

325 E. 118th St., LLC v Roach Bernard, PLLC

2017 NY Slip Op 31697(U)

August 7, 2017

Supreme Court, New York County

Docket Number: 160717/15

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

325 EAST 118TH STREET, LLC;
GREATER EMMANUEL BAPTIST CHURCH;
and MARJORIE J. GOODEN,

Plaintiffs,

-against-

ROACH BERNARD, PLLC,

Defendant.

ROACH BERNARD, PLLC,

Third-Party Plaintiff,

-against-

EUGENE AGBIMSON;
AGBIMSON & CO., PLLC;
AGBIMSON & CO. C.P.A., P.C.;
and ERIGENICS, LLC,

Third-Party Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing third-party defendants' motion under CPLR 3211 and 3013 and in reviewing third-party plaintiff's cross-motion under CPLR 3025.

Papers

Numbered

Third-Party Defendants' Notice of Motion to Dismiss the Third-Party Complaint	1
Third-Party Plaintiff's Notice of Cross-Motion	2
Third-Party Plaintiff's Reply Affirmation	3
Third-Party Defendants' Reply	4

Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Yuri Burshteyn of counsel), for plaintiffs.

Kelley Jasons McGowan Spinelli Hanna & Reber, LLP, New York (Christopher P. Hannan of counsel), for defendant/third-party plaintiff Roach Bernard, PLLC.

Maduegbuna Cooper, LLP, New York (Samuel O. Maduegbuna of counsel), for third-party defendants.

Gerald Lebovits, J.

Plaintiffs filed a complaint against defendant Roach Bernard, PLLC, for a de novo review under 22 NYCRR 137.8 because they were aggrieved by an arbitration award. Plaintiffs seek monetary relief for overpaying legal fees in connection with a real-estate development transaction and damages for real-estate taxes that plaintiffs had to pay because of Roach Bernard’s alleged negligence. Roach Bernard represented plaintiffs in the real-estate transaction.

Roach Bernard then filed a third-party complaint against third-party defendants asserting causes of action under common-law contribution and common-law indemnification. Roach Bernard alleges that third-party defendants’ culpable conduct caused any potential damages caused to plaintiffs. Third-party defendants provided business transactional, accounting and taxation consulting services to plaintiffs. According to Roach Bernard, third-party defendants allegedly failed to inform plaintiffs about the real-estate taxes that plaintiffs had to pay.

Third-party defendants now move to dismiss the third-party complaint under CPLR 3211 and 3013. They assert that the third-party complaint fails to provide notice of the transactions or occurrences that Roach Bernard intends to prove with respect to its common-law contribution and common-law indemnification claim and of the material elements of each cause of action.

In opposition, Roach Bernard cross-moves for leave to amend the complaint under CPLR 3025 (b).

The court addresses Roach Bernard’s cross-motion to amend the complaint before it addresses third-party defendants’ motion to dismiss. The cross-motion is dispositive.

I. Roach Bernard’s Cross-Motion

Roach Bernard’s cross-motion for leave to amend the complaint to assert direct claims of negligence against third-party defendants under CPLR 3025 (b) is granted.

Under CPLR 3025 (b), “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” A court has broad discretion to grant a motion for leave to amend a pleading unless the proposed amendment would cause surprise or prejudice to the opposing party or the proposed amendment is palpably insufficient or patently devoid of merit. (*Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920, 922 [2d Dept 2015]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011].) Also, according to CPLR 3025 (b), a “motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleadings.”

Third-party defendants do not allege that they are prejudiced by the proposed amendments.

A. Clear Showing of Changes or Additions

Roach Bernard’s proposed amended third-party complaint shows clearly the proposed changes and additions to the complaint. Third-party defendants’ argument that the proposed

amended third-party complaint does not comply with CPLR 3025 (b) because it does not contain highlights, redlines, or otherwise delineating marks is unpersuasive.

A plaintiff's failure to submit a proposed amended pleading with the original moving papers is a "technical defect, which the court should . . . overlook[] . . . , particularly after plaintiff provide[s] those documents with his reply" and when "the proposed amendments [are] clearly described in the moving papers" and do not prejudice the defendant. (*Medina v City of New York*, 134 AD3d 433, 433 [1st Dept 2015].)

Roach Bernard attaches the proposed amended third-party complaint to its cross-motion to amend its complaint. Even though Roach Bernard does not redline or otherwise highlight the changes it made to its amended complaint, the amended complaint contains the proposed amendments. Third-party defendants are not prejudiced by the fact that Roach Bernard did not highlight the proposed changes. Third-party defendants recognized the proposed changes — they refer to the changes in their reply papers. (Third-Party Defendants' Reply Memorandum of Law, Section II. B, II. C.) Also, Roach Bernard provides a highlighted version of its proposed amended third-party complaint in its reply papers.

B. Proposed Amendment Is Neither Palpably Insufficient Nor Patently Meritless

Roach Bernard's proposed amendments are sufficient and have merit.

Under CPLR 3025 (b), "no evidentiary showing of merit is required." (*Lucido v Mancuso*, 49AD3d 220, 229 [2d Dept 2008].)

Notwithstanding the CPLR's liberal pleading requirements, a cause of action cannot be predicated solely on mere conclusory statements unsupported by factual allegations. (*Taylor v State of New York*, 36 AD2d 878, 879 [3d Dept 1971].) The Court of Appeals has noted that

"[g]eneral allegations of misconduct will not do in the absence of statements of those facts upon which are based the pleader's conclusions that the acts of which the complaint is made are wrongful, lacking in good faith, or unlawful, as the case may be A pleading which, fairly construed, fails to allege any facts which constitute a wrong but only general conclusions, is entirely insufficient and may be dismissed on that ground." (*Kalmanash v Smith*, 291 NY 142, 154 [1943].)

Roach Bernard's allegations are sufficiently supported by facts with respect to its third-party claim for common-law contribution and common-law indemnification.

To establish a third-party claim for common law contribution, Roach Bernard must establish (1) that third-party defendant owed a duty to the plaintiff, (2) that this duty was breached, and (3) that this breach contributed to or aggravated plaintiff's damages. (*Rosner v Paley*, 65 NY2d 736, 738 [1985].) A claim for common-law indemnity is viable when one party is held vicariously liable solely on account of another's negligence to shift the entire burden of

the loss to the real wrongdoer. (*Mas v Two Bridges Assocs. by Nat. Kinney Corp.*, 75 NY2d 680, 690 [1990]; *17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass'n of Am.*, 259 AD2d 75, 80 [1st Dept 1999].) A claim for common-law indemnity is barred when “the party seeking indemnification was itself at fault, and both tortfeasors violated the same duty to plaintiff.” (*Monaghan v SZS 33 Assocs., L.P.*, 73 F3d 1276, 1284 [2d Cir 1996]; *accord 110 Cent. Park S. Corp. v 112 Cent. Park S., LLC*, 970 NYS2d 681, 688 [Sup Ct, NY County 2013], citing *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [finding that common-law indemnification is predicated on “vicarious liability without fault” and dismissing common-law indemnity claim against third-party defendant where “plaintiff alleged direct, not vicarious liability for negligence.”].)

The proposed amended complaint is sufficiently detailed with respect to the transactions and occurrences and the material elements of common-law contribution and common-law indemnification. Roach Bernard provides specific allegations with respect to the requested causes of action and the material elements thereof. Roach Bernard alleges that third-party defendants provided various accounting and taxation services to plaintiffs concerning the real-estate transaction and that they owed plaintiffs a duty to provide accurate, adequate, well-informed, and reasonable advice with respect to this transaction. Roach Bernard further alleges that third-party defendants negligently breached their duty to plaintiffs by failing to advise plaintiffs that the transaction would lead to a loss of the “house of worship” real-estate tax exemption and that because of third-party defendants’ breach, plaintiffs had to pay real-estate taxes. (Amended Third-Party Complaint, Exhibit E, at ¶¶ 23-28.)

Third-party defendants’ argument — that the proposed amendments are conclusory — is unpersuasive.

Third-party defendants also argue that Roach Bernard’s proposed amendment should be denied because Roach Bernard fails to include an affidavit of merit. Third-party defendants’ reliance on *Cushman & Wakefield Inc. v John David Inc.* (25 AD2d 133 [1st Dept 1966]), a case that implicated the now-abrogated CPLR 3211 (e), is unpersuasive. In any event, the Second Department has noted that an evidentiary showing of merit is not required and held that *Cushman & Wakefield Inc. v John David Inc.* is no longer good law. (*See Lucido*, 49 AD3d at 229 [“Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b).”].)

Once a movant demonstrates that its proposed amendment is neither palpably insufficient nor patently devoid of merit, a court need not examine the amendment’s validity. (*Lucido*, 49 AD2d at 230.) Roach Bernard’s proposed amendment to assert a third-party claim against third-party defendants is neither palpably insufficient nor patently meritless.

II. Third-Party Defendants’ Motion to Dismiss

Third-party defendants’ motion to dismiss Roach Bernard’s complaint under CPLR 3211 (a) (7) is denied.

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-1202 [2d Dept 2011], quoting *Breyman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, “a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.” (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) A “pleading must contain a statement sufficiently particular to give the court and the parties notice of what is intended to be proved and the material elements of each cause of action.” (*Delran v Prada USA, Corp.*, 23 AD3d 308, 308 [1st Dept 2005]; accord CPLR 3013.) Mere legal conclusions without supporting factual allegations are insufficient to set forth a cause of action. (*Delran*, 23 AD3d at 308.)

As discussed above, the proposed amended complaint is sufficiently detailed with respect to the transactions and occurrences and the material elements of common-law contribution and common-law indemnification.

Because the amended third-party complaint satisfies the requirements of CPLR 3013, third-party defendants’ motion to dismiss is denied.

Accordingly, it is ORDERED that third-party defendants’ motion to dismiss is denied; and it is further

ORDERED that third-party plaintiff’s cross-motion to amend the third-party complaint is granted, and the amended third-party complaint attached to third-party plaintiff’s motion papers (NYSCEF document number 37) is deemed served and filed; and it is further

ORDERED that third-party plaintiff serve a copy of this decision and order with notice of entry on all parties at the County Clerk’s Office, which is directed to amend its records accordingly; and it is further

ORDERED that third-party defendants have 20 days from service of this decision and order to file its answer; and it is further

ORDERED that the parties appear for a preliminary conference in Part 7, at 60 Centre Street, room 345, on October 25, 2017, at 11:00 a.m.

Dated: August 7, 2017



J.S.C.

HON. GERALD LEBOVITS
J.S.C.