

Allied Prop. Group LLC v MBAF CPAS, LLC
2016 NY Slip Op 31227(U)
March 29, 2016
Supreme Court, New York County
Docket Number: 651592/2014
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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ALLIED PROPERTY GROUP LLC,

Plaintiff,

Index No. 651592/14

- against -

MBAF CPAS, LLC f/k/a MBAF-ERE CPAS, LLC and
ROY BECKERMAN,

Defendants.

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MBAF CPAS, LLC f/k/a MBAF-ERE CPAS, LLC and
ROY BECKERMAN,

Third-Party Plaintiffs,

Index No. 595376/14

- against -

ALAN SILLS and VICTOR CHERA,

Third-Party Defendants.

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DONNA MILLS, J.:

Third-party defendant Victor Chera (Chera) moves to dismiss the third-party complaint, which asserts a claim for contribution against him. In the alternative, Chera moves for an order severing and staying the third-party complaint.

Plaintiff Allied Property Group LLC (Allied) is a real estate holding company. Nonparty Michael Chera is Allied's managing member, and the brother of third-party defendant Chera. Allied brought this action (Allied's action) against defendants/third-party plaintiffs MBAF CPAS, LLC (MBAF), an accounting firm, and Roy Beckerman, MBAF's principal (defendants/third-party plaintiffs will be referred to as MBAF). Allied alleges that MBAF failed

to expose significant misappropriations of more than \$1 million of Allied's assets by defendant/third-party defendant Alan Sills, Allied's erstwhile controller, and that MBAF made an accounting error which caused Allied to overpay Chera approximately \$114,000 on two promissory notes. Chera and Sills are not parties in Allied's action.

Before Allied commenced the instant action, Chera and V.C. Realty Management, LLC (VC Realty, which, together with Chera, will be referred to as Chera), commenced an action (hereinafter, Chera's action) on January 31, 2014, under Index No. 650331/14, against Allied, Michael Chera, and the guarantors of five promissory notes, pursuant to which Allied borrowed \$16.8 million from Chera and VC Realty in June 2006. Two of these notes are the ones which Allied states in its complaint were overpaid. Chera's complaint sounds in breach of contract and seeks payment under all the promissory notes. While Chera's action was pending, which it still is, Allied allegedly paid off all the notes and interest in May 2014. Since then, the parties in Chera's action have been disputing whether Allied owes additional interest on the notes.

In Chera's action, on October 30, 2014, Allied filed an amended answer which interposed affirmative defenses and counterclaims seeking the recovery of the alleged overpayment made on the two promissory notes. While all of Allied's counterclaims are presented under the heading "money had and received," one of them alleges that Chera caused his coplaintiff VC Realty to distribute all of its assets to Chera's personal accounts in order to render VC Realty judgment proof. Allied's fifteenth affirmative defense states that any recovery awarded to Chera must be offset by amounts owed to Allied.

Allied commenced the instant action on November 4, 2014, asserting causes of action against MBAF for professional malpractice, breach of contract, and gross negligence, and

seeking \$3 million on each. Regarding Chera, Allied's complaint alleges the following. In May 2012, Allied made two payments pursuant to promissory notes held by Chera. MBAF wrongly classified these payments as made to another party. In May 2014, by which time MBAF was no longer working for Allied, Allied paid off the notes in full. Because of the mistakes that MBAF made on Allied's ledger, Allied miscalculated the amounts and overpaid Chera by the amount already paid in May 2012. "Allied is unlikely to be able to recover this overpayment directly from [Chera]" (Allied complaint, ¶ 103).

In Allied's action, MBAF presents affirmative defenses for contributory negligence, failure to mitigate damages, setoff, and other things. MBAF brought a third-party action against Chera and Sills, seeking contribution in the event that Allied is awarded a judgment against MBAF. MBAF's claim against Sills is based on Allied's allegation that Sills stole from Allied. The claim against Chera is based on Allied's allegation that it paid him more money than was due to him under the notes and he did not return the money. Nothing else is stated about Chera. Chera argues that the third-party action must be dismissed because it is not possible for MBAF to obtain contribution from him. Chera contends that, even if MBAF is adjudged liable to Allied, Chera will have no obligation to contribute, because contribution is available only in tort actions, and neither Allied, nor MBAF, have any tort claims against Chera. Also, Chera states that Allied's claims in Chera's action sound in money had and received, a quasi contract claim, and contribution is not permitted for contract claims.

