq.; Goshen v. Mutual Life Ins. Co. of NY, 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]). The facts of the underlying complaint by 277

Mott against FHC and Abrams are set forth in extensive detail in the court's prior decision/orders (dates provided above) and the decision on appeal.

This court has already decided that the monies paid by 277 Mott as a down payment on the project were received by FHC but never used as intended. FHC was supposed to have constructed a building for the owner but the project never progressed beyond a concrete slab. There are yet unresolved claims by the owner that defendant Abrams diverted the down payment by using it to pay his personal and/or other debts, having nothing to do with the project and/or of no beneficial interest to the owner in any way.

The 3rd party complaint contains only one cause of action. Abrams denies any wrongdoing in connection with the monies diverted by FHC and claims that he stopped serving as FHC's managing member in January 2008 following complications from foot surgery. Abrams alleges that after January 2008, he turned managerial control of FHC over to DiPalermo, another member of the LLC, and that DiPalermo assumed responsibility for FHC's day-to-day operations. Abrams contends it was DiPalermo who decided: 1) how much deposit was needed for the 277 Mott project and 2) how the monies would be disbursed. Abrams' claim against DiPalermo is for "an award of damages against DiPalermo in an amount equal to the award of damages against Abrams and in favor of 277 Mott, including any award of interest thereon." The complaint further states that "In the event 277 Mott shall recover judgment against Abrams, DiPalermo shall be liable to Abrams for the full amount of such judgment, including interest thereon."

Arguments

DiPalermo raises a defense of documentary evidence based on FHC's operating agreement. DiPalermo contends the operating agreement is dispositive evidence that Abrams was the sole managing member of FHC, with a controlling interest, whereas he (DiPalermo), only had a 10% interest in the company. The operating agreement provides that it is the managing member who has responsibility for day-to-day management of the business and affairs of the LLC and that only the managing member may make decisions relating to the expenditure of capital and receipts of the LLC and the payment of monies. Thus, DiPalermo not only denies any wrong doing, he argues that under the operating agreement, Abrams – the managing member of FHC – had sole responsibility for (and decided how) FHC funds were managed, deposited and disbursed.

DiPalermo also argues that because 277 Mott's claims against Abrams are predicated on his failure as a managing member, specifically his misuse of FHC monies conveyed as a deposit for the 277 Mott Street project, Abrams lacks standing to directly bring any claim against him because such claim properly belongs to FHC, the judgment debtor.

DiPalermo argues that the 3rd party complaint fails to state a cause of action because the complaint is bare boned and the one cause of action pleaded only contains generalized allegations. Next, DiPalermo argues that he has no duty to indemnify Abrams either in contract or at common law. With respect to common law indemnification, DiPalermo contends that, if Abrams is found liable, such liability is not vicarious because of his actual involvement in FHC as its managing member and participating in the acts giving rise to the loss. DiPalermo also argues that the operating

agreement itself negates the 3rd party complaint because of Abrams responsibilities as a managing member.

In opposition, Abrams provides the same affidavit he supplied in support of his prior motion for summary judgment dismissing the breach of trust claim against him. The affidavit is allowed to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]). Abrams states that he spoke with Mr. Fountain about the project and, although they discussed the need for a deposit, this matter (amount and use of said monies) was not handled by him, but handled by DiPalermo, the *de facto* managing member. Abrams states that when he became ill, and all times thereafter, he "expected and intended that [FHC] would honor its contractual obligations...[but]...Unfortunately, through a combination of mismanagement by the persons who took over operation of [FHC] when I became sick and the bad economy... [FHC's] business failed..."

Abrams states that DiPalermo has mischaracterized the 3rd party complaint and that it is not for indemnification, but for contribution which, unlike indemnification, does not arise from a contractual relationship and permitted even where the party seeking contribution is a wrongdoer alleged to have defrauded a party. Abrams contends that his claim against DiPalermo is based upon a fiduciary duty owed to Abrams and that the claims against him (Abrams) are the result of DiPalermo's tortious acts.

Discussion

Regardless of which subsection of the CPLR 3211 the defendant is moving

under, the court must afford the pleadings a liberal construction, take the allegations therein as true, and provide the plaintiff (and here, the cross claimants) with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of NY, 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]). In deciding ENIC's motion to dismiss, the court must also consider whether, accepting all of plaintiffs' facts, they support the causes of action asserted (Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561 [2005]).

DiPalermo has moved under CPLR 3211 [a] [1] and [7]. Where a defense is founded on documentary evidence, the documents relied on must establish a defense to the claims asserted, as a matter of law (See Leon v Martinez, 84 NY2d 83 at 87) and conclusively dispose of the challenged pleading (Forftis Fin. Servs., LLC v Fimat Futures USA, Inc., 290 AD2d 383, 383 [1st Dept 2002]). The operating agreement does not satisfy these requirements.

Although the operating agreement identifies Abrams as FHC's managing member, the claims by 277 Mott against Abrams are in his individual capacity, not as the managing member of FHC (277 Mott Street LLC v. Fountainhead Const., LLC, 83 AD3d 541 [1st Dept 2011]). Thus the claim over against DiPalermo has nothing to do with Abrams rights and responsibilities under the operating agreement. Furthermore, Abrams claims DiPalermo was the *de facto* managing member in his absence. Under the operating agreement, this is apparently allowed (paragraph 11). Therefore,

accepting these facts as true, as the court must on a motion to dismiss, DiPalermo's motion, based upon a defense of documentary evidence, is denied.

A related argument by DiPalermo is that Abrams lacks standing to bring this action because it is a claim belonging to the LLC. 277 Mott, however, has sued Abrams personally for a tort and LLC § 609 does not insulate Abrams from a fraud which he is alleged to have personally participated in. Abrams is not suing DiPalermo on behalf of FHC to recover monies the monies that were diverted. He is suing DiPalermo on his own behalf. Therefore, Abrams' claims against DiPalermo are not derivative, as DiPalermo claims.

In deciding a motion to dismiss where it is alleged that the complaint fails to state a cause of action (CPLR 3211 [a][7]), the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (see AG Capital Funding Partners, LP v. State Street Bank and Trust Co., 5 NY3d 582 [2005]). "The sole criterion is whether the pleading states a cause of action and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (Ackerman v. 204 East 40th Owners Corp., 189 AD2d 665 [1st Dept 1993]).

DiPalermo argues that Abrams cannot, as a matter of law, seek indemnification from him, either based on contract or at common law. A party's right to indemnification may arise from a contract or may be implied "based upon the law's notion of what is fair and proper as between the parties" (McCarthy v. Turner Const., Inc., 17 NY3d 369 [2011]). There being no contract between 277 Mott and Abrams (or for that fact 277

Mott and FHC), contractual indemnification is not an available claim. Abrams readily concedes this point but argues that what he is looking for is contribution, not implied or common-law indemnification.

Unlike common law indemnification, contribution arises automatically when certain factors are present and does not require any kind of contract or agreement among the wrongdoers (Rosado v. Proctor & Schwartz, Inc., 66 NY2d 21 [1985]). Furthermore a defendant may seek contribution from a 3rd party, even if the injured plaintiff has no direct right of recovery against that party (Guerre v. St. Catherine of Sienna, 79 AD3d 808 [2nd Dept 2010]). Abrams' complaint against DiPalermo states, however, that "DiPalermo shall be liable to Abrams for the *full amount* of such judgment..." (emphasis added). He claims that an injured party is free to seek 100% recovery against any individual wrongdoer among joint wrongdoers (Greenridge v. HRH Construction Corp., 279 AD2d 400 [1st Dept 2001]) and that DiPalermo is responsible for 100% of any injury to the plaintiff. Abrams claims further that DiPalermo was the person making all the decisions for FHC after January 2008 and that DiPalermo owed 277 Mott a duty 1) not to make material misrepresentations about FHC use of the down payment and 2) not to convey FHC's assets without fair consideration so as to render FHC insolvent and defraud 277 Mott. Abrams claims further that DiPalermo owed him a fiduciary duty because they are both members of the LLC.

Even accepting Abrams' facts as true, it appears that he is impermissibly trying to shift 100% of the blame for 277 Mott's losses to DiPalermo and Abrams' claim is really for implied or common law indemnification, not contribution.

Abrams has been sued individually for a tort (fraud). If found liable, such liability on his part would be actual, not vicarious. "A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification' " (Gap, Inc. v Fisher Dev., Inc., 27 AD3d 209, 212 [1st Dept 2006] *citing* Mathis v Central Park Conservancy, Inc., 251 AD2d 171, 172 [1st Dept 1998]). A party is only entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another (Perales v First Columbia 1200 NSR, LLC, 88 AD3d 1213, 125 [3rd Dept 2011]). A party who has him or herself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine (Edge Management Consulting, Inc. v. Blank, 25 AD3d 364 [1st Dept. 2006] *citing* Trump Vil. Section 3, Inc. v. New York State Hous. Fin. Agency, 307 AD2d 891, 895 [1st Dept 2003] *lv. denied* 1 NY3d 504 [2003] [internal quotation marks omitted]).

Contribution is a remedy available only "to [a]ny tortfeasor who pays more than its fair share of a judgment-as apportioned by the fact finder in terms of relative culpability" against other joint tortfeasors (See Sommer v. Fed. Signal Corp., 79 NY2d 540, 556 [1992]). Unlike common law indemnity, contribution only seeks ratable or proportional relief from the other tortfeasor (Rosado v. Proctor & Schwartz, Inc., 66 NY2d 21 [1985]). Abrams, however, seeks judgment over against DiPalermo for the full amount of any judgment 277 Mott obtains against him. Thus, Abrams is really not seeking contribution at all (Haven Plaza Housing Dev Fund Co. v. Daitch-Shopwell, 69 NY2d 559 [1987]).

Abrams contends that Westchester County v. Welton Becket Associates (102 AD2d 34 [2nd Dept 1984]) ("Westchester v. Welton Becket") which was affirmed on appeal (66 NY2d 642 [1985]; also Greenridge v. HRH Construction Corp) allows his claim to proceed against DiPalermo because "an injured party is free to seek a 100% recovery against any individual wrongdoer among joint wrongdoers" and "it is possible that despite a claim for contribution, only one wrongdoer will be found to exist" (Westchester County v. Welton Becket Associates, 102 AD2d at 48). That statement of law is, however, taken out of context. Westchester v. Welton Becket involved principles of joint and several liability and stands for the legal principle that a party with even minimal culpability will be held responsible to an innocent tort victim.

DiPalermo has, therefore, proved that Abrams has failed to state a cause of action against him and the motion to dismiss pursuant to CPLR 3211 [a][7] must be granted. The third party complaint is dismissed.

Conclusion

The motion by 3rd party defendant Joseph DiPalermo is denied on the basis of CPLR 3211 [a][1] but it is granted on the basis of CPLR 3211 [a][7] and the third party complaint is hereby dismissed.

In accordance with the foregoing,

It is hereby

ORDERED that the clerk shall enter judgment in favor of 3rd party defendant Joseph DiPalermo against 3rd party plaintiff Steven Abrams dismissing the 3rd party complaint (Index No. 590925/11); and it is further

ORDERED that the direct complaint (Index No. 603168/08) shall continue; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 7, 2012

So Ordered:



Hon. Judith J. Gische, JSC