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| <b>Fulton v Hankin Firm, PLLC</b>                                                                                                                                                                                                                                |
| 2013 NY Slip Op 32879(U)                                                                                                                                                                                                                                         |
| October 11, 2013                                                                                                                                                                                                                                                 |
| Sup Ct, Queens County                                                                                                                                                                                                                                            |
| Docket Number: 10187/2011                                                                                                                                                                                                                                        |
| Judge: Howard G. Lane                                                                                                                                                                                                                                            |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE** **HOWARD G. LANE** **IA Part** **6**  
**Justice**

TIMOTHY FULTON,  
 Plaintiff,

Index  
 Number 10187/2011

-against-

Motion  
 Date June 10, 2013

THE HANKIN FIRM, PLLC,  
 Defendant.

Motion Seq. No. 4

THE HANKIN FIRM, PLLC,  
 Third-Party Plaintiff,

Motion Cal. No. 40

-against-

MATTONE, MATTONE, MATTONE, LLP and  
 JOSEPH M. MATTONE, JR., ESQ.,  
 Third-Party Defendants.

The following numbered papers read on this motion by third-party defendants Mattone, Mattone, Mattone, LLP and Joseph M. Mattone, Jr., Esq. pursuant to CPLR 3211(a)(7) to dismiss the third-party complaint asserted against them.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits .....1-5  
 Answering Affidavits - Exhibits .....6-8  
 Reply Affidavits .....9-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action against defendant Hankin & Mazel, PLLC (Hankin) alleging that nonparties John Kelly and Michael Cholowsky were the equity owners of Emjay Environmental Recycling, Ltd. (Emjay). Plaintiff alleges that Kelly agreed to sell his 60% ownership interest in Emjay to Cholowsky and Cholowsky's "investors/purchasers" in consideration for, among other things, the payment of the sum of \$1.3 million. Plaintiff alleges that on February 3, 2010, Kelly, Cholowsky, plaintiff and one Matthew Cresciamanni entered into a written stock purchase agreement (the Emjay agreement), and that plaintiff was an investor/purchaser pursuant to the agreement. Kelly, Cholowsky and defendant Hankin allegedly recognized plaintiff as an investor/purchaser and represented that if plaintiff wired the funds, plaintiff would become the owner of a portion of the stock in Emjay held by Kelly. Plaintiff alleges that he wired \$200,000.00 to a bank account of defendant Hankin on February 4, 2010. He then allegedly authorized a wire transfer from an escrow account maintained by third-party defendants on March 8, 2010 in the amount of \$200,000.00 to a second bank account of defendant Hankin, and on March 10, 2010, authorized a wire transfer from an escrow account maintained by third-party defendants in the amount of \$700,000.00. It is alleged that defendant Hankin wrongfully released the funds held by Hankin in escrow to Kelly, who in turn, transferred his stock in Emjay to Cholowsky. Plaintiff alleges that notwithstanding his payments, he did not obtain an ownership interest in Emjay, and defendant Hankin has refused to refund his money. Plaintiff originally asserted causes of action against defendant Hankin for unjust enrichment, conversion, fraud, aiding and abetting fraud, gross negligence, mutual mistake and breach of contract, seeking an award of damages. Defendant Hankin thereafter moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint asserted against it. By order dated December 13, 2011, the motion was granted to the extent of dismissing the causes of action for gross negligence, mutual mistake and breach of contract.

Defendant Hankin thereafter served an answer and a third-party complaint against the third-party defendants. In the third-party complaint, defendant/third-party plaintiff Hankin alleges the third-party defendants represented plaintiff in connection with the Emjay agreement, and knew or should have known plaintiff was a guarantor to the obligations of Cholowsky under the agreement, and not a purchaser of the Emjay stock, and that no written escrow agreement existed between plaintiff and defendant Hankin. Third-party plaintiff Hankin also alleges that third-party defendants failed to advise plaintiff properly that under the terms of the Emjay agreement, plaintiff was a guarantor of Cholowsky's obligations under the agreement and not a purchaser of Emjay stock, or an investor in Emjay, and no written escrow agreement existed between plaintiff and Hankin. Third-party plaintiff Hankin further alleges it never agreed to act as an escrow agent for plaintiff, and only accepted the February 4, 2010, March 8, 2010 and March 10, 2010 wire transfers because they had been made on behalf of Cholowsky. Third-party

plaintiff Hankin additionally alleges that to the extent plaintiff and Cholowsky made a separate agreement by which Cholowsky agreed to transfer to plaintiff an interest in Emjay in exchange for plaintiff's remitting \$1.1 million to Kelly on behalf of Cholowsky, such agreement is not memorialized in writing or mentioned within the confines of the Emjay agreement. Lastly, third-party plaintiff Hankin alleges third-party defendants falsely misrepresented to this court, in an affidavit dated September 6, 2011 of third-party defendant Joseph M. Mattone, Jr., Esq., which affidavit was submitted in opposition to its motion to dismiss the complaint, that plaintiff was a purchaser of Kelly's shares of Emjay stock, in an effort to deceive it and the court. Third-party plaintiff Hankin asserts causes of action against third-party defendants for common-law indemnification, contribution and violation of Judiciary Law § 487.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must "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 *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]). " 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus' (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005])" (*Marist College v Chazen Envtl Servs. Inc.*, 84 AD3d 1181, 1182 [2d Dept 2011]).

With respect to the claim for common-law, or implied indemnification, "the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor' " (*Raquet v Braun*, 90 NY2d 177, 183 [1977], quoting *Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 [1990]; see *Balkheimer v Spanton*, 103 AD3d 603 [2d Dept 2013]; *Lovino, Inc. v Lavallee Law Offs.*, 96 AD3d 909, 909–910 [2d Dept 2012]). In this instance, third-party plaintiff Hankin has made no allegation in the third-party complaint that third-party defendants owed any duty to it (see *Raquet v Braun*, 90 NY2d at 183; *Balkheimer v Spanton*, 103 AD3d at 604 [2d Dept 2013]; *Breen v Law Off. of Bruce A. Barket, P.C.*, 52 AD3d 635, 638 [2008]). Under such circumstances, that branch of the motion by third-party defendants to dismiss the cause of action for indemnification asserted against them by third-party plaintiff Hankin in the third-party complaint is granted (CPLR 3211[a][7]; *Balkheimer v Spanton*, 103 AD3d 603).

With respect to the claim for contribution, contribution may be obtained if the breach of duty by a third-party defendant "had a part in causing or augmenting the same injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599 [1988]; see CPLR 1401; *Raquet v Braun*, 90 NY2d at 183; *Williams v Brentwood Farmers Mkt.*, 256 AD2d 613, 614 [2d Dept 1998]; *Gonzalez v*

*Jacoby & Meyers*, 258 AD2d 560 [2d Dept 1999]). In this instance, third-party plaintiff Hankin alleges that by virtue of third-party defendants' failure to advise plaintiff properly regarding the terms of the Emjay agreement, and obtain an escrow agreement protecting plaintiff's rights in advance of wiring any of plaintiff's monies to Hankin, third-party defendants caused or augmented the injury for which contribution is sought, i.e., the loss of \$1.1 million dollars of plaintiff. Under such circumstances, the third-party complaint states a viable cause of action for contribution (*see Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 NY2d at 603; *Williams v Brentwood Farmers Market, Inc.*, 256 AD2d 613, 614; *Taft v Shaffer Trucking*, 52 AD2d 255 [4th Dept 1976]). Accordingly, that branch of the motion by third-party defendants pursuant to CPLR 3211(a)(7) to dismiss the cause of action for contribution asserted against them by third-party plaintiff Hankin in the third-party complaint is denied.

The claim asserted by third-party plaintiff Hankin against third-party defendants in the third-party complaint based upon violation of Judiciary Law § 487 fails to state a cause of action. Judiciary Law § 487(1) provides, inter alia, that treble damages may be sought against any attorney or counselor who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." Third-party plaintiff Hankin has failed to allege the manner in which it, or the court, was deceived by reason of the misrepresentation by third-party defendant Mattone in his September 6, 2011 affidavit regarding plaintiff's status as a purchaser, or the manner in which Hankin has sustained damages by virtue of such statement (*see Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652 [1<sup>st</sup> Dept 2011]). Defendant Hankin specifically argued, in its papers in support of its motion to dismiss, that plaintiff should be estopped from asserting he was a purchaser under the Emjay agreement because he had already been adjudicated not to be one in a related action (*see Fulton v Kelly*, Supreme Court, Queens County, Index No. 20501/2010). The court, in dismissing the cause of action against defendant Hankin for breach of contract, in effect, agreed with such argument (*see* order dated December 13, 2011). That branch of the motion by third-party defendants to dismiss the cause of action based upon violation of Judiciary Law § 487 asserted against them in the third-party complaint is granted.

Accordingly, the first and third causes of action asserted against third-party defendants by third-party plaintiff Hankin in the third-party complaint are dismissed.

Dated: October 11, 2013

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**Howard G. Lane, J.S.C.**