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court's role is deciding "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

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law a motion for dismissal will fail” (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]). In furtherance of this task, the court liberally construes the pleading, accepts the alleged facts as true, and accords the non-moving party the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sheila C. v Povich*, 11 AD3d 120, 122 [1st Dept 2004]).

Under the contribution law, “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them . . .” (CPLR 1401). In order for contribution to be available: 1) the party from whom contribution is sought must be liable for the same injury as the party seeking contribution, although the theory of liability need not be the same; 2) the party from whom contribution is sought must have breached a duty owed to the injured party or to the party seeking contribution; and 3) the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 602-603 [1988]; see *Raquet v Braun*, 90 NY2d 177, 182-183 [1997]; *Garrett v Holiday Inns*, 58 NY2d 253, 260 [1983]). A contribution claim can be made even when the person from whom contribution is sought has no duty to the injured plaintiff (*Raquet*, 90 NY2d at 182), and even when an action has not been brought against that person (*Crews v County of Nassau*, 612 F Supp 2d 199, 216 [ED NY 2009]).

Contribution requires some form of tort liability (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 27-28 [1987]). The contribution statute may not be invoked to apportion liability arising solely from breach of contract (*id.* at 28). Breach of contract does not constitute injury within the meaning of the contribution statute (*id.* at

26; *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009]; *Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009]).

Allied's complaint alleges that it inadvertently paid Chera more than was properly due to him and that this overpayment was MBAF's fault. Allied makes tort claims and a contract claim against MBAF, but no claims of any sort against Chera. "Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation" (*Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 [1st Dept 2001], quoting *Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382, 390 [1882]). As Chera correctly states, there is no allegation in Allied's complaint or MBAF's third-party complaint that Chera engaged in a tort or breached a duty.

MBAF argues that Allied's complaint contains the elements of a claim of conversion against Chera. Conversion is an unauthorized exercise of dominion or control over property by one who is not the owner of the property (*AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402, 403 [1st Dept 2011]). Any dominion or control in this case was over the property of Allied, not MBAF. MBAF cannot assert a claim for conversion over property that is not its own (*see Fidelity & Deposit Co. of Md. v Levine*, 2008 WL 2950631, 2008 NY Misc LEXIS 9175, *13; 2008 NY Slip Op 32101[U], *10 [Sup Ct, NY County 2008], *affd* 66 AD3d 514 [1st Dept 2009]). Thus, MBAF's contribution claim cannot depend upon a conversion by Chera.

Allied's claims against Chera in the Chera action are for money had and received, a quasi contract claim, not a tort claim (*see Mosaic Caribe, Ltd. v Allsettled Group, Inc.*, 117 AD3d 421, 423 [1st Dept 2014]). Allied also alleges fraudulent conveyance on Chera's part, though, as

stated above, the tort is not named as such and is not presented as a separate cause of action. In some discussions concerning the propriety of contribution claims, courts analyze the nature of the damages sought by the plaintiff. "[T]he touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein" (*Children's Corner*, 64 AD3d at 324). The measure of damages sought by Allied are not tort damages. Even if Allied is regarded as asserting a tort claim in Chera's action, as damages, Allied seeks only the amount of the overpayment from Chera. MBAF cannot look to the Chera action to make a case that Chera engaged in a tort against Allied and should pay contribution to MBAF.

The motion to dismiss the third-party complaint against Chera is granted.

It is

ORDERED that the motion by third-party defendant Victor Chera to dismiss the third-party action as against himself is granted and the complaint is dismissed in its entirety as against said third-party defendant, with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant; and it is further

ORDERED that the third-party action is severed and continued against the remaining third-party defendant.

Dated: 3/29/16

ENTER:



J.S.C.

DONNA M. MILLS