

Gross v Chambre

2017 NY Slip Op 32830(U)

May 15, 2017

Supreme Court, Rockland County

Docket Number: 031761/2015

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
LESSER GROSS, individually and on behalf of LASK
DEVELOPERS LLC,

Plaintiff,

-against-

DECISION & ORDER

Index No. 031761/2015

Motion # 9

ROBERT J. CHAMBRE, 14 RT 59 LLC, YOEL Y. WEISS,
GIBRALTAR ABSTRACT COMPANY, SHAUL KOPELOWITZ,
VICTOR WEISS and ISAAC SCHEINER and
LASK DEVELOPERS LLC,

Defendant.

-----X
Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1 - 2 were considered in connection with Defendant SHAUL KOPELOWITZ's Notice of Motion for an Order granting summary judgment pursuant to Civil Practice Law and Rules § 3212 dismissing Defendant ROBERT CHAMBRE's cross-claim for indemnification and granting such other and further relief as the Court deems just and proper:

<u>PAPERS</u>	<u>NUMBER</u>
NOTICE OF MOTION/AFFIRMATION OF JEFFREY FLEISCHMANN, ESQ./EXHIBITS (A-C)/AFFIRMATION OF SHAUL KOPELOWITZ, ESQ.	1
REPLY AFFIDAVIT IN FURTHER SUPPORT OF DEFENDANT CHAMBRE'S MOTION FOR SUMMARY JUDGMENT AGAINST KOPELOWITZ ON INDEMNITY CROSS-CLAIM AND IN OPPOSITION TO KOPELOWITZ' CROSS-MOTION TO DISMISS CROSS-CLAIM	2

Plaintiff brought this action against Defendant KOPELOWITZ alleging that Defendant KOPELOWITZ assigned to himself a purchase money mortgage in the amount of \$450,000 belonging to LASK DEVELOPERS, LLC. This action and the related action, Kopelowitz v. Weiss et al., (Index # 032450/2015) arise from a business transaction for the sale of property located at 141 Rt. 59 Airmont, New York. In October 3, 2013 the Plaintiff entered into a contract to sell the subject property to Defendant WEISS's entity, Defendant 141 RT 59 LLC, for \$1.1 million dollars. Defendant KOPELOWITZ brought the related action based on his allegations that Plaintiff and Defendant WEISS engaged in a "secret deal" to steal

money from Plaintiff with the assistance of former Defendant MICHAEL KLEIN. After the closing on the subject property, Plaintiff received and deposited into his personal account a check for \$225,000 of the sale proceeds from the sale of the subject property. As a result Defendant KOPELOWITZ commenced the related action on June 2, 2014 seeking an accounting, and alleging a breach of fiduciary duty, fraud, conversion and unjust enrichment.

Plaintiff commenced the instant action on April 22, 2015 against the Defendants alleging that Defendant KOPELOWITZ improperly assigned to himself a purchase money mortgage which was dated March 18, 2014 and subsequently recorded with the Rockland County Clerk. Defendant CHAMBRE interposed an Answer with cross-claims on September 24, 2015. Specifically, Defendant CHAMBRE asserted a cross-claim against Defendant KOPELOWITZ for indemnification.

Defendant KOPELOWITZ argues that Defendant CHAMBRE has failed to allege the existence of any contractual obligation of Defendant KOPELOWITZ to indemnify Defendant CHAMBRE. Further, Defendant KOPELOWITZ directs the Court's attention to the fact that Defendant CHAMBRE in the Affidavit of his counsel admits that no contract exists that provides a right of indemnification from Defendant KOPELOWITZ.

Further, Defendant KOPELOWITZ submits that the doctrine of implied indemnification is inapplicable to the instant action because Defendant must demonstrate that the party seeking indemnification participated in the alleged wrongdoing. Specifically, Defendant KOPELOWITZ asserts that Defendant CHAMBRE cannot seek to indemnify himself from a judgment that he "himself aided and abetted fraud."

In Opposition Defendant CHAMBRE submits that based on his Affidavit submitted on Motion #7 there is no basis for the Plaintiff to assert any claim against Defendant CHAMBRE. Defendant CHAMBRE concedes there is no indemnity agreement signed by the parties when the Purchase Money Mortgage was assigned. However, Defendant CHAMBRE asserts that an intention to indemnify can be implied by the language and purpose of the agreement and the surrounding facts and circumstances.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept 2003)].

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez, supra*, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Zuckerman v. City of New York*, 49 NY2d 557 (1980))].

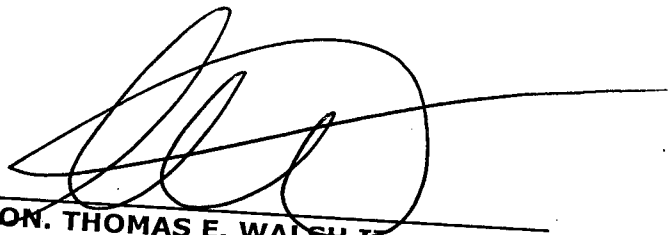
Defendant KOPELOWITZ has made a prima facie showing of entitlement to judgment as a matter of law dismissing Defendant CHAMBRE's cross-claim for indemnification. Upon Defendant KOPELOWITZ meeting his burden on the summary judgment motion, the burden shifted to Defendant CHAMBRE to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. The Plaintiff has raised a material question of fact as to whether the parties, Defendant KOPELOWITZ intended on indemnifying Defendant CHAMBRE based on the facts surrounding the meeting in which the Purchase Money Mortgage was assigned from Defendant KOPELOWITZ to Defendant CHAMBRE. As such, Defendant KOPELOWITZ' Motion of Summary Judgment to dismiss Defendant CHAMBRE's cross-claims for indemnification is denied.

Accordingly, it is

ORDERED that Defendant KOPELOWITZ's motion for Summary Judgment (Motion #9) is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motion #9.

Dated: New City, New York
May 15, 2017



HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:

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(via e-file)

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