

<b>Petty v MCO</b>
2015 NY Slip Op 30636(U)
April 15, 2015
Supreme Court, Suffolk County
Docket Number: 13-4062
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 5-7-13 (#001)

MOTION DATE 5-15-13 (#002)

MOTION DATE 2-25-14 (#003)

ADJ. DATE 1-12-15

Mot. Seq. # 001 - MotD

# 002 - MotD

# 003 - MotD

-----X  
KENNETH PETTY, MARIE LACROIX PETTY  
and CHICAGO TITLE INSURANCE  
COMPANY, Individually and as  
subrogee/assignee of the rights of KENNETH  
PETTY and MARIE LACROIX PETTY,

Plaintiffs,

- against -

MCO, PAT T. SECCAFICO, PAT T.  
SECCAFICO PROFESSIONAL LAND  
SURVEYOR, P.C., TREIMANE A. EASON and  
T. EASON LAND SURVEYOR, P.C.,

Defendants.  
-----X

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Upon the following papers numbered 1 to 52 read on these motions to dismiss and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5, 6 - 12, 13 - 24 ; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 26 - 30, 31 - 38 ; Replying Affidavits and supporting papers 41 - 43, 44 - 48, 49 - 51 ; Other memoranda of law 25, 39 - 40, 52 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by the defendants Pat T. Seccafico and Pat T. Seccafico, Professional Land Surveyor P.C. for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing those portions of the complaint containing CTIC's causes of action against them is granted to the extent of dismissing the plaintiffs' claim for contractual indemnification in the eighth cause of action, and is otherwise denied; and it is further

**ORDERED** that the motion by the defendants Treimane A. Eason and T. Eason Land Surveyor, P.C. for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the complaint against them is granted to the extent of dismissing the plaintiffs' claim for contractual indemnification in the eighth cause of action, and is otherwise denied; and it is further

**ORDERED** that the motion by the defendant MCO for an order pursuant to CPLR 3212, CPLR 3211(a)(1) and (a)(7) granting summary judgment dismissing the complaint is granted to the extent that, as to the plaintiff CTIC only, the second and third causes of action in the complaint are dismissed, as well as any claim by the plaintiffs for contractual indemnification included in the eighth cause of action.

This is an action by the purchasers of a vacant parcel of real property and their title insurer against the vendor of the property and two surveyors retained by the purchasers relative to said purchase and the construction of a single-family dwelling thereon. It is undisputed that, on or about March 10, 2010, the plaintiffs Kenneth Petty and Marie Lacroix Petty (the Pettys) entered into a contract of sale with the defendant MCO, a New York corporation, to purchase 2.3 acres of vacant land on Eastport Manor Road, in the Town of Brookhaven, New York (the property). The contract did not contain a metes and bounds description of the property, but was more specifically identified by its Suffolk County Tax Map designation as District 200, Section 510, Block 1, Lot 8. Thereafter, the Pettys retained the defendants Pat T. Seccafico and Pat T. Seccafico, Professional Land Surveyor P.C. (Seccafico) to prepare a Board of Health (BOH) survey of the property, and the plaintiff Chicago Title Insurance Company (CTIC) to search title and deliver a title insurance policy at the anticipated closing of title to the property.

It is further undisputed that the Pettys closed title pursuant to the subject contract of sale on April 21, 2011 and received a bargain and sale deed with covenants against grantor's acts from MCO. MCO also provided an affidavit of title to CTIC at said closing. Based at least in part on said affidavit and Seccafico's survey, CTIC issued an owner's policy of title insurance, policy number 3810-00126, to the Pettys insuring their title to the property. Thereafter, the Pettys commenced construction of the dwelling and discovered a concrete drainage pipe owned by the Suffolk County Department of Public Works running through the property. The Pettys retained the defendants Treimane A. Eason and T. Eason Land Surveyor, P.C. (Eason) to locate the drainage pipe on the property and to prepare a second boundary survey. Eventually, the Pettys learned that approximately .63 acres of the property had been condemned by Suffolk County in April 1974 (parcel H), and that the dwelling under construction was encroaching on said taking parcel. On or about February 21, 2012, the Pettys were directed to remove the dwelling from that portion of the property owned by Suffolk County.

Moreover, it is undisputed that MCO obtained title to the property on December 26, 1986 from the Cord Meyer Company by a deed delivered “without consideration and as a liquidating dividend.” This was more than 12 years after the receipt and release regarding Suffolk County’s taking of parcel H was filed at Liber 7655, page 421 in the Office of the Suffolk County Clerk on April 24, 1974.

In their complaint, the plaintiffs set forth nine causes of action against the various defendants as follows: a first cause of action against MCO sounding in fraud, a second cause of action against MCO sounding in breach of contract, a third cause of action against MCO sounding in breach of warranty and covenant, a fourth cause of action against Seccafico for professional negligence, a fifth cause of action against Eason for professional negligence, a sixth cause of action against MCO for fraudulently inducing the Pettys to purchase the property and CTIC to issue its policy of title insurance, a seventh cause of action against MCO sounding in negligence for failing to advise the plaintiffs that it was not the owner of the entire parcel of the property, an eighth cause of action against all the defendants for contribution, common-law indemnification and/or contractual indemnification, and a ninth cause of action for attorney’s fees and costs. Here, the complaint was drafted by the attorney for CTIC before the Pettys obtained separate counsel. Portions of the complaint fail to clearly distinguish between the allegations made on behalf of the individual plaintiffs and the corporate plaintiff, thus hampering the Court in determining these motions.

Seccafico now moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss those portions of the complaint containing CTIC’s causes of action against them. As summarized above, the allegations against Seccafico are set forth in the fourth, eighth and ninth causes of action. In support of the motion, Seccafico submits the affirmation of his attorney, the complaint, and his affidavit with copies of some of the surveys prepared in this matter attached as an exhibit. Pursuant to CPLR 3211(a)(1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp.*, 90 AD3d 1007, 935 NYS2d 624 [2d Dept 2011]).

In his affidavit, Pat T, Seccafico swears, among other things, that he is a licensed land surveyor, that Seccafico did not enter into any agreements with CTIC or have any knowledge of its involvement with the property, and that it had no duty to provide CTIC with any documentation or information regarding the property. It is well settled that documentary evidence does not include affidavits, deposition testimony or letters (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017, 900 NYS2d 686 [2d Dept 2010]). A review of the surveys with revisions submitted herein indicates that approximately one week prior to the plaintiffs’ closing of title to the property Seccafico provided a certified survey dated April 14, 2011 to some person or entity. Whether said survey was guaranteed to CTIC is a pivotal question herein. Thus, the Court finds that the documents do not conclusively resolve all factual issues; neither do they establish a defense as a matter of law to CTIC’s causes of action.

Pursuant to CPLR 3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v Martinez*, 84 NY2d 83, 614

NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez, supra*; *Thomas v Lasalle Bank N. A.*, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*Chan Ming v Chui Pak Hoi*, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

In the fourth cause of action for professional negligence, the plaintiffs, in effect, allege that Seccafico owed them a duty to prepare an accurate survey of the boundaries of the property. Surveyors must generally exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances (*Vaughan v Commonwealth Land Tit. Ins. Co.*, 133 AD2d 626, 519 NYS2d 734 [2d Dept 1987]; *R.H. Bowman Assoc., Inc. v Danskin*, 72 Misc2d 244, 338 NYS2d 224 [Sup Ct. Schenectady County 1972], *affd* 43 AD2d 621, 349 NYS2d 655 [3d Dept 1973]). As Seccafico's motion is directed against CTIC only, Seccafico contends that it had no duty or responsibility to CTIC as noted above in his affidavit. In opposition, CTIC submits the affidavit of Spencer Thomas (Thomas), the manager of its local office, wherein he swears that Seccafico provided a survey "actually 'certified' to [CTIC]."

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *DaCosta v Trade-Winds Envtl. Restoration, Inc.*, 61 AD3d 627, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Thomas v Lasalle Bank N. A.*, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]). Dismissal under CPLR 3211 is not warranted unless it is established "conclusively that the plaintiff has no cause of action" (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting *Lawrence v Graubard Miller*, 11 NY3d 588, 873 NYS2d 517 [2008]). Here, Seccafico has failed to establish that CTIC has no cause of action for professional negligence herein.

In the eighth cause of action, the plaintiffs allege that the defendants owed a duty to the Pettys, and that CTIC "made payment as the result of the breach of duty of the Defendants in the amount of \$165,000, all of which damages" were caused by the defendants' negligence, and "not through any acts of negligence ... on the part of the Pettys and/or [CTIC]." It is further alleged that CTIC is entitled to "common law indemnification and/or contractual, full or partial contribution and or indemnification" in said amount. Seccafico contends that CTIC is not entitled to common-law indemnification as it "participated to some degree in the wrongdoing."

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The key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that “every one is responsible for the consequences of his own negligence, and if another person has been compelled \* \* \* to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him” (*Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997] quoting *Oceanic Steam Nav. Co. (Ltd.) v Compania Transatlantica Espanola*, 134 NY 461 [1892]; see also *Charles v William Hird & Co., Inc.*, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]). Because the predicate of common-law indemnity is vicarious liability without actual fault on part of the proposed indemnitee, a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Ferguson v Shu Ham Lam*, 74 AD3d 870, 903 NYS2d 101 [2d Dept 2010]; *Kagan v Jacobs*, 260 AD2d 442, 687 NYS2d 732 [2d Dept 1999]; see also *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] [party seeking common-law indemnification must be “free from negligence”]).

The complaint alleges that CTIC was not negligent herein, and Thomas swears in his affidavit that CTIC “justifiably relied” upon Seccafico’s survey. In addition, CTIC submits the affidavit of a land surveyor who indicates that CTIC was not negligent in failing to discover the taking of parcel H in 1974. In his affidavit, Seccafico fails to make any factual allegations of negligence on the part of CTIC. Seccafico has failed to establish that CTIC has no cause of action for common-law indemnification herein.

In addition, Seccafico has failed to establish that CTIC has no claim for contribution herein. Seccafico contends, among other things, that CTIC negligently failed to discover the 1974 taking of parcel H in searching title to the property, which implies that CTIC is a potential joint tortfeasor herein. Seccafico further contends that an action for contribution cannot be maintained herein, as the Pettys’ action is based solely on breach of contract and that, in any event, as a settling tortfeasor CTIC is prohibited from pursuing a claim for contribution pursuant to GOL 15-108. Seccafico’s contention that the Pettys’ action against them is solely for breach of contract is without merit. In addition, the parties have not addressed the issue whether CTIC violated a legal duty to the Pettys independent of its contract with said purchasers of the property (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 521 NYS2d 653 [1987]). Moreover, the allegations in the eighth cause of action imply that CTIC is seeking relief from its relative liability to the Pettys vis-a-vis the defendants. Thus, the Court is not able to determine if CTIC’s payment of the proceeds of the policy can be deemed a settlement of any purported negligence claim the Pettys may have or may have had against CTIC.

CTIC has failed to plead that an express contract between Seccafico and CTIC exists, and the parties do not dispute the absence of such an agreement, requiring dismissal of that branch of the eighth cause of action for contractual indemnification as “the right to contractual indemnification depends upon the specific language of the contract” (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588, 590 [4th Dept 1995]). Nonetheless, to the extent that the plaintiffs’ eighth cause of action can be read to be one for subrogation, it remains viable subject, perhaps, to a finding that CTIC was negligent herein (see e.g. *Kozlowski v. Briggs Leasing Corp.*, 96 Misc2d 337, 408 NYS2d 1001 [Sup Ct, Kings County 1978]; *American Sur. Co. of N.Y. v Gerold*, 255 AD 285, 7 NYS2d 447 [1st Dept 1938]).

The Court declines to dismiss the plaintiff's ninth cause of action for costs and attorney's fees as Seccafico fails to adequately address the issue in its submission. Accordingly, Seccafico motion is granted to the extent that CTIC's claim for contractual indemnification is dismissed, and is otherwise denied.

Eason now moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint against them. As summarized above, the allegations against Eason are set forth in the fifth, eighth and ninth causes of action. However, as noted below, the Pettys and CTIC do not share a common interest in these three causes of action. In support of the motion, Eason submits, among other things, the affirmation of his attorney, the complaint, and his affidavit with copies of the survey prepared in this matter attached as an exhibit.<sup>1</sup> In his affidavit, Treimane A. Eason swears that he is a licensed land surveyor, that the Pettys retained him "to conduct a field survey of [the property] ... and to prepare a site plan for the ongoing construction of a dwelling" thereon. He states that he made no representations as to deficiencies in title to the property, neither was he retained to investigate such deficiencies, and that he included a clear disclaimer on the site plan stating "this survey is subject to any easement of record and other pertinent facts in which an abstract of title may disclose."

It is determined that the plaintiffs' fifth cause of action against Eason for professional negligence, though pled in favor of "Plaintiffs" inclusively, consists of allegations on behalf of the Pettys only, and that CTIC makes no claim therein. Thus, in opposition to the motion, the Pettys submit a copy of Eason's invoice dated September 12, 2011 which indicates that he was retained to perform a boundary survey of the property. In addition, the Pettys submit the affidavit of Scott Gillis, a licensed surveyor, who opines that the "flawed description of the parcel ... forces the prudent Surveyor to obtain additional information from as many sources as necessary to make a reasonable and informed decision as to its boundary ..."

The Court finds that the survey with alleged disclaimer does not conclusively resolve all factual issues, neither does it establish a defense as a matter of law to the Pettys' fifth cause of action. In addition, upon reviewing the evidentiary materials submitted, it is determined that Eason has failed to establish "conclusively" that the Pettys have no cause of action for professional negligence herein (citations omitted). Accordingly, that branch of Eason's motion which seeks to dismiss the fifth cause of action is denied.

It is determined that the plaintiffs' eighth cause of action for indemnification/contribution, though pled in favor of "Plaintiffs" inclusively, consists of allegations on behalf of CTIC only, and that the Pettys make no claim therein. In his affirmation in support of the motion, counsel for Eason contends, among other things, that CTIC is not entitled to indemnification as it has participated in the alleged wrongdoing, that CTIC had no contractual relationship with Eason, and that Eason did not owe a duty to CTIC. For the reasons set forth above relative to Seccafico's motion to dismiss, it is determined that Eason has failed to establish that CTIC has no cause of action for common-law indemnification.

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<sup>1</sup> The survey is folded and attached as an exhibit by stapling it to the affidavit. Regrettably, this requires the Court to remove the staple and the exhibit from the submission in order to review the document. Counsel is advised in the future to prepare its submissions in a manner that avoids this problem.

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However, CTIC has failed to plead that an express contract between Eason and CTIC exists, and the parties do not dispute the absence of such an agreement, requiring dismissal of that branch of the eighth cause of action for contractual indemnification.

In addition, Eason's contention that it owed no duty to CTIC does not negate CTIC's claim that it is entitled to contribution herein, as the relative duties of CTIC and Eason to the Pettys are at issue in that circumstance. Here, Eason has not addressed that branch of the eighth cause of action seeking contribution, and Eason has failed to establish that CTIC has no claim for contribution herein.

The Court declines to dismiss the plaintiff's ninth cause of action for costs and attorney's fees as Eason fails to address the issue in its submission. Accordingly, Eason's motion is granted to the extent that CTIC's claim for contractual indemnification is dismissed, and is otherwise denied.

MCO now moves for summary judgment pursuant to CPLR 3212 and CPLR 3211(a)(1) and (a)(7) dismissing the complaint against it. As summarized above, the allegations against MCO are set forth in the first, second, third, sixth, seventh, eighth and ninth causes of action. In support of the motion, MCO submits, among other things, the pleadings, the contract of sale for the property, the deed delivered to the Pettys, and the affidavit of title it provided to CTIC at the closing of title to the property.

It is determined that the documents submitted by MCO fail to conclusively resolve all factual issues or establish a defense as a matter of law to the plaintiffs' causes of action pursuant to CPLR 3211(a)(1). MCO strongly contends that the contract of sale, an amendment thereto, and the subject deed do not contain any representations or warranties regarding the property and, in at least one case, disclaim any responsibility regarding the metes and bounds of the property. Nonetheless, the contract of sale contains the express intent of the parties to convey approximately 2.3 acres of vacant land, and the affidavit of title provided by MCO and included in its submission indicates that "title thereto has never been disputed, questioned, or rejected," and that it knows of "no facts by reason of which said possession or title might be called into question ..." Moreover, MCO does not dispute the manner in which it took title to the property, or the allegations that it knew or should have known of the condemnation and taking of parcel H in 1974, and the documents do not shed light on those, and other, issues. Accordingly, that branch of MCO's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

The record reveals that the same issues raised by the documents submitted by MCO, as well as other issues of fact, preclude the grant of summary judgment herein. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

The record reveals that the deed delivered to the Pettys at closing contains an additional paragraph not contained in the sample deed attached to the subject contract of sale as an exhibit.

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Specifically, MCO has added a paragraph that it “makes no representation or covenants (*sic*) to the accuracy of the metes and bounds description set forth ...” The act of adding this language at the closing of title, as well as the plaintiffs’ allegations that they relied on the affidavit of title delivered by MCO, raises issues of fact whether MCO actively concealed its knowledge of the 1974 taking, and bears directly on the plaintiffs’ first, second, third, sixth and seventh causes of action. In addition, there are issues of fact which preclude summary judgment dismissing the eighth cause of action for contribution/indemnification. In the same vein as its codefendants, MCO contends that CTIC is not entitled to indemnification as it is partially at fault herein. However, the record does not resolve whether CTIC can be found negligent under these circumstances. Finally, MCO does not address the plaintiffs’ ninth cause of action for costs and attorney’s fees. Accordingly, that branch of MCO’s motion for summary judgment pursuant to CPLR 3212 is denied.

Nonetheless, MCO has established its entitlement to summary judgment for failure to state a cause of action to the extent that CTIC alleges entitlement to relief in the second and third cause of action in the complaint, as well as any claim for contractual indemnification included in the eighth cause of action. The second cause of action alleges that MCO breached its contract with the Pettys, and the third cause of action alleges that MCO breached the warranties and covenants in the deed delivered to the Pettys. In both cases, the plaintiffs fail to plead any agreement between MCO and CTIC. In order to maintain an action for breach of contract, there must be privity of contract between the person bringing the action and the defendant (*Seaver v Ransom*, 224 NY 233, 120 NE 639 [1918]; *CDJ Bldrs. Corp. v Hudson Group Const. Corp.*, 67 AD3d 720, 889 NYS2d 64 [2d Dept 2009]). In addition, as set forth above, absent an express contract a party is not entitled to seek contractual indemnification from another party (citations omitted). Accordingly, MCO’s motion for summary judgment is granted to the extent of dismissing the second and third causes of action in the complaint as they relate to CTIC, and dismissing CTIC’s claim for contractual indemnification.

Dated: April 15, 2015

W. Gerald Able  
 J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION