

Morgan v Worldview Entertainment Holdings, Inc.
2017 NY Slip Op 31729(U)
August 16, 2017
Supreme Court, New York County
Docket Number: 652323/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HOYT DAVID MORGAN,

Index No.
652323/2014

Plaintiff,

**DECISION
and ORDER**

- against -

Mot. Seq. 13

WORLDVIEW ENTERTAINMENT HOLDINGS, INC.,
WORLDVIEW ENTERTAINMENT HOLDINGS, LLC,
WORLDVIEW ENTERTAINMENT PARTNERS VII,
LLC, MOLLY CONNERS, MARIA CESTONE, and
SARAH JOHNSON,

Defendants.

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WORLDVIEW ENTERTAINMENT HOLDINGS, INC.;
WORLDVIEW ENTERTAINMENT HOLDINGS; LLC;
WORLDVIEW ENTERTAINMENT PARTNERS VII,
LLC; and MOLLY CONNERS,

Third-Party Plaintiffs,

Index No.
595472/2016

-against-

GOETZ FITZPATRICK LLP, AARON BOYAJIAN,
ESQ., and CHRISTOPHER WOODROW,

Third-Party Defendants.

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MARIA CESTONE,

Second Third-Party Plaintiff,

Index No.
595475/2016

-against-

GOETZ FITZPATRICK LLP, AARON BOYAJIAN,
ESQ., and CHRISTOPHER WOODROW,

Second Third-Party Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Defendant, Christopher Woodrow (“Woodrow”), moves pursuant to CPLR §3211(a)(7) to dismiss all claims asserted against him in the Second Third-Party Complaint filed against him by third-party plaintiff Maria Cestone (“Cestone”). Cestone opposes.

CPLR § 3211 provides, in relevant part, that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . (7) the pleading fails to state a cause of action[.]” CPLR § 3211(a)(7).

On a CPLR § 3211 motion to dismiss, the complaint is given a liberal construction; the court will accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. (*Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 [2011]; *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91 [1st Dept. 2003] [“The court must accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory.”]). The question of “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]).

The Second Third-Party Complaint includes three Claims, one of which names Woodrow as a defendant in his individual capacity.

Claim III of the Second Third-Party Complaint alleges a claim for common law indemnity against Woodrow. It alleges, “If the Plaintiff was damaged and injured as alleged in the First Party Complaint, which Second Third-Party Plaintiff/Defendant Cestone denies, then those damages and injuries, if any, were caused solely by Second Third-Party Defendant’s breaches and/or negligent acts and/or omissions.” It further alleges, “Cestone did not participate in the breaches and/or negligence of Second Third-Party Defendants and therefore Cestone is entitled to full indemnification by all Second Third-Party Defendants for any and all liabilities imposed upon her relative to Plaintiff’s First Party Complaint.”

Woodrow argues that that this claim fails because any claim for indemnification has not yet accrued for any party in this case.

“Under Delaware law claims for common law indemnity do not accrue until the indemnitee can be confident that any claim against him has been resolved with certainty.” (*Quereguan v. New Castle County*, 2006 WL 2522214, at *5 [Del. Ch.

Aug. 18, 2006]; see also *Chesapeake Utilities Corp. v. Chesapeake and Potomac Tel. Co. of Maryland*, 401 A.2d 101, 102 [Del. Super. 1979] [“[T]he [indemnity] claim accrues and the statute begins to run only when the cause of action for indemnity arises, or the indemnitee's liability is fixed and discharged. The determining factor is the point at which the indemnitee suffers loss or damage through payment of a claim after judgment or settlement.”]).

Under New York law, a cause of action “for indemnification [does] not accrue until payment [is] made to the [claimant].” (*Mars Assoc., Inc. v New York City Educ. Const. Fund*, 126 A.D.2d 178, 191 [1st Dep’t 1987]). “An exception to this rule, that until payment is made to the claimant there is no cause of action for indemnification, arises where indemnification is asserted in a third-party action.” (*Mars*, 126 A.D. 2d at 191). (See also *Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140, 146 [4th Dept 1976] (“Technically a claim for indemnity does not arise until the prime obligation to pay has been established ... Nevertheless, for the sake of fairness and judicial economy, the CPLR allows third-party actions to be commenced in certain circumstances before they are technically ripe, so that all parties may establish their rights and liabilities in one action[.]”).

“A party's right to indemnification may arise from a contract or may be implied ‘based upon the law's notion of what is fair and proper as between the parties.’” (*McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 374-75 [2011]). “Implied [or common-law] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other.” (*Id.*). “Common-law indemnification is generally available ‘in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer.’” (*Id.*). “Consistent with the equitable underpinnings of common-law indemnification, our case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity.” (*Id.*).

Here, since Cestone fails to plead any theory of liability or culpable fault against Woodrow in her Second Third Party Complaint that would warrant a shift of loss to him, the cause of action for indemnification asserted by her against him fails to state a claim.

Wherefore, it is hereby

ORDERED that second third party defendant Christopher Woodrow's motion to dismiss all claims asserted against him in the Second Third-Party Complaint filed

by second third party plaintiff Maria Cestone is granted; and it is further

ORDERED all claims asserted in the Second Third-Party Complaint against second third defendant Christopher Woodrow are dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: AUGUST 16, 2017



EILEEN A. RAKOWER, J.S.C.