

A.S.K. Constr., Inc. v Community Envtl. Ctr., Inc.

2017 NY Slip Op 30167(U)

January 25, 2017

Supreme Court, Kings County

Docket Number: 507451/14

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of January, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
A.S.K. CONSTRUCTION, INC., Individually and on Behalf of All Lienors, Claimants and Creditors Similarly Situated Entitled to Share in Funds Received by Community Environmental Center, Inc. from East New York Partnership, L.P. in Connection with the Improvement of Real Property owned by East New York Partnership, L.P. in the County of Kings, Under Article 3-A of the New York State Lien Law,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 507451/14

COMMUNITY ENVIRONMENTAL CENTER, INC., ET AL.,

Mot. Seq. No. 3

Defendants.

-----X
RICHARD CHERRY,

Third-Party Plaintiff,

- against -

KEN DANIELS,

Third-Party Defendant.

-----X
The following e-filed papers read herein:

NYSCEF#:

Notice of Motion, Affirmation, Memorandum of Law, and Exhibits Annexed _____
Affirmation in Opposition, Memorandum of Law, and Exhibits Annexed _____
Reply Affirmation and Memorandum of Law Annexed _____

64-65, 66, 67-72
73, 74-79
80-81

The third-party defendant Ken Daniels (Daniels) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the third-party complaint of the defendant/third-party plaintiff Richard Cherry (Cherry) for failure to state a cause of action.

The plaintiff A.S.K. Construction (plaintiff) was a subcontractor to the defendant Community Environmental Center, Inc. (CEC), a construction contractor engaged in the remodeling of buildings to make them energy efficient. During the relevant time period, Cherry was the chief executive officer of CEC, whereas Daniels was its de facto chief financial officer.

In 2014, plaintiff commenced the underlying action asserting causes of action under article 3-A of the Lien Law, as well as for aiding and abetting conversion, breach of fiduciary duty and/or abetting same, fraudulent transfers, and an accounting. Plaintiff named CEC and Cherry, among others, as defendants. Plaintiff did not name Daniels as a defendant. During the pendency of the underlying action, CEC in March 2015 filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (*see In re Community Env'tl. Ctr., Inc.*, 15-BK-41173 [Bankr ED NY]). CEC's bankruptcy filing has stayed the underlying action insofar as asserted against it, but did not stay the underlying action against Cherry.

Thereafter, Cherry commenced the third-party action against Daniels. In the third-party action, Cherry alleges, upon information and belief, that:

(1) Daniels' position as CFO makes him liable to plaintiff in the underlying action under article 3-A of the Lien Law because he (Daniels) knew about, participated in, and was grossly negligent with respect to any alleged misapplication of certain government funds that should have been (but were not) paid to plaintiff in the underlying action (hereafter, the government funds);

(2) Daniels was responsible for the preparation of financial statements and annual audits of CEC;

(3) Daniels was responsible for the preparation of financial statements for several of CEC's affiliates to which the Government Funds were allegedly diverted;

(4) Daniels knew that CEC was in financial distress since at least 2011 but failed to provide sufficient disclosure of that fact in CEC's financial statements;

(5) Daniels failed to keep books and records clearly identifying (a) the allocation of the Government Funds; (b) the accounts payable for each CEC contract; and (c) the application of the Government Funds to each CEC contract;

(6) Daniels represented to Cherry up until 2013 that CEC was not in any type of financial debt;

(7) Daniels provided to Cherry with CEC's cash-flow analysis indicating that its cash-flow projections were positive;

(8) Daniels provided Cherry with financial statements indicating that CEC was solvent, *i.e.*, that its assets exceeded its liabilities; and

(9) Cherry was unaware of the existence of any financial problems with CEC until December 2013.

Based on the foregoing allegations, Cherry seeks common-law contribution and indemnification against Daniels in the event that he (Cherry) is held liable, in whole or in part, to plaintiff in the underlying action. Daniels has moved, pre-answer, to dismiss the third-party complaint for failure to state a cause of action.

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Ingvarsdottir v. Gaines, Gruner, Ponzini & Novick, LLP*, 144 AD3d 1099, 1101 [2d Dept 2016]). “Whether the complaint

will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims . . . plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). Further, “a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery” (*Cohn v Lionel Corp.*, 21 NY2d 559, 563 [1968]).

Here, affording the third-party complaint a liberal construction and according Cherry the benefit of every favorable inference, he sufficiently pleaded causes of action seeking both common-law contribution and indemnification against Daniels (*see Nilazra, Inc. v Karakus, Inc.*, 136 AD3d 994, 997 [2d Dept 2016]; *Soodoo v LC, LLC*, 116 AD3d 1033, 1034 [2d Dept 2014]; *see also AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 594 [2005]; *McDermott v City of New York*, 50 NY2d 211, 216-217 [1980]).

Accordingly, it is hereby

ORDERED that the third-party defendant’s motion to dismiss the third-party complaint for failure to state a cause of action is denied in its entirety; and it is further

ORDERED that the third-party defendant Ken Daniels shall answer the third-party complaint within 20 days after service of a copy of this decision and order with notice of entry on his counsel.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL