

Haberman v Xander Corp.

2017 NY Slip Op 32755(U)

May 5, 2017

Supreme Court, Nassau County

Docket Number: 21508/10

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

SINCLAIR HABERMAN and BELAIR BUILDING, LLC,

TRIAL PART 29
NASSAU COUNTY

Plaintiffs,

-against-

XANDER CORP., AARON WAGNER, DENNIS BERKOWSKY, HERMAN NEUMAN, JEANETTE IANNUCCI and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

MOTION # 06
INDEX # 21508/10
MOTION SUBMITTED:
FEBRUARY 17, 2017

Defendants.

XANDER CORP.,

Third-Party Plaintiff,

-against-

MICHAEL G. ZAPSON and DAVIDOFF MALITO & HUTCHER, LLP,

Third-Party Defendants.

Third party defendants Michael G. Zapson, Esq. and Davidoff Malito & Hutcher LLP (collectively "Zapson Defendants") seek summary judgment dismissing the second cause of action of the amended third-party complaint pursuant to CPLR 3212.

Background

The Decision and Order of the Honorable James P. McCormack dated November 20, 2015 (Motion Sequence #005), sets forth a concise and thorough statement of the history of the multifacteted litigation among the parties. To the extent unrelated to this motion that history is not repeated in this decision.

In the first party action, plaintiffs allege malicious prosecution and abuse of process in arising out of previous litigation between the parties. Plaintiffs also seek a determination of damages arising out of a preliminary injunction obtained by defendants in those previous actions. Defendant Xander Corp. ("Xander") filed this third-party action against the Zapson Defendants asserting two causes of action: the first for common law indemnification and the second for contribution. In the decision of November 20, 2015 (*supra.*), Justice McCormack granted the motion of the Zapson Defendants for partial summary judgment dismissing the first cause of action (for indemnification).

The Zapson Defendants now move to dismiss the second cause of action which alleges that by committing acts of professional malpractice, the Zapson Defendants "contributed" to creating the claims against Xander. The second cause of action states "...in the event that the plaintiffs are determined to have sustained damages as alleged in their [the first party plaintiffs'] complaint by reason other than [Xander's] own negligence or wrongful conduct, then it will be alleged that such damages were the result of and/or caused by the professional negligence contributing thereto." (Third-Party Amended Complaint ¶41). The third party complaint further alleges that if the "plaintiff's recover any sum from Xander for the damages alleged to have been sustained as set forth in the [first party] complaint, then the third-party defendants, will be liable to [Xander] based upon the theory of common law contribution for all such damages...pursuant to Articles 14 and 16 of the CPLR" (see, Third-Party Complaint ¶42).

Xander claims triable issues of fact preclude the grant of summary judgment. In addition, Xander argues that the previous summary judgment motion (Motion Seq. #5) bars this one. The Zapson Defendants assert that as a matter of law, the alleged malpractice cannot be considered as contributing to Xander's potential losses in the malicious prosecution action.

Discussion

CPLR 1401 states: "...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 whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." An action for contribution is predicated upon a third-party's breach of a duty owed to either the plaintiff or the defendant (*see Sommer v Fed. Signal Corp.*, 79 NY2d 540 [1992]). To state a contribution claim the "critical requirement" is an allegation that "the breach of duty by the contributing party ... had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988];

accord *In re Adelpia Communications Corp.*, 322 BR 509 [SD NY 2005]; *Duenas v North Harbor Co.*, 278 AD2d 193 [2d Dept 2000]; *Di Marco v NYC Health & Hosps. Corp.*, 187 AD2d 479 [2d Dept 1992]). The basic requirement for contribution is that the culpable parties must be "subject to liability for damages for the same personal injury" (emphasis supplied; *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568; see, *Garrett v Holiday Inns*, 58 NY2d 253, 258). Although the right of apportionment may arise from a duty owed directly to the injured party or to the party seeking contribution, the critical requirement for apportionment is that the breach of the duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought (see, *DiMarco v. N.Y. City Health & Hosps. Corp.*, 187 A.D.2d 479, 480, 589 N.Y.S.2d 580 (1992); *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603; see also, *Schauer v Joyce*, 54 NY2d 1; *Dole v Dow Chem. Co.*, 30 NY2d 143; CPLR 1401).

Under CPLR §3026 all pleadings must be liberally construed. Policy considerations against dismissing third party actions require that such complaints be entitled to a more liberal reading than others (*Braun v. City of New York*, 17 A.D.2d 264, 268, 234 N.Y.S.2d 935, 938). Although Xander designated the second cause of action as a claim for contribution, it sounds in tort (the alleged malpractice). Construing the complaint liberally, the second cause of action sufficiently pleads a claim for malpractice, if not one for contribution.

On a motion for summary judgment, the court's function is to decide whether there is a material factual issue to be tried, not to resolve it. See *Sillman v. Twentieth Century-Fox Film Corp.*, 2 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. See *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept. 1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dept. 1986). Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial and such facts presented by the opposing party to show that a factual dispute exists requiring a trial and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

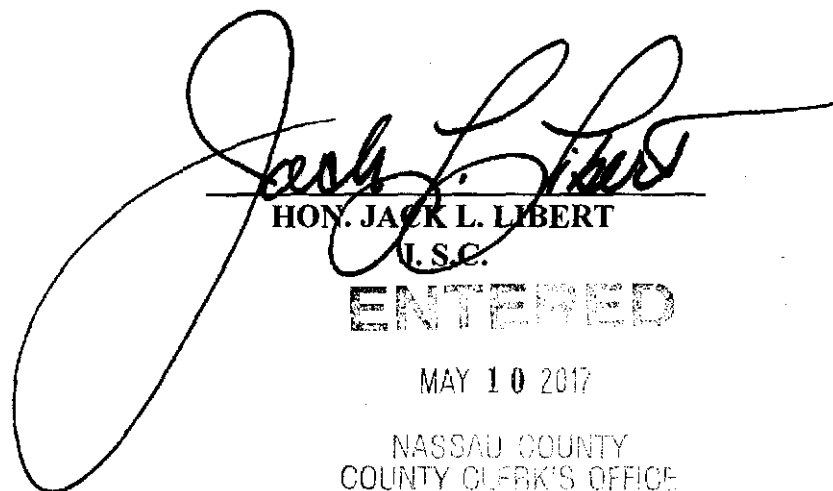
To prevail on a claim for legal malpractice, a plaintiff must establish the following elements: (1) that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community; (2) that the attorney's negligence was a proximate cause of the loss sustained; (3) that the plaintiff incurred damages as a direct result of the attorney's actions; and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care. *Blank v. Harry Katz, P.C.*, 3 A.D.3d 512, 770 N.Y.S.2d 742 (2004). Substantial issues of fact exist with respect to all of these elements. The motion for summary judgment is denied.

CPLR § 1010 states: "The court may . . . order a separate trial of the third-party claim . . . In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party." Xander's cause of action for malpractice can be best adjudicated after resolution of the first party action, which is already scheduled for trial. That trial will be delayed in order to enable the third party action to go forward simultaneously. The decision in the first party action could be dispositive of the malpractice claim or at least narrow the scope of the issues. Separate trials will not prejudice the rights of any party. The third-party action is severed.

Third party plaintiff is directed to make arrangements for a new index number.

ENTER

DATED: May 5, 2017


 HON. JACK L. LIBERT
 U. S. C.
ENTERED
 MAY 10 2017
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE