

Fidelity Natl. Tit. Ins. Co. of N.Y. v Lite & Russell

2017 NY Slip Op 30438(U)

January 5, 2017

Supreme Court, Suffolk County

Docket Number: 09-42051

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 09-42051
CAL. No. 12-01770CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-29-16 (003) (004)
MOTION DATE 7-29-16 (005) (006)
ADJ. DATE 8-16-16
Mot. Seq. #003 - MG #005 - MotD
#004 - MotD #006 - XMD

-----X
FIDELITY NATIONAL TITLE INSURANCE
COMPANY OF NEW YORK, AS SUBROGEE
OF ALBARANO HOLDING CORP.,

Plaintiff,

- against -

LITE & RUSSELL and JUSTIN LITE, ESQ.,

Defendants.
-----X

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LITE & RUSSELL and JUSTIN LITE, ESQ.,

Third-Party Plaintiffs,

- against -

GANGADEEN & ASSOCIATES and ALL
ISLAND MORTGAGE & FUNDING
CORPORATION,

Third-Party Defendants.
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the third-party defendant Gangadeen, dated 6/8/16, and supporting papers 1- 34 (including Memorandum of Law dated 6/8/16); (2) Notice of Motion by the plaintiff, dated 7/1/16, and supporting papers 35 - 36); (3) Notice of Motion by the third-party defendant All Island, dated 6/14/16, and supporting papers 51 - 55); (4) Notice of Cross Motion by the defendant/third-party plaintiff Lite & Russell, dated 7/11/16, supporting papers 56 - 65, (including Memorandum of Law dated 7/11/16); (5) Affirmation in Opposition by the defendant/third-party plaintiff Lite & Russell, dated 7/15/16, and supporting papers 47 - 48; (6)

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Affirmation in Opposition by the plaintiff, dated 7/25/16, and supporting papers 66 - 67; (7) Reply Affirmation by the plaintiff, dated 7/25/16, and supporting papers 49 - 50; (8) Reply Affirmation by the third-party defendant Gangadeen, dated 7/28/16, and supporting papers 68 - 70; (9) Reply Affirmation by the the third-party defendant All Island, dated 7/28/16, and supporting papers 71 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

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

ORDERED that the motion (#003) by the defendant Gangadeen & Associates for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (#004) (incorrectly designated a cross motion) by the plaintiff for an order pursuant to CPLR 3108 directing the issuance of open commissions enabling it to take the deposition of a non-party witness, Marlana Hermann, and for sanctions against the defendant/third-party plaintiff Lite & Russell pursuant to 22 NYCRR 130-1.1, is denied, and to the extent that the motion seeks an open commission said denial is without prejudice to renewal upon the requisite showing that a commission would be necessary or convenient; and it is further

ORDERED that the motion (incorrectly designated a cross motion) by the defendant All Island Mortgage & Funding Corp. for an order pursuant to CPLR 3211(a)(5) or CPLR 3016(b) dismissing the complaint or, in the alternative, pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the second and third causes of action in the third-party complaint are dismissed and is otherwise denied; and it is further

ORDERED that the cross motion by the defendant/third-party plaintiff Lite & Russell pursuant to CPLR section 3025(b) for leave to serve an amended third-party complaint is denied.

This is an action to recover damages sustained by the plaintiff, as insurer and subrogee of Albarano Holding Corp. (AHC), after it was obligated to pay its insured's claim upon the discovery that imposters fraudulently obtained a loan from AHC secured by a mortgage on certain real property. It is undisputed that, in 2005, AHC, a private lender, received a request from the third-party defendant All Island Mortgage & Funding Corp. (All Island), a mortgage broker, to finance a loan to "Carlos Hernandez" and "Margaret Hernandez" for the alleged purpose of improving real property located in Brooklyn. The loan was to be secured by a mortgage on two other Brooklyn properties allegedly owned by the borrowers. AHC's principal, Paul Albarano (Albarano), retained the defendants Lite & Russell and Justin Lite, Esq. (Lite)(collectively Lite & Russell) to act as the closing attorney for the transaction. At the closing held on October 19, 2005 (the closing), the borrowers were represented by the third-party defendant law firm Gangadeen & Associates (Gangadeen) and executed a promissory note and mortgage. The borrowers presented identification which was examined by the title closer, who notarized the documents. As a result, the plaintiff issued a policy of title insurance to AHC. The next day, Lite & Russell's office received a fax requesting that the balance of the loan proceeds due to the borrowers be

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wired to a bank account in Switzerland. The “son” of the borrowers purportedly called Lite & Russell’s office to confirm the wiring instructions and receipt of the fax. Lite & Russell then executed the wire transfer in accordance with the instructions from the borrowers.

When the first payment due under the loan was not received, a subsequent investigation determined that the purported borrowers who appeared at the closing were imposters and did not own the subject properties. AHC subsequently submitted a claim under its title insurance policy and the plaintiff made payment to AHC pursuant to a Settlement and Release Indemnity Agreement. The plaintiff commenced this action against Lite & Russell asserting causes of action for legal malpractice and breach of fiduciary duty, alleging that Lite & Russell was negligent in wiring the loan proceeds to a Swiss bank account without making any inquiry or advising AHC of the request. Lite & Russell commenced a third-party action against All Island, the mortgage broker, and Gangadeen, the attorney for the imposters, asserting causes of action for contribution, common law indemnification and aiding and abetting fraud.

After issue was joined, Lite & Russell moved for summary judgment dismissing the complaint, and Gangadeen moved for summary judgment dismissing the third-party complaint. By order dated August 23, 2013, the undersigned granted Lite & Russell’s motion for summary judgment on the grounds that mere speculation supported the allegations that Lite & Russell’s negligence was the proximate cause of the plaintiff’s damages. In addition, in light of the dismissal of the complaint, the undersigned granted Gangadeen’s motion for summary judgment and dismissed the third-party complaint against Gangadeen and All Island. The plaintiff appealed the subject order, and by decision and order dated October 21, 2015 the Appellate Division, Second Department reversed the order “insofar as appealed from,” and denied Lite & Russell’s motion for summary judgment indicating that the plaintiff had raised an issue of fact whether Lite & Russell’s conduct was a proximate cause of AHC’s damages. Under the circumstances, the undersigned so-ordered a stipulation entered into by the parties directing that the third-party defendants serve their summary judgment motions on or before June 10, 2016 with return dates of July 29, 2016.

The defendant/third-party plaintiff and the third-party defendants have moved or cross-moved for relief herein. For reasons of efficiency and clarity in rendering its determinations herein, the Court will address the motions for summary judgment served by that the third-party defendants (#003) and (#005) before it reviews the motion of the plaintiff (#004) and the cross motion of the defendant/third-party plaintiff (#006).

Gangadeen now moves (#003) for entry of judgment based upon the undersigned’s order dated August 23, 2013 dismissing the third-party complaint (the prior order) or, in the alternative, for summary judgment dismissing the third-party complaint and all cross claims against it. Regarding the first branch of its motion, Gangadeen contends that the decision by Lite & Russell to forego an appeal of the prior order dismissing the third-party complaint entitles it to the judgment requested. It is determined that Gangadeen’s contention is without merit. The prior order did not address the merits of Gangadeen’s motion for summary judgment and was based solely on the determination therein that Lite & Russell was entitled to summary judgment dismissing the plaintiff’s complaint. In that light, the undersigned dismissed the third-party complaint against Gangadeen and the non-moving party, All Island, citing

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authority which stands for the proposition that a third-party cause of action cannot be maintained when the plaintiff cannot recover against the defendant/third-party plaintiff (*Langan v Cabela*, 289 AD2d 377, 734 NYS2d 876 [2d Dept 2001]). Accordingly, that branch of Gangadeen's motion which seeks judgment in its favor is denied.

In support of the branch of its motion for summary judgment, Gangadeen submits, among other things, the pleadings, the affidavits of its principal and an employee, documents relating to the subject closing, and the deposition transcripts of Albarano, All Island, and Lite & Russell as well as the attorney who attended the closing on Lite & Russell's behalf. 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]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the part opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore*, *supra*).

In his affidavit, Gangadeen swears that he received an unsolicited telephone call at approximately noon on the day of the closing from a man claiming to be "Eddie Hernandez" (Eddie), the son of "Carlos Hernandez" (Carlos) and "Margaret Hernandez" (collectively the imposters), and that Eddie asked him to represent his parents at a "real estate refinancing transaction." He states that he had never spoken to this person before, that he asked why Eddie had not contacted him sooner, and that Eddie told him that his parents attorney could not make the closing. He indicates that he told Eddie that he was not available, but that he could have his paralegal attend the closing, and that he would explain the relevant documents to his parent over the telephone. Gangadeen further swears that Eddie agreed to the arrangement, that his paralegal attended the closing, that he and his paralegal did not receive or review any documents prior to the closing, and that approximately two months later he received a telephone call from the actual owner of the subject properties, Carlos Hernandez, who informed him that the borrowers herein were imposters. He attests that, prior to that date, he had "absolutely no knowledge that 'Eddie Hernandez' and his alleged 'parents' were imposters and/or that they were perpetrating a fraud." He states that he and his law firm never had an attorney-client relationship with, or provided any legal advice or services to, AHC, Lite & Russell, or All Island.

In her affidavit dated December 6, 2012, Diane Blumenthal swears that she was formerly employed as a paralegal at Gangadeen, that she was deposed in this matter on May 23, 2012, and that, at the time of her deposition and currently, she has "very little recollection of the subject closing." She declares that, in November 2012, the attorney for Gangadeen sent her an affidavit dated August 6, 2007 filed in a related action, that she recalls executing said affidavit now that she has read it, and that the

information therein is true and accurate. In said affidavit, Diane Blumenthal swears that she attended the subject closing, that she did not recall the date of the closing or the names of the individuals involved, and that three individuals attended on behalf of the borrowers. She states that one individual was a "black man in a wheelchair who appeared to be in his sixties," another was a Hispanic woman who also appeared to be in her sixties, and a third person who was "perhaps in his thirties."

At his deposition on April 3, 2012, Lite testified that he has represented Albarano personally and AHC in various matters over the years, that he was hired to close this loan without a formal retainer, and that he did not negotiate the terms of the loan and mortgage between AHC and the imposters. He stated that he did not recall speaking with anyone from All Island regarding this loan, that All Island ordered title for the transaction, and that his paralegal, Marlana Hermann (Hermann), prepared the subject note and mortgage. He indicated that his wife, Elisa Lite, Esq., and Hermann attended the closing on his firm's behalf, and that, sometime after the closing, Hermann "moved South" and had not been employed by Lite & Russell for a "few years." Lite further testified that verifying the identity of borrowers at a closing is the "purview" of the title company, that there were no instructions in the closing documents how his firm was to disburse loan monies, and that it is custom and practice to distribute any net proceeds of a loan as dictated by the borrowers. He indicated that he did not know Gangadeen or Diane Blumenthal, that he never spoke with Gangadeen, and that he did not remember if anyone ever told him that Diane Blumenthal attended the closing on behalf of the imposters. He stated that he did not know if he had any facts or information that Gangadeen or his office knew that the borrowers were committing a fraud, and that he did not have any knowledge or information that Gangadeen "substantially assisted" the imposters in this fraud.

Elisa Lite was deposed on July 31, 2012 and testified that she maintains her own law practice, that she had represented Albarano and his companies previously, and that she occasionally covers closings for Lite & Russell. She indicated that she met Gangadeen at the closing, that she did not speak with Carlos Hernandez at the closing, and that she did not remember if Margaret Hernandez or Eddie attended the closing. She stated that she met the mortgage broker from All Island, Schiano, at the closing, and that it was her understanding that Schiano "put together the whole transaction." Elisa Lite further testified that the loan funds were not disbursed the evening of the closing because there was an issue as to the amounts due to the borrowers and the possibility that the funds were to be delivered by wire transfer. She stated that she learned months later that the borrowers were imposters, and that the loan funds had been wired to a Swiss bank. She acknowledged that she did not remember if Diane Blumenthal attended the closing as Gangadeen's paralegal or if Gangadeen attended the closing. Elisa Lite further testified that she did not know that a fraud was being perpetrated by the imposters, and that she had no knowledge that anyone else at the closing knew that this was a fraudulent transaction except the imposters. She indicated that she did not remember the form of identification the title company requested from the imposters, that it was her understanding that the title company is responsible to check for identification, and that the title company was satisfied with the identification presented by the imposters at the closing.

At his deposition, Nicholas Schiano (Schiano) testified that his father owns All Island, that he is employed as a loan officer with the company, and that "Eddie Hernandez" approached him about obtaining a non-conventional loan on a building "Eddie's father" owned. He indicated that Albarano

had previously contacted AHC saying “if a deal looked right he would be interested in it if it didn’t meet conventional bank’s underwriting guidelines,” that he did not remember if this was the first loan that he had personally handled for Albarano, and that he contacted Albarano about this deal. He stated that Albarano gave him a verbal “okay” on the deal, that he then “ordered title to the property,” conducted computer research on the value of one of the “Hernandez” properties, and obtained a “credit check on Carlos Hernandez.” Schiano further testified that his company had previously brokered similar loans with Albarano’s company, and that he did not know when Albarano became a client of All Island. He stated that “Eddie Hernandez” was All Island’s client in this transaction, that he never communicated with Gangadeen prior to the closing, and that a woman from Gangadeen attended the closing. He indicated that he learned that the borrowers were imposters after he sent letters to the “real” Carlos Hernandez regarding the December payment due on the loan.

Albarano was deposed on March 18, 2011 and testified that he is a shareholder in AHC, that the corporation is a real estate company which also makes private loans secured by mortgages, and that it does business with various brokers, including All Island. He stated that All Island brought him the deal involving the imposters, that he did not recall if All Island gave him any other information about the imposters beside their names, and that he did not know what All Island did regarding investigating the borrowers’ information. He indicated that he contacted Lite & Russell after he did not receive the first payment under this loan. Albarano further testified that he did not rely on anyone to do a background check on the borrowers herein, and that he did not give any instructions to Lite & Russell regarding the disbursement of the subject loan proceeds.

Gangadeen has established its prima facie entitlement to summary judgment on Lite & Russell’s first cause of action for contribution and All Island cross claim for contribution. The “critical requirement” of a valid claim for contribution is that “the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997] quoting *Nassau Roofing & Sheet Metal Co. v Facilities Development Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]; see also *Nelson v Chelsea GCA Realty*, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). It is well settled that attorneys do not owe a duty of care to their adversary or one with whom they are not in privity (*Aglira v Julien & Schlesinger*, 214 AD2d 178, 631 NYS2d 816 [2d Dept 1995]; see also *Cascardo v Stacchini*, 100 AD3d 675, 954 NYS2d 177 [2d Dept 2012]). Here, Gangadeen has prima facie established that it did not owe any duty to Lite & Russell, AHC, Albarano or All Island.

An insurer, having indemnified its insured, inherits the insured’s cause of action against the tortfeasor (*ELRAC, Inc. v Ward*, 96 NY2d 58, 724 NYS2d 692 [2001]; *Westport Insurance Co. v Alvertec Energy Conservation, LLC*, 82 AD3d 1207, 921 NYS2d 90 [2d Dept 2011]). An insurer, as equitable subrogee of its insured, stands in the insured’s shoes, and its rights to proceed against third parties, being derivative in nature, are limited to such rights as insureds would have had against such third parties, and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured (*ELRAC, Inc. v Ward, supra*; *Westport Insurance Co. v Alvertec Energy Conservation, LLC, supra*). Thus, Gangadeen owed no duty to the plaintiff herein.

In addition, Gangadeen has established its prima facie entitlement to summary judgment on Lite & Russell's second cause of action for common-law indemnification. 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 be 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 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"]). Here, to succeed on the causes of action in its complaint, the plaintiff must establish negligence on the part of Lite & Russell. If the plaintiff is successful, Lite & Russell will be unable to maintain its cause of action for common-law indemnification. If the plaintiff fails to meet its burden, Lite & Russell would have no obligation to pay damages, the issue of indemnification would be academic, and upon the dismissal of the complaint, the third-party complaint would also be dismissed (*Langan v Cabela, supra*).

Finally, Gangadeen has established its prima facie entitlement to summary judgment on Lite & Russell's third cause of action for aiding and abetting fraud. "To plead a cause of action to recover damages for aiding and abetting fraud, the complaint must allege the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud" (*Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 934 NYS2d 199 [2d Dept 2011]; see also *Matter of Woodson*, 136 AD3d 691, 24 NYS3d 706 [2d Dept 2016]). "Substantial assistance" requires an affirmative act on the part of the alleged aider and abettor (*Markowitz v Friedman*, ___ AD3d ___, 2016 WL 6885733 [2d Dept 2016], citing *Baron v Galasso*, 83 AD3d 626, 921 NYS2d 100 [2d Dept 2011]). Here, Gangadeen has prima facie established that it had no knowledge of the subject fraud, and that it did not substantially assist in the perpetration thereof.

Gangadeen's motion is unopposed by the plaintiff and All Island. In opposition to Gangadeen's motion, Lite & Russell contends that Gangadeen was "recklessly indifferent to the facts that had an odor of fraud" herein for the "simple reason [that] the law firm stood to reap a quick and easy payday ... for doing virtually no work." Lite & Russell submits the transcript of Gangadeen's deposition on April 12, 2012, wherein Gangadeen testified to the facts summarized above, as well as the unusual nature of this transaction including that he was called upon to represent the imposters at the last minute, that he did not personally attend the closing, and that he never spoke directly to "Eddie's parents." In addition, Gangadeen testified that he never asked to see his clients loan application, never talked to the lender or broker about the transaction, and that he had no recollection of discussing the substance of the closing with his clients. Lite & Russell also contends that there is an issue of fact whether Gangadeen had knowledge of the fraud herein based on Gangadeen conviction in an unrelated matter in June 2015.

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Lite & Russell has failed to raise an issue of fact whether Gangadeen committed an affirmative act to substantially assist the imposters in committing the instant fraud. In addition, the alleged indifference or recklessness of Gangadeen herein does not indicate that Gangadeen had knowledge of the subject fraud. Aiding and abetting fraud is not made out by conclusory allegations that the aider and abettor had actual knowledge of such fraud (*Goel v Ramachandran*, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]). In addition, it is determined that Lite & Russell's contention that the surrounding circumstances can permit a reasonable inference of knowledge herein is without merit, as the well settled principle that the pleading requirements of CPLR 3016(b) may be met by a pleading alleging constructive knowledge is not applicable in the context of this motion for summary judgment. Where, as here, the mere legal representation of a client in a transaction would not have imparted any awareness of a scheme to defraud, and the transaction appears unobjectionable at the time, a law firm would have to have knowledge of the details of the fraud to be held liable as an aider and abettor (*eg. National Westminster Bank v Weksel*, 124 AD2d 144, 511 NYS2d 626 [1st Dept 1987]). Moreover, Lite & Russell's contention that Gangadeen's conviction raises an issue of fact as to his knowledge of the fraud herein is without merit. "A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion" (*Coopersmith v Gold*, 223 AD2d 572, 636 NYS2d 399 [2d Dept 1996], quoting *Matter of Brandon*, 55 NY2d 206, 210, 448 NYS2d 436 [1982]). Accordingly, Gangadeen's motion for summary judgment dismissing the third-party complaint and all cross claims against it is granted.

All Island now moves (#005) to dismiss the third-party complaint on the grounds that the prior order and the Appellate Division, Second Department decision herein preclude a finding of liability against All Island and that Lite & Russell has failed to comply with the pleading requirements of CPLR 3016(b). It also seeks summary judgment in its favor on the grounds that All Island did not violate any duty owed to the plaintiff or Lite & Russell. For the reasons set forth above, and in light of the fact that neither the prior order or the Appellate Division decision address the issue of All Island's liability if the third-party complaint survives, All Island first contention is without merit. As discussed below, the issues regarding the pleading requirements of CPLR 3016(b) are academic.

The Court now turns to that branch of All Island's motion which seeks summary judgment herein. In searching the record, it is determined that All Island is entitled to summary judgment dismissing Lite & Russell's causes of action for common-law indemnification and aiding and abetting fraud. As set forth above, Lite & Russell cannot succeed on its claim for indemnification as the sole ground for the plaintiff's claims against it sound in negligence. In addition, the record indicates that All Island has prima facie established that it did not have knowledge of the fraud herein, and that it did not undertake an affirmative act to assist in that fraud.

However, All Island has failed to establish its prima facie entitlement to summary judgment regarding Lite & Russell's first cause of action for contribution. There are issues of fact whether All Island owed AHC a duty, as fiduciary or otherwise, regarding this transaction and its relative culpability for the breach of that duty, if any. Schiano's testimony that, among other things, AHC was a prior client, that he undertook to order a title search on behalf of AHC, and that he conducted other inquiries to ensure that the imposters were a "good borrowers" raise issues which preclude summary judgment.

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In opposition to All Island's motion, Lite & Russell contends that "[i]f All Island had taken the most rudimentary measures to verify that [the imposters] were the people they purported to be, [All Island] likely would have nipped the fraudulent scheme in the bud." Said contention, and the factual allegations in the opposition to the motion, do not raise issues of fact regarding Lite & Russell's second and third causes of action. Lite & Russell also contends that All Island's motion is untimely as it was made after the time set forth in the so-ordered stipulation permitting these motions. However, it is determined that All Island's motion may be considered as it is made on nearly identical grounds a Gangadeen's motion (*Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 994 NYS2d 159 [2d Dept 2014]). In addition, the determination of All Island's motion is made in searching the record pursuant to the Court's discretion pursuant to CPLR 3212(b). Thus, All Island is entitled to summary judgment on Lite & Russell's second and third causes of action. Its contention that Lite & Russell has not properly pled fraud is academic. Accordingly, All Island's motion for summary judgment is granted to the extent that the second and third causes of action in the third-party complaint are dismissed and is otherwise denied.

Although designated as motion sequence #004, the plaintiff's motion for an open commission to take the deposition of Marlana Hermann and for sanctions against Lite & Russell was made after All Island's motion for summary judgment (#005). It is undisputed that Marlana Hermann (Hermann) was the paralegal in Lite & Russell's office who prepared the subject note and mortgage, and that she processed the request from the imposters to wire the net proceeds of the loan to a Swiss bank account. It is further undisputed that, despite the fact that Hermann is no longer employed by Lite & Russell, said firm agreed to arrange for Hermann's deposition to be conducted in New York. In addition, Hermann agreed to appear for a deposition in New York. For reasons not important herein, said deposition did not take place. It is well settled that a party must demonstrate that a witness outside of New York will not cooperate with a notice of deposition to be entitled to issuance of an open commission (*Sorrentino, v Fedorczyk*, 85 AD3d 759, 925 NYS2d 150 [2d Dept 2011]; *Susan A. v Steven J. A.*, 141 AD2d 790, 529 NYS2d 867 [2d Dept 1988]). Accordingly, that branch of the plaintiff's motion which seeks an order granting it an open commission is denied without prejudice to a renewal of the motion upon the requisite showing that a commission would be necessary or convenient (CPLR 3108).


The court has considered that portion of the plaintiff's motion seeking sanctions against Lite & Russell pursuant to 22 NYCRR 130-1.1 for the failure to produce Hermann for a deposition. Pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR § 130-1.1[a]). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130-1.1[c]). Plaintiff failed to establish in its moving papers that Lite & Russell engaged in frivolous or delaying conduct within the meaning of 22 NYCRR § 130-1.1 [c] (*see Kaplon-Belo Assoc., Inc. v D'Angelo*, 79 AD3d 931, 912 NYS2d 886 [2d Dept 2010]; *Correspondence v Correspondence*, 46 AD3d 736, 849 NYS2d 284 [2d Dept 2007]). Accordingly, that branch of the plaintiff's motion which seeks sanctions against Lite & Russell is denied.

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Lite & Russell now cross-moves for leave to serve an amended third-party complaint in this action. Pursuant to CPLR 3025(b) leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted provided the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see Kiaer v Gilligan*, 63 AD3d 1009, 883 NYS2d 224 [2d Dept 2009]; *Kinzer v Bederman*, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]). Courts are unlikely to deny the request if the proposed amendments do not prejudice the opponent by changing the basic issues of the action, or by adding significant factual allegations of which the party is unaware (*Symphonic Electronic Corp. v Audio Devices, Inc.*, 24 AD2d 746, 263 NYS2d 676 [1st Dept 1965]; *Rogers v South Slope Holding Corp.*, 255 AD2d 898, 680 NYS2d 772 [4th Dept 1998]). It is also the established rule that the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt (*Vista Properties, LLC v Rockland Ear, Nose & Throat Assocs., P.C.*, 60 AD3d 846, 875 NYS2d 848 [2d Dept 2009]).

Here, counsel for Lite & Russell contends that the third-party defendants cannot show prejudice, that granting said parties relief under CPLR 3016 for “failure to state a fraud claim” would be inappropriate, and that his client should be given the opportunity to “re-plead in order to conform the pleadings to the proof.” However, it is determined that the cross motion must be denied, as the motion papers do not include the proposed amended third-party complaint (*Codrington v Wendell Terrace Owners Corp.*, 118 AD3d 844, 988 NYS2d 237 [2d Dept 2014]; *Kilkenny v Law Office of Cushner & Garvey, LLP*, 76 AD3d 512, 905 NYS2d 661 [2d Dept 2010]). More importantly, Lite & Russell has failed to offer an affidavit of merit or any new facts as would overcome the legal and factual defects in its prior complaint, or to demonstrate that any proposed amendment has merit (*Pollak v Moore*, 85 AD3d 578, 926 NYS2d 434 [1st Dept 2011]; *Kilkenny v Law Office of Cushner & Garvey, LLP*, *supra*). Accordingly, Lite & Russell’s motion to amend the third-party complaint is denied.

Dated: January 5, 2017


PETER H. MAYER, J.S.C.