SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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STONE & BROAD INC.,

Plaintiff,

- v -

NEXTEL OF NEW YORK, INC.,SPRINT CORPORATION, 88 BROAD REALTY CORP., LANA 28 CORP., BENJAMIN-PARK, INC.,GULIANO-PARK 88 BROAD STREET INC.,GIULIANO GOURMET PIZZA & DELI, FRANK RENEO, PETER RENEO, VITO RENEO, ADA MIZUKOVSKI, ROBERT PARK, KUI SUN PARK, TECH NEL ELECTRIC, INC.,

Defendants.

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INDEX NO. 156297/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 55, 56
were read on this motion to/for DISMISSAL.

HON. BARRY R. OSTRAGER:

This pre-Answer motion to dismiss the Complaint as against defendants Nextel of New York, Inc. ("Nextel") and Sprint Corporation ("Sprint") pursuant to CPLR 3211(a)(5), (7) and (8) is granted for the reasons stated herein.

Background

According to the Complaint in this action, filed on July 6, 2018, plaintiff Stone & Broad, Inc. ("Stone") was the primary tenant of a commercial triple-net lease of the building at 88 Broad Street in lower Manhattan from 1970 until that lease terminated in April 2013 (NYSCEF Doc. No. 22). The landlord of the building is non-party 88 Broad Street, LLC ("the Landlord"), and the net lease at issue is referred to in the Complaint as the Over Lease. Since the inception of the Over Lease in 1932 with Stone's predecessor, there were a series of assignments and renewals, as well as subleases and sub-subleases, conferring rights and obligations on various parties.

After Stone vacated the premises, the Landlord commenced an action in Supreme Court under Index Number 652833/14 entitled *88 Broad Street, LLC v Stone & Broad, Inc., et al.*, to recover compensation for damage to the building caused over the years by water, fire, and lack of maintenance and repair and for other wrongdoing, including the failure to pay all rent and additional rent due under the lease and the fraudulent transfer of assets to impair the Landlord's rights. (A copy of the Second Amended Complaint in that action is attached to the moving papers as Ex C, Doc. 24). That action was resolved by Stipulation So Ordered by Justice Shirley Kornreich and filed on September 13, 2017 pursuant to which Stone agreed to pay the Landlord $750,000 in full settlement of all claims (NYSCEF Doc. No. 99 under Index No. 652833/14).

Claiming it was compelled by the terms of the Over Lease to compensate the Landlord for the alleged damages, even though Stone insisted that any damage had been caused by others, Stone commenced this action to recover the $750,000 settlement sum paid plus $184,000 in legal fees allegedly incurred from the parties that purportedly caused the damage. The Complaint includes an extensive list of alleged wrongs by the various defendants, most of whom were subtenants or sub-subtenants. Nextel and Sprint are charged with water damage caused by the improper installation of cell phone equipment on the outside of the building.

Other than alleging that Sprint is the parent of Nextel, the Complaint fails to allege any wrongful act or omission by Sprint. As to Nextel, the Complaint references an August 2000 "Communications Tower Agreement" between Nextel and defendant Guliano-Park 88 Broad Street, Inc. ("GP"), the latter being the assignee of the sub-sublease of the entire building as of 2000. Stone claims GP entered into the Nextel Agreement without Stone's knowledge or consent. Stone adds that Nextel's contractor Tech Nel Electric, Inc. improperly installed the

telecommunications equipment, causing damage to the building that included water infiltration which led to mortar deterioration and the erosion of wooden beams. (Complaint ¶¶ 28-35).

The causes of action against the moving defendants here are the Second Cause of Action, captioned "Common Law Indemnity as to All Defendants", and the Third Cause of Action, captioned "Restitution as to All Defendants." The theory alleged as to indemnity is that Stone was held vicariously liable in the 2014 action for damage to the building caused exclusively by defendants' negligence and that defendants must therefore indemnify Stone for the expenses Stone incurred due to defendants' negligence and/or breach of duty to keep the premises in good repair.[1] The theory alleged as to restitution is that Stone's payment to the Landlord was necessary to satisfy the requirements of public decency, health, and/or safety and that defendants received a benefit at Stone's expense that in equity and good conscience defendants should not retain. Nextel and Sprint have moved to dismiss both causes of action as against them pursuant to CPLR 3211 (a)(5), (7) and (8).

Personal Jurisdiction over Sprint

Sprint moves to dismiss pursuant to CPLR 3211(a)(8), as this Court lacks both general and specific jurisdiction over Sprint. As attested in the Affidavit of Sprint's vice president, Stefan K. Schnopp, Sprint is a Delaware corporation with its principal place of business in Overland Park, Kansas. Sprint exists primarily as a holding company for various operating companies, including Nextel. Sprint does not directly control Nextel's finances, nor appoint its officers, and corporate formalities are observed. Further, Sprint does not conduct business in New York State, is not licensed to do business here, has no designated agent for service of

[1] Stone in its First Cause of Action asserts a claim for contractual indemnity as to defendants 88 Broad Realty, Lana 28, and/or Guliano-Park and their Principals pursuant to a lease between the parties, and its Fourth Cause of Action claims breach of contract against those same parties.

process here, does not collect New York sales tax, nor file any New York sales tax returns or pay any other taxes here. No Sprint offices or employees are located in New York, and Sprint does not lease or own property in New York. Thus, this Court lacks general jurisdiction over Sprint in this case, as Sprint is a foreign sister-state corporation without continuous and systematic activity in New York sufficient to render Sprint "at home" in New York under *Daimler AG v Bauman,* 571 US 117 (2014).

The Court also lacks specific jurisdiction over Sprint, as Sprint itself does not transact any business here or contract anywhere to supply goods and services here related to the claim at issue as required by CPLR 302(a)(1). And Sprint, as a holding company for Nextel securities, is not subject to New York jurisdiction simply because of its relationship to Nextel of New York. *FIA Leveraged Fund Ltd. v Grant Thornton LLP,* 150 AD3d 492, 493 (1st Dep't 2017) (although Citco Cayman did not contest New York's jurisdiction over it, its parent was not subject to New York jurisdiction simply because Citco Cayman was).

Plaintiff Stone does not contest that this Court lacks general jurisdiction (see NYSCEF Doc. No. 66 at p 9), but it argues that Stone made a sufficient *prima facie* showing of specific jurisdiction under CPLR 302(a)(1) and (4) to at least warrant jurisdictional discovery. In support of its claim that Sprint transacts business in New York related to the claim here, Stone contends that Sprint has admitted in several tax proceedings filed in New York courts to owning similar telecommunications equipment throughout the City and State, which it uses to provide cellular telephone service to its customers. (See Affirmation of James Reilly, Esq. , NYSCEF Doc. No. 33). According to Stone, this telecommunications equipment constitutes "real property" under Real Property Tax Law § 102(12)(i).

Based on the tax filings, Stone argues that this Court has specific jurisdiction under CPLR 302(a)(1) on the ground Sprint "transacts any business within the state or contracts anywhere to supply goods or services in the state" or under (a)(4) because Sprint "owns, uses or possesses any real property situated within the state." The argument fails, as Sprint has demonstrated on reply that the tax filings relate to locations held by subsidiaries, not by Sprint, and that the filings, in any event, have no nexus whatsoever to the claims at issue here, even if Sprint were to agree (which it does not) that the equipment is considered real property for jurisdictional purposes. Based on Sprint's papers and the *FIA* decision discussed above, the Court also rejects Stone's theory that Sprint is subject to jurisdiction because Nextel, which is subject to jurisdiction, is merely a "department or instrumentality" of Sprint.

As plaintiff has failed to meet its burden to establish jurisdiction over Sprint, or even a basis for jurisdictional discovery, Sprint's motion to dismiss pursuant to CPLR 3211(a)(8) is granted. Were the Court to address the merits, no cause of action has been stated against Sprint based on the single allegation of Sprint's relationship to Nextel. *See FIA, supra.*

The Common Law Indemnity Claim against Nextel

Nextel argues that the Second Cause of Action must be dismissed because Stone's common law indemnity claim cannot stand without proof of two critical elements: (1) vicarious liability by Stone for Nextel's conduct; and (2) lack of fault on Stone's part. Nextel correctly notes that the Landlord in the underlying action sued Stone for breach of its contractual duty under the Over Lease to return the premises in good condition. The Landlord did not seek to hold Stone vicariously liable for Nextel's allegedly defective installation in that action, and Nextel was not a named party. Rather, the Landlord claimed that Stone itself had breached the Over Lease by allowing the subtenant to contract with Nextel to have equipment installed without first

securing the consent of the Landlord and without ever providing notice as required by the Over Lease. Citing cases such as *Dormitory Auth. of State of New York v Scott,* 160 AD2d 179, 181 (1st Dep't 1990), Nextel asserts that indemnification is not available for a party such as Stone who is charged not with vicarious liability for Nextel, but with its own breach of contract. Indeed, Nextel does not even have a relationship with Stone, as Nextel's contract was with defendant Guliano-Park 88 Broad Street, Inc. ("GP). Stone remains free to pursue its claims against its subtenant GP, which may well make Stone whole for any damage caused by the Nextel equipment, and GP in turn may then be able to pursue any cross-claim it may have against Nextel.

Turning to the second prong for indemnification, Nextel cites *Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.,* 109 AD2d 449, 453 (1st Dep't 1985), to argue that Stone, who itself participated at least to some degree in the wrongdoing, cannot receive the benefit of the doctrine of common law indemnification. Further, the $750,000 settlement at issue undeniably covered claims for which Nextel had no involvement, such as Stone's alleged nonpayment of rent and fire damage allegedly caused by a different party.

Stone in opposition attempts to disown any fault, claiming that Stone's subtenant had assumed Stone's obligations relative to the Landlord and that the damage to the building was, in any event, caused by the negligent installation of Nextel's equipment and not by Stone's failure to notify the Landlord of the work and obtain consent. Stone further argues that the alleged liability of some other defendants for a portion of the settlement is not a bar to indemnification.

Stone's arguments, as well as its attempts to distinguish Nextel's cases, fail. The two criteria for indemnification --- vicarious liability by Stone for Nextel's conduct and lack of fault on Stone's part --- have not and cannot be alleged. Indemnity involves "an attempt to shift the

entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer." *Trustees of Columbia Univ.,* 109 AD2d at 451. Such is not the case here. Therefore, Nextel is entitled to dismissal of the Second Cause of Action asserted against it by Stone, even though Nextel must remain a party to the case at this point based on the cross-claims asserted by various co-defendants.

The Restitution Claim against Nextel.

In its Third Cause of Action, Stone seeks "restitution" as to all defendants, claiming that defendants are jointly and severally liable to pay for damage to the building because plaintiff discharged defendants' duty in order "to satisfy the requirements of public decency, health, and/or safety" and that defendants "received a benefit at Plaintiff's expense that in equity and good conscience they should not retain." (Complaint ¶¶ 64-65). Nextel claims "Restitution" is governed by CPLR 5223, which empowers a court to "order restitution of property or rights lost by the judgment" when the judgment is reversed or modified. That term has no application here.

The intended cause of action presumably is unjust enrichment, Nextel says, which entitles a plaintiff to compensation when a defendant benefitted at the plaintiff's expense and equity and good conscience require that plaintiff be made whole. *See Nakamura v Fuji,* 253 AD2d 387, 390 (1st Dep't 1998). Nextel argues that the doctrine has no application here because, while Stone is not obligated to establish privity, the relationship between the parties is too attenuated to support the claim as Stone and Nextel had no dealings whatsoever with each other. *Georgia Malone & Co., Inc. v Rieder,* 19 NY3d 511, 517-18 (2012). Further, Nextel asserts it received no benefit from Stone's settlement of its claims with the landlord, as Nextel did not receive a release or anything else of value.

Nextel also seeks dismissal of the claim as time-barred. The statute of limitations for unjust enrichment is the same as that for the underlying tort, and the claim accrues upon the occurrence of the wrongful act giving rise to the claim. *Maya NY, LLC v Hagler,* 106 AD3d 583 (1st Dep't 2013). As Stone is seeking to recover damages for "injury to property" caused by the installation of Nextel's equipment, this 2018 claim is governed by a three-year statute of limitations under CPLR 214 and is time-barred, whether the injury occurred when the equipment was first installed in or about 2000 or at some point before the equipment was decommissioned in October 2012.

Relying on *City of New York v Lead Indus. Assn.,* 222 AD2d 119, 125 (1st Dep't 1996), Stone emphasizes in opposition that the First Department has recognized a restitution claim unrelated to CPLR 5223, explaining that:

> A cause of action for restitution is defined in section 115 of the Restatement of Restitution as follows: "A person who has performed the duty of another by supplying things or services although acting without the other's knowledge or consent, is entitled to restitution from the other if (a) he acted unofficiously and with intent to charge therefor, and (b) the things or services supplied were immediately necessary to satisfy the requirement of public decency, health, or safety." Unlike a claim for indemnity, a plaintiff seeking restitution need not have been under a duty to perform that for which restitution is sought but, rather, that such party because there was an immediate necessity to protect "public decency, health or safety", took action to fulfill a duty actually owed by the defendant restitutor.

Even accepting that proposition as true, Stone has failed to state a cause of action for restitution. In the *Lead Indus. Assn* case, the City sought restitution from lead paint manufacturers who had misrepresented the safety of their product and concealed their knowledge of the health hazards of lead paint, as a result of which the City was obliged to expend considerable sums of money inspecting, testing, monitoring and abating lead paint hazards. That scenario presented the type of expense "immediately necessary to satisfy the requirement of

public decency, health, or safety" to trigger restitution. The scenario here is far different; here, Stone simply paid money to its Landlord in settlement of a suit in which the Landlord claimed Stone had breached its lease by failing to surrender the building in good condition. Even accepting the allegation that Nextel's installation of its equipment caused water infiltration at the building, that fact does not satisfy the "immediate health and safety" element needed to state a claim for restitution. The claim here is a simple claim for property damage caused by the allegedly negligent installation of the equipment. Thus, the Third Cause of Action not only fails to state a claim, but it must be dismissed as time-barred pursuant to CPLR 214 governing injury to property for the reasons state above.

Accordingly, it is hereby

ORDERED that the motion by defendant Sprint Corporation to dismiss the Complaint against it for lack of jurisdiction is granted, and the Complaint is dismissed in its entirety as against Sprint Corporation, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Sprint Corporation; and it is further

ORDERED that the caption be amended to reflect the dismissal of Sprint Corporation and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

*Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the motion by Nextel of New York to dismiss plaintiff's Second and Third Causes of Action against Nextel is granted, with any cross-claims remaining in place at this time; and it is further

ORDERED all dismissed claims are severed and the action shall continue against the remaining defendants, who shall appear before this Court in Room 232 on March 22, 2019.

3/1/2019
DATE

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
JSC

CHECK ONE:	☐	CASE DISPOSED			☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE