

<b>VFS Leon, LLC v Pritchett</b>
2019 NY Slip Op 33951(U)
April 30, 2019
Supreme Court, Orange County
Docket Number: EF002980-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
VFS LEON, LLC,

Plaintiff,

-against-

ANGELIQUE PRITCHETT a/k/a  
ANGELIQUE L. PRITCHETT, et al.,

Defendants.

To commence the statutory time  
period for appeals as of right  
(CPLR 5513 [a]), you are  
advised to serve a copy of this  
order, with notice of entry,  
upon all parties.

Index No. EF002980-2017

-----X  
ANGELIQUE PRITCHETT,

Third-Party Plaintiff,

-against-

VISIO FINANCIAL SERVICES, INC., RAYMOND  
KNOX, SUPERIOR MORTGAGE COMPANY, INC.,  
and MICHELLE ANDERSON, ESQ.,

Third-Party Defendants.

Motion Date: April 16, 2019

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The following papers numbered 1 to 9 were read on the motions of Third-Party

Defendants Visio Financial Services, Inc., Raymond Knox and Superior Mortgage Company, Inc.  
for dismissal of the Defendant's third-party claims against them:

Notice of Motion (Visio) - Affirmation / Exhibits .....	1-2
Notice of Motion (Knox) - Affirmation / Exhibits .....	3-4
Notice of Motion (Superior) - Affirmation / Exhibits .....	5-6

Affirmation in Opposition (2) ..... 7-8

Reply Affirmation (Knox)..... 9

Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

This is an action to foreclose a Mortgage held by plaintiff VFS Leon, LLC (“VFS”) on premises known as 28 Fieldstone Drive, Middletown, New York (the “Premises”).

Answering, Defendant denied the allegations of the Complaint and asserted counterclaims.

A conference in this matter was scheduled for February 6, 2018. As Defendant appeared, but Plaintiff did not, Plaintiff’s action was dismissed pursuant to Uniform Rule 202.27(b).<sup>1</sup>

Ten days later, on February 16, 2018, Defendant filed a Third-Party Summons and Third-Party Complaint against Third-Party Defendants Visio Financial Services, Inc. (“Visio”), Raymond Knox (“Knox”), Superior Mortgage Company, Inc. (“Superior”) and Michelle Anderson, Esq.

By prior Decision and Order dated March 8, 2019, this Court (1) awarded VFS summary judgment of foreclosure, and (2) dismissed the Third-Party Complaint as against Michelle Anderson, Esq. on the grounds that it was not permitted by CPLR §1007. With respect to the dismissal of the Third-Party Complaint, the Court wrote:

Third-Party Defendant Anderson contends that because Plaintiff’s action was dismissed for non-appearance on February 6, 2018, the third-party action filed pursuant to CPLR §1007 after dismissal and prior to restoration is “null and void” and must be dismissed. CPLR §1007 provides in pertinent part:

After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant, by filing pursuant to Section 304 of this chapter a third-party summons and complaint with the clerk of the court..., for which a

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<sup>1</sup>Uniform Rule 202.27 (“Defaults”) provides in subdivision “b” thereof that “If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.”

separate index number shall not be issued but a separate index number fee shall be collected....

In *Qosina Corp. v. C & N Packaging, Inc.*, 96 AD3d 1032 (2d Dept. 2012), the Second Department discussed the nature of third-party practice under CPLR §1007:

CPLR 1007 provides that “a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant.” The Court of Appeals has recognized that “[t]he language of CPLR 1007 serves only to identify the persons against whom a third-party claim may be brought” (*George Cohen Agency v. Donald S. Perlman Agency*, 51 NY2d 358, 365...). “It places no limit upon the amount which may be recovered or upon the legal theories which may be asserted as a basis for the claim” (*id.*;...).

Although the impleader language of CPLR 1007 has been liberally construed and “should not be read as allowing recovery solely for claims sounding in strict indemnity” (*George Cohen Agency v. Donald S. Perlman Agency*, 51 NY2d at 365...), the “third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party, for whatever reason, for the damages for which the latter may be liable to plaintiff” (*Zurich Ins. Co. v. White*, 129 AD2d 388, 390... [cit.om.]. In other words, “[t]he liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR 1007 should ‘arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action’” (*Lucci v. Lucci*, 150 AD2d 649, 650...[cit.om.].

*Qosina Corp., supra*, 96 AD3d at 1034-35. See also, *Sunbelt Rentals, Inc. v. Tempest Windows, Inc.*, 94 AD3d 1088, 1089 (2d Dept. 2012) (“the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action”); *BBIG Realty Corp. v. Ginsberg*, 111 AD2d 91 (2d Dept. 1985); *Buttermark v. Korber*, 65 AD2d 587, 588 (2d Dept. 1978) (“third-party plaintiff must, at least in part, assert a claim over against the third-party defendant for the plaintiff’s claim against him”).

In view of the foregoing, it is eminently clear that Defendant’s third-party action was not permitted by CPLR §1007. As of February 16, 2018, the date of commencement, Plaintiff’s complaint against Defendant had been dismissed, and consequently she possessed no claim over against any party for Plaintiff’s non-existent claim against her. Paraphrasing *Sunbelt Rentals, Inc. v. Tempest Windows, Inc., supra*, “since [VFS’s] claims were discontinued against [Ms. Pritchett], [Ms. Pritchett was] no longer liable to [VFS] for any damages. Accordingly, since [VFS could] no longer hold [Ms. Pritchett]

liable, [Ms . Pritchett] cannot implead [Visio, Knox, Superior and Anderson] pursuant to CPLR 1007.” *Id.*, 94 AD3d at 1090.

The Third-Party Complaint is therefore fatally flawed and must be dismissed. *See, Sunbelt Rentals, Inc. v. Tempest Windows, Inc., supra. Cf., American Bridge Company v. Acceptance Insurance Company*, 293 AD2d 634, 636 (2d Dept. 2002) (where amended judgment in declaratory judgment action left issue of indemnification unresolved, the action was still “pending”, and hence third-party action could properly be commenced).

Defendant contends that the Court has discretion pursuant to CPLR §1010 to allow her third-party action to proceed. Section 1010 provides:

The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. 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.

CPLR §1010 by its terms assumes the existence and pendency of the “main action” and authorizes the court in appropriate circumstances to order a “separate trial” of the third-party claim. By way of example, the Second Department in *Qosina Corp. v. C & N Packaging, Inc., supra*, held:

Here, the third-party complaint was not permitted by CPLR 1007 since it failed to state any cause of action arising from or conditioned upon the liability asserted against [the defendant / third-party plaintiff] in the main action [cit.om.]. However, the third-party complaint nevertheless stated causes of action to recover damages for breach of duty of loyalty and for tortious interference with contractual relations. Accordingly, although these causes of action were not sufficiently related to the allegations in the complaint to provide a proper basis for a third-party complaint under CPLR 1007, they nevertheless constituted proper grounds for an independent action. Under the circumstances of this case, rather than direct dismissal of the third-party complaint on the ground that it was not permitted by CPLR 1007, the Supreme Court should have exercised its discretion to sever the third-party action from the plaintiff’s complaint (*see* CPLR 603, 1010....).

*Id.*, 96 AD3d at 1035. To the same effect is *Buttermark v. Korber*, 65 AD2d 587 (2d Dept. 1978).

Here, the “main action” having been dismissed on February 6, 2018, it was no longer pending when the third-party action was commenced ten days later on February 16<sup>th</sup>, and hence there was nothing from which to “sever” the third-party claim for “separate trial.” Consequently, the invocation of CPLR §1010 cannot save Defendant’s impermissible third-party action from dismissal in the circumstances of this case.

(Decision and Order dated March 8, 2019, pp. 7-9)

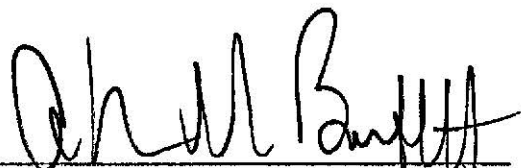
The remaining Third-Party Defendants – Visio, Knox and Superior – now move on the same grounds for dismissal of Defendant’s third-party claims against them. Dismissal is compelled for the reasons, quoted above, set forth in this Court’s prior Decision and Order of March 8, 2019.

It is therefore

ORDERED, that the motions of Third-Party Defendants Visio Financial Services, Inc., Raymond Knox and Superior Mortgage Company, Inc. are granted to the extent that Defendant’s Third-Party Complaint, as against them, is dismissed without prejudice.

The foregoing constitutes the decision and order of the Court.

Dated: April 30, 2019      ENTER  
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE