Jaybar Realty Corp. v Armato
2014 NY Slip Op 34024(U)
May 19, 2014
Supreme Court, Westchester County
Docket Number: 57692/13
Judge: Mary H. Smith

FILED: WESTCHESTER COUNTY CLERK 05/19/2014 INDEX NO. 57692/2013
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DECISION AND ORDER

FILED & ENTERED
5/19/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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JAYBAR REALTY CORP. and JB PARKS PLACE REALTY, LLC,

Plaintiffs,

MOTION DATE: 5/9/14
INDEX NO.: 57692/13

-against-

JOSEPH ARMATO, ADJUSTRITE, INC., MICHAEL CASTELLANO a/k/a MIKE CASTELLANO, VENETIAN CONTRACTING, INC., NATIONWIDE CONTRACTING CONSULTING, INC., CAPITAL ONE, N.A. a/k/a CAPITAL ONE BANK (USA), N.A. a/k/a CAPITAL ONE FINANCIAL CORP., TRAVELERS INSURANCE COMPANY, JOHN DOE #1 through #12, JANE DOE #1 through #12,

Defendants.

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CAPITAL ONE, NATIONAL ASSOCIATION,

Third-Party Plaintiff,

-against-

SOVEREIGN BANK, N.A. a/k/a BANCO SANTANDER, S.A.,

Third-Party Defendant.

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The following papers numbered 1 to 12 were read on this pre-answer motion to dismiss by third-party defendant Santander Bank, N.A., f/k/a Sovereign Bank, N.A. i/s/h as Banco Santander, S.A., for an Order dismissing the third-party complaint pursuant to CPLR 3211, subdivision (a), paragraph 7, and on this motion by third-party defendant Santander Bank, N.A. for admission pro hac vice.[1]

Papers Numbered

Notice of Motion - Affirmation (Walch) - Exhs. (1-2) - Affidavit (Ferris) - Exhs. (A-J) - Memorandum of Law 1-5
Answering Memorandum of Law 6
Replying Memorandum of Law 7
Notice of Motion - Affirmation (Walch) - Affidavit (Malloy) - Supplemental Affidavit (Malloy) - Exh. 8-12

Upon the foregoing papers, it is Ordered that these motions are disposed of as follows:

First addressing the motion by third-party defendant Santander Bank, N.A., f/k/a Sovereign Bank, N.A. i/s/h as Banco Santander, S.A. ("Santander") for an Order pursuant to 22 N.Y.C.R.R. 520.11(a)(1) and 22 N.Y.C.R.R. 690.3 granting admission of attorney Michael D. Malloy pro hac vice in the above-captioned action is granted. Order signed

Next addressing Santander's dismissal motion, the unrefuted pertinent facts are as follows:

Plaintiff Jaybar Realty Corp. ("Jaybar") is the owner of certain Bronx property which, on July 27, 2011, had sustained extensive damage due to a water main break. Third-party defendant Santander holds a mortgage on said property. Jaybar had notified its insurance carrier, defendant Travelers Insurance Company ("Travelers"), of its loss. Travelers thereafter had issued certain checks to Jaybar, several of which are in issue herein.

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[1]This Court notes that the parties properly should have requested that this action have been assigned to the Commercial Part for all purposes, which Specialized Part is much better situated than this IAS Part in handling such complex commercial matters.

The first check that Travelers had issued, dated August 16, 2011, named "Jaybar Realty Corp. and Sovereghn (sic) Bank" joint payees, in the sum of $50,000.00. Jaybar's principal, Joseph Barone, Sr., and Santander had endorsed said check on August 24, 2011, which then was deposited into an account by Santander. This check bears a "For Deposit Only" business stamp. On September 12, 2011, one-third of this check's proceeds, i.e., $16,666.67, had been released by Santander in the form of a check payable to Jaybar and plaintiff JB Park Place Realty ("Park Place"), a separate entity affiliated with the Barone family.[2] Park Place is a single-member limited liability company of which Joseph Barone, Jr. is the sole member and managing member; Joseph Barone Sr. had no involvement with nor any authority to bind Park Place. Only Joseph Barone Jr. is authorized to sign on behalf of Park Place. This check had been deposited into plaintiffs' corporate/business account(s) and is not here in issue.[3]

Defendant Venetian Contracting Consulting Inc. ("Venetian") and defendant Nationwide Contracting Consulting, Inc. ("Nationwide") eventually both had become involved in performing the required repair and remediation work at the premises. According to plaintiffs, Venetian and Nationwide had been hired and authorized by Travelers. The complaint contains further allegations that defendants Armato, Adjustrite, Inc. and Catellano also had been by authorized by Travelers to perform repair, construction

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[2]The Santander mortgage covered properties owned by both Jaybar and Park Place.

[3]The record also reflects a check payment from Travelers, dated November 23, 2011, to Jaybar, in the sum of $69,166.57, representing lost earnings. This check had been deposited into Jaybar's business account and also is not here in issue.

and remediation work at the premises.

Subsequently, Santander had received from Venetian an "Authorization of Payment," dated October 6, 2011, bearing the notarized signature of Joseph Barone, Sr. This Authorization had directed Santander to "deal directly with [defendant] Venetian Contracting Consulting Inc. regarding all matters pertaining to my insurance loss." Further, this Authorization had directed "that Venetian Contracting Consulting Inc. be named as payee on any and all checks and drafts." Finally, this Authorization had directed "that all payments be mailed directly to: Venetian Contracting Inc., 145 Huguenot Street, Suite 505, New Rochelle, New York 10801." Plaintiff alleges that, while the signature is Joseph Barone Sr.'s, Barone Sr. did not knowingly authorize Santander to deal directly with Venetian, to name Venetian as payee on any checks, or to mail the checks directly to Venetian. Accompanying this Authorization was a copy of an executed "Construction Agreement," signed by Venetian and Joseph Barone Sr., as "Pres." In its covering letter to Santander accompanying these two documents, Venetian had highlighted paragraph 9 of the Construction Agreement wherein plaintiff had assigned to Venetian a lien against the proceeds of all insurance payments for the loss and had authorized Venetian to endorse the owner's signature and deposit the insurance proceeds, and further had requested Santander to recognize Venetian's lien "and comply with its terms."

On November 8, 2011, Santander had released another one-third of Traveler's initial $50,000.00 payment, in the sum of $16,666.67, payable to Jaybar and Park Place. Its check had been mailed to Barone c/o Park Place Realty, at a Yonkers address. The record establishes that this check's endorsement does not bear any "For Deposit Only" stamps of Jaybar or Park Place, just the handwritten endorsement "JB Park Place Realty

LLC and Jaybar Realty," and a signature underneath, which signature allegedly is neither that of Barone Jr. or Barone Sr. It also bears a "For Deposit Only" stamp for Nationwide into a Capital One, NA account.

By letter dated November 21, 2011, Travelers had sent to Santander a Traveler's Check in the sum of $184,389.39 payable to Jaybar and Santander. On December 12, 2011, Santander had sent a third payment to Venetian, at its New Rochelle address, by way of an Official Check in the sum of $178,000.00, payable to Jaybar and Park Place. This check contains two endorsement signatures, neither of which are Joseph Barone Jr. or Joseph Barone Sr., and a "For Deposit Only" stamp for Venetian into a Capital One, NA account.

On March 1, 2012, Santander had received a fax notification from Venetian advising that Venetian had relocated its office to a Bronx address where it now requested Santander to send all checks with respect to Jaybar's claim. On March 2, 2012, Santander had mailed to Venetian, at its new Bronx address, its Official Check in the amount of $22,931.02, payable to Jaybar and Park Place, representing what Santander characterized as the "final advanced loss draft insurance proceeds." This check contains two endorsement signatures, neither of which are Joseph Barone Jr. or Joseph Barone Sr., and a "For Deposit Only" stamp for Venetian into a Capital One, NA account.

Finally, Travelers had issued a check, dated April 4, 2012, payable to Jaybar and Santander, in the sum of $97,236.90, which plaintiff alleges had been mailed directly to Venetian. Although Santander claims that it has no record of ever having received this check, there is stamped on the back of said check a "without recourse" endorsement which is signed by a representative of Santander. Further, it bears one endorsement signature,

which is neither that of Joseph Barone Jr. or Joseph Barone Sr., and a "For Deposit Only" stamp for Venetian into a Capital One, N.A. account.

Plaintiffs eventually had come to learn from its own independently retained expert, Minogue Associates, Inc., that, notwithstanding the remittance of total insurance loss payments by Travelers in the sum of $576,524.77, to Armato, Adjustrite, Castellano, Venetian and Nationwide, and defendants' collective "invoice," dated September 28, 2011, showing allegedly performed work totaling $292,160.77, only a very limited amount of repair work, improper work and only completely superficial work actually had been done at the premises, and that thousands of dollars of the insurance payments had not been accounted for by defendants.

This action ensued. Plaintiffs are suing Armato, Adjustrite, Castellano, Venetian, Nationwide, Capital One and Travelers, alleging as against one or more said defendants multiple causes of action for fraud, conversion, unjust enrichment, monies had and received, constructive trust, civil RICO violations under 18 U.S.C. §1962(c), breach of contract, breach of fiduciary duties, declaratory judgments, damages to property and equitable claims for the return of monies. Additionally, as against defendant Capital one only, plaintiffs have pleaded causes of action alleging violations of §3-419, UCC §3-417 and UCC §4-207. Santander had not been named as a direct defendant herein.

Capital One thereafter commenced a third-party action against Santander, relying upon UCC §3-405, seeking contribution and/or indemnification as against Santander. Capital One alleges that if it is found liable to plaintiff that Santander is liable to Capital One for its "wrongful acts and omissions," which wrongful actions include Santander's having sent its checks, at Venetian's request, to Venetian's address or the address of other

defendants instead of properly to the addresses of Jaybar or Park Place, and that as a result indorsements made by Venetian or other defendants in the name of the payee are effective as to Capital One and any loss properly should be allocated to Santander as the drawer of the checks.

Presently, third-party defendant Santander is moving pre-answer to dismiss the third-party complaint, arguing that Capital One has failed to state a cause of action. Specifically, Santander argues that Capital One's reliance upon UCC §3-405, commonly known as the "imposter rule," is misplaced because said statute is intended to be used only as a means to escape liability and not, as Capital One is attempting to use it, as a basis for imposing liability. In any event, Santander maintains that there had been no "imposter" within the meaning of UCC §3-405 as a basis for applying said statute. Moreover, Santander argues that common law rights of contribution and indemnity do not apply in this action to which the UCC Article 3 applies and that, in any event, Capital One has been directly sued for its own affirmative negligence herein, which necessarily precludes its entitlement to contribution and/or indemnification.

Capital One vigorously opposes the motion, arguing that UCC Article 3 provides a broad framework for allocating risk of loss among the parties associated with transactions involving negotiable instruments, that Santander had been directly involved in the transactions here in issue, and that any determination at this early juncture finding that no imposter had been involved is premature and beyond the proper scope of consideration on a motion to dismiss pursuant to CPLR 3211, subdivision (a), paragraph 7. Capital One also submits that other UCC Article 3 provisions support Capital One's third-party contribution/indemnification claims against Santander, including UCC §§ 3-405(1)(a), 3-

405(1)(c) and 3-406.

It is well-settled that on a motion to dismiss for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true, giving the plaintiff the benefit of every possible inference, then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3rd Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2nd Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable intendment. See Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 868 (2nd Dept. 1980); Penato v. George, 52 A.D.2d 939 (2nd Dept. 1976). The test is whether the pleading gives notice of the transactions relied upon by the plaintiff and whether sufficient material elements of the cause of action have been asserted. See Stoianoff v. Gahona, 248 A.D.2d 525, 526 (2nd Dept. 1998).

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one. Guggenheimer v. Ginzburg, supra at 275; Kaufman v. International Business Machines Corp., 97 A.D.2d 925 (3rd Dept. 1983), affd. 61 N.Y.2d 930 (1984); Rappaport v. International Playtex Corporation, 43 A.D.2d 393, 395 (3rd Dept. 1974). Thus where it has

been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. See CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2nd Dept. 2009); Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999), affd. 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1st Dept. 2003).

After this Court's careful consideration of the record at bar and the parties' respective arguments, and upon application of the controlling principles of law, third-party defendant Santander's dispositive motion is granted; the third-party complaint is hereby dismissed.

Article 3 of the Uniform Commercial Code "ensure[s] the ready negotiability of commercial paper." Guardian Life Ins. Co. of Am. v. Chemical Bank, 94 N.Y.2d 418, 421 (2000). In order to accomplish the important goal of checking fraud, the Court of Appeals has acknowledged that the provisions of Article 3 "further a policy of assigning loss based upon the relative responsibility of the parties 'by establishing commercially sound rules designed to place the risk of loss attributable to fraud such as forged indorsements with the party best able to prevent them.'" Id. at 421, citing Getty Petroleum Corp. v. American Express Travel Related Servs. Co., 90 N.Y.2d 322, 326 (1970). Generally, "[l]osses caused by a forged instrument are in the first instance allocated to the drawee bank because, as between that bank and its drawer, the drawee bank is in the better position to detect the forgery before payment." Getty Petroleum Corp. v. American Express Travel Related Servs. Co., 90 N.Y.2d at 327. However, UCC §3-405, also known as the Imposter

Rule and upon which Capital One relies, is an exception thereto; it shifts the risk of loss to the drawer in situations where it is determined that the drawer is the party best able to have prevented the loss. UCC §3-405(1) provides:

> An indorsement by any person in the name of a named payee is effective if
>
> (a) an imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee ...

This Court agrees with Santander that UCC §3-405(1) is inapplicable to the matter at bar because no "imposter" had induced Santander to issue the subject checks. Although "imposter" is not defined in the UCC, Official Commentary to §3-405 states that who is an "imposter" is to be narrowly construed, and that "'imposter' refers to impersonation, and that it does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement thereon."

Manifestly, the facts at bar do not support any finding that Venetian in any way had impersonated principals or agents of either Jaybar or Park Place. See Leonard Smith, Inc. v. Merrill Lynch, Pierce, Fenner and Smith, 113 A.D.2d 387, 389-390 (3rd Dept. 1985), app. den. 68 N.Y.2d 661 (1986). Rather, the undisputed facts establish that Santander had been presented with a notarized Authorization signed by Jaybar stating that Venetian was authorized to receive the insurance checks to be issued to Jaybar. Notwithstanding this apparent authorization, Santander notably nevertheless had not issued the subject checks as payable to Venetian, nor had it issued any check payable to Nationwide; instead, Santander had issued the checks payable to Jaybar and Park Place and, having done so, Santander had the right to insist that Jaybar and Park Place endorse same.

These checks however not only had not been properly endorsed by them but additionally had included "For Deposit Only" stamps of Nationwide or Venetian, which this Court finds had imposed upon Capital One a duty to inquire. Since Capital One had accepted the checks presented by Venetian and Nationwide bearing the unauthorized forged endorsements, Capital One, not Santander, is liable therefore because it had been in the best position to have verified the endorsements. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chemical Bank, 57 N.Y.2d 439, 448 (1982).

The Court rejects Capital One's argument that it is too premature for this Court to determine that this is not an imposter case and to dismiss the third-party action because of plaintiffs' allegations that Joseph Barone Sr. did not knowingly authorize Santander to deal with Venetian, nor to mail payments directly to Venetian.[4]

While Capital One correctly argues that the Court must assume the truth of the allegations on a motion to dismiss, nevertheless, as above-stated, the Court need not assume the truthfulness of the pleaded allegations where extrinsic evidentiary material is considered. The Court's task properly on a CPLR 3211 motion is to see if a cause of action is stated. UCC §3-405 does not simply require, as Capital One seemingly maintains, that the drawer, here Santander, have been induced to send the checks in issue to the forger, Venetian. Said statute critically further requires, and fatally for Capital One, that the inducing of Santander had been done by Venetian while Venetian had been impersonating as a rightful payee. The irrefutable facts are that Venetian, in its communications and

[4]Plaintiffs do not claim that Mr. Barone Sr.'s signatures on the Authorization and the October 6, 2011, contract with Venetian had been forged, nor do plaintiffs affirmatively assert that paragraph 9 of the contract, wherein Venetian essentially is granted a lien with respect to the insurance proceeds, is unenforceable.

dealings with Santander requesting the forwarding of the insurance proceeds to it, never had impersonated Joseph Barone, Sr. nor Jr., nor any other authorized agent of Jaybar and/or Park Place. Since Venetian had not impersonated anyone, UCC §3-405 simply does not apply.

Nor does this Court find that Capital One properly may rely upon UCC §3-406, entitled "Negligence Contributing to Alteration or Unauthorized Signature," as a basis for upholding its third-party claims. Said section on its face has no relevance to the matter at bar, and Capital One has not provided any analysis with respect thereto warranting a different conclusion. Similarly, Capital One's reliance upon UCC §3-405(1)(c) also is rejected because said section provides that "an endorsement by any person in the name of the named payee is effective if ... (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest." Here, Venetian clearly was not been the "agent or employee" of Santander, the drawer, and thus this section too is inapplicable.

Finally, common law indemnification generally is available to a party that has been held vicariously liable from the party who was at fault in causing the plaintiff's injuries. See Structure Tone, Inc. v. Universal Services Group, Ltd., 87 A.D.3d 909, 911 (1st Dept. 2011). "To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident." Mikelatos v. Theofilaktidis, 105 A.D.3d 822 (2nd Dept. 2013).

This Court cannot find that same applies upon the facts presented. Since it had

been Capital One which had accepted the improperly indorsed forged checks for deposit, and there has been no demonstration of any wrongdoing by Santander which, notwithstanding that it had apparent authorization to make Venetian the payee on the insurance proceed checks, nevertheless had issued said checks in the names only of Jaybar and Park Place, there is no basis for any indemnification and contribution claim by Capital One as against Santander; to hold otherwise would undermine the commercially reasonable risk-assigning rules set forth in UCC Article 3.

The third-party action is hereby dismissed.

The parties shall appear in the Preliminary Conference Part, Room 811, at 9:30 a.m., on June 30, 2014.

Dated: May 19, 2014
White Plains, New York

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J.S.C.

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