

Kaufman v Coplan

2020 NY Slip Op 30273(U)

January 28, 2020

Supreme Court, New York County

Docket Number: 653780/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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SCOTT KAUFMAN,

Plaintiff,

INDEX NO. 653780/2018

- v -

MOTION DATE 01/28/2020

BETH COPLAN,

Defendant.

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

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BETH COPLAN

Plaintiff,

Third-Party
Index No. 595307/2019

-against-

THOMAS KAUFMAN, JOAN KAUFMAN

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 162, 163, 164, 165, 166, 167, 168

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (1/28/2020), Thomas Z. Kaufman and Joan B. Kaufman (collectively, the **Movants**)’s motion to dismiss the third party complaint is granted solely to the extent that the first cause of action (contribution) is dismissed as against Joan Kaufman and the second (indemnification), third (fraud), fourth (violation of Judiciary Law § 489), fifth (accord and satisfaction), and seventh (abuse of process) causes of action are dismissed in their entirety. For the avoidance of doubt, Beth Coplan’s cross

motion is granted to extent that counsel for the Movants, Mr. Elliot Polland, conceded that he will not represent Thomas Kaufman in this action.

The Relevant Facts and Circumstances

Reference is made to (i) a Note, dated January 29, 1998, by and between Joan Kaufman as lender and Thomas Kaufman and Beth Coplan as borrowers, pursuant to which Joan Kaufman lent \$250,000 (NYSCEF Doc. No. 137, the **Note**), (ii) a mortgage in the amount of \$250,000, by and between Joan Kaufman as lender and Thomas Kaufman and Beth Coplan as borrowers (NYSCEF Doc. No. 73, the **Mortgage**) which Mortgage was discharged by Joan Kaufman on March 14, 2018 (NYSCEF Doc. No. 67), (iii) an Assignment of Note, dated June 12, 2018 (NYSCEF Doc. No. 96, the **June 2018 Assignment**), from Joan Kaufman as assignor to Scott Kaufman as assignee and (iv) an Assignment of Note dated September 19, 2018 (NYSCEF Doc. No. 95, the **September 2018 Assignment**) from Joan Kaufman as assignor to Scott Kaufman as assignee. By affidavit, dated April 18, 2019, Joan Kauffman explained that there were two versions of the assignment because the June 2018 Assignment was initially misplaced by Scott Kaufman, but later found after she executed the September 2018 Assignment as a replacement assignment agreement (NYSCEF Doc. No. 130, ¶¶ 2-4).

In the underlying action, Scott Kaufman brought a lawsuit against Ms. Coplan for recovery of \$250,000 pursuant to the Note. Pursuant to a third party complaint, Ms. Coplan sues Thomas Kaufman and Joan Kaufman for: (1) joint and several liability and contribution, (2) indemnification, (3) fraud, (4) violation of Judiciary Law § 489, (5) accord and satisfaction, (6)

breach of contract, and (7) abuse of process (NYSCEF Doc. No. 121, the **Third Party Complaint**).

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Under CPLR § 3211 (a)(3), dismissal may be justified if a party lacks the legal capacity to sue. Under CPLR § 3211 (a)(4), dismissal may result where there is another action pending between the same parties for the same cause of action. Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

I. Motion to Dismiss the Third Party Complaint

A. First Cause of Action (Joint and Several Liability and Contribution)

A joint obligor that pays more than his or her proportionate share of the debt is entitled to contribution from other joint obligors (*Falb v Frankel*, 73 AD2d 930, 930-31 [2d Dept 1980], citing *Hard v Mingle*, 206 NY 179, 184 [1912]). The Movants, however, argue that Ms. Coplan's cause of action for contribution should be dismissed because she has not made any payment towards the debt on the Note. The Movants rely on the general rule articulated in *Panish v Rudolph*, 282 AD2d 233 [1st Dept 2001] and *Beltrone v Gen. Schuyler & Co.*, 229 AD2d 857 [3d Dept 1996] for the proposition that a joint obligor cannot state a claim for

contribution until that party has paid more than the proportionate share owing on the common liability. Their reliance is misplaced.

A guarantor that is sued for payment under a guaranty “may assert a third party claim for indemnity against the obligor before any payment is made for an indemnitee may obtain a conditional judgment fixing the potential liability without the need for payment until the indemnitee has made payment on its obligation” (28A N.Y. Prac., Contract Law § 25:22). Put another way, there is an exception to the general rule that a first party claim for contribution does not arise until the prime obligation to pay has been established in third party actions (*Mars Assoc., Inc. v NY City Educ. Constr. Fund*, 126 AD2d 178, 192 [1st Dept 1987] [holding that “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”). The New York Court of Appeals has also explained that impleader of a third party “does not vitiate the requirement of a showing of actual loss before there may be recovery” (*McCabe v Queensboro Farm Prods., Inc.*, 22 NY2d 204, 208 [1968]). Thus, in the interests of judicial economy, the first cause of action for contribution as against Thomas Kaufman is sustained. However, the first cause of action as against Joan Kaufman is dismissed because there is no cognizable legal theory that supports Ms. Coplan’s claim of contribution against the purported assignor of the Note.

B. Second Cause of Action (Indemnification)

An indemnification consists of a primary obligation such that should a loss occur, the indemnitor becomes primarily liable for said loss (*Weissman v Sinorm Deli*, 88 NY2d 437, 446 [1996]).

Although Ms. Coplan alleges that the Movants are jointly and severally liable for obligations under the Note, she fails to adequately allege that there was any agreement between the parties to the Note concerning indemnification (*Weissman*, 88 NY2d at 447 [stating that a promise to assume an obligation in an indemnity “should not be found unless it can be clearly implied from the language and purpose of the entire agreement”]). Significantly, section 8 of the Note provides that “any one of us may be required to pay all of the amounts owed under this Note” but it does not provide any basis for indemnification between the borrowers. In addition and to the extent that Ms. Coplan argues that Thomas Kaufman indicated that this was “his debt”, this allegation is duplicative of her claim for contribution. Accordingly, the second cause of action for indemnification is dismissed.

C. Third Cause of Action (Fraud)

The elements of fraud consist of (i) a representation of material fact, (ii) the falsity of the representation, (iii) knowledge by the party making the representation that it was false when made, (iv) justifiable reliance by the plaintiff, and (v) resulting injury (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). In sum and substance, Ms. Coplan alleges fraud in connection with concealment of the Mortgage associated with the Note, the purported assignment of the Note, and alleged violations of Penal Law §§ 175.30 and 175.35. However, Ms. Coplan’s assertion that she was unaware of the Mortgage is contradicted by the documentary evidence, namely that Ms. Coplan appended the subject mortgage to her complaint against Thomas Kaufman in a separate and prior action (NYSCEF Doc. No. 73). The documentary evidence also indicates that the June 2018 Assignment of the Note was not fraudulent as there is affidavit evidence from Joan Kaufman and Scott Kaufman explaining why two assignment were made

under the circumstances (NYSCEF Doc. Nos. 130-131). Ms. Coplan's allegations that false statements were made regarding assignment of the Note before this court are also improper in this third party action because there is no evidence that Ms. Coplan relied upon these statements when she signed the Note, and therefore can not serve as a basis upon which she can assert a claim grounded in fraud. Accordingly, the third cause of action for fraud is dismissed.

D. Fourth Cause of Action (Violation of Judiciary Law § 489)

The fourth cause of action for violation of Judiciary Law § 489 is dismissed because this is merely an affirmative defense that cannot be asserted as a separate cause of action (*see Fairchild Hiller Corp. v McDonnell Douglas Corp.*, 28 NY2d 325, 329 [1971]). Further, section 489 of only applies as against the purchaser or assignee of a claim and neither of the Movants are such.

E. Fifth Cause of Action (Accord and Satisfaction)

The fifth cause of action for accord and satisfaction is dismissed for failure to state a claim because the affirmative defense of accord and satisfaction does not form a basis for an independent cause of action (*see Illinois Natl. Ins. Co. v Schumann*, 2016 NY Slip Op 31646[U], *7 [Sup Ct, NY County 2016]). In addition, the fifth cause of action is also dismissed as against Scott Kaufman because he is not a proper third party defendant to this action (CPLR § 1007 [permitting a defendant to sue "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"]).

F. Sixth Cause of Action (Breach of Contract)

The elements of a claim for breach of contract are (i) the existence of a contract, (ii) the plaintiff's performance, (iii) the defendant's breach and (iv) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, Ms. Coplan sufficiently states a claim for breach of contract by alleging that Joan Kaufman breached the Note by her unilateral decision to vary its payment obligations, such that enforcement of the Note is barred in whole or in part (NYSCEF Doc. No. 121, ¶¶ 251-252). To the extent that Section 17 of the Rider to the Note states that the "Note Holder may waive or delay enforcing its rights under this Note," this does not mean on its face that Joan Kaufman could unilaterally and without notice to Ms. Coplan modify the terms of the Note and change the character of the payments received from principal and interest, as required by the Note, to interest only (*see* NYSCEF Doc. No. 137, § 17).

In addition, according Ms. Coplan's Third Party Complaint every favorable inference, the alleged agreement with Thomas Kaufman for complete satisfaction of the Mortgage in exchange for discontinuing a prior action also states a claim for breach of contract as against Thomas Kaufman. In an affidavit, dated March 29, 2019, Ms. Coplan explained that she and Thomas Kaufman entered into a stipulation and settlement regarding their judgment of divorce in 2015, which provided that she would receive 100% of the proceeds from the home that is subject to the \$250,000 Mortgage (NYSCEF Doc. No. 163, ¶ 14). When Ms. Coplan subsequently filed a lawsuit in 2017 to rescind the stipulation of settlement in the divorce action, she asserts that she discontinued the 2017 action upon receipt of the discharge of \$250,000 mortgage and Thomas Kaufman's assurance that the \$250,000 mortgage had been satisfied (*id.*, ¶ 18). Put another way, Ms. Coplan asserts that her understanding was that in consideration for discontinuing the 2017 action, she was to receive the proceeds from the home and Thomas Kaufman would be

responsible for satisfying the mortgage and the \$250,000 debt it secured. At this stage of the proceedings, and taking these allegations as true recognizing any cognizable legal theory upon which recovery can be granted, the sixth cause of action for breach of contract must be sustained.

G. Seventh Cause of Action (Abuse of Process)

Ms. Coplan's seventh cause of action for abuse of process is dismissed because this is not a proper third party claim for contribution of indemnity vis-à-vis Ms. Coplan's purported obligations under the Note (*see Phoenix Erectors, LLC v Fogarty*, 90 AD3d 468, 468 [1st Dept 2011] [stating that "suits against a third party can only be maintained for contribution or indemnification claims" pursuant to CPLR § 1007]).

II. Ms. Coplan's Cross-Motion

As an initial matter, Ms. Coplan's failure to attach an explicit notice of cross motion to her papers does not preclude this court from entertaining her request for relief, which relief should be considered in the interests of justice (*see Wimbledon Fin. Master Fund, Ltd. v Laslop*, 169 AD3d 550, 551 [1st Dept 2019]).

Ms. Coplan cross moves to disqualify Mr. Polland as counsel for Thomas Kaufman because of Mr. Polland's simultaneous representation of Scott Kaufman in this action. Whether a motion to disqualify should be granted rests in the discretion of the motion court (*Mayers v Stone Castle Partners, LLC*, 126 A.D.3d 1, 6 [1st Dept 2015], citing *Macy's Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616, 617 [1st Dept 2013]). An attorney should avoid "not only the fact, but even the appearance, of representing conflicting interests" (*Cardinale v Golinello*, 43 NY2d 288, 296

[1977]). Here, Thomas Kaufman is a party to the Note that Scott Kaufman is suing to enforce solely as against Ms. Coplan. These circumstances give rise to not only an appearance, but an actual conflict of interest where Mr. Polland purports to represent the original assignor, assignee, and obligee of the Note in both the first party action for recovery under the Note and the defense of the third party action regarding contribution and indemnity between parties to the Note. During oral argument, Mr. Polland acknowledged the same and has indicated that he will no longer represent Thomas Kaufman in the third party action given this court's decision to sustain Ms. Coplan's contribution claim.

The branch of Ms. Coplan's cross motion for sanctions is denied because the history of litigation in this case, while contentious, does not indicate that the Movants conduct was frivolous.

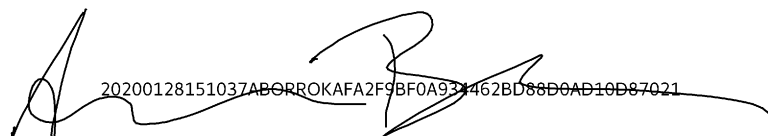
Accordingly, it is

ORDERED that the motion to dismiss the Third Party Complaint is granted solely to the extent that the first cause of action (contribution) is dismissed as against Joan Kaufman and the second (indemnification), third (fraud), fourth (violation of Judiciary Law § 489), fifth (accord and satisfaction), and seventh (abuse of process) causes of action are dismissed in their entirety; and it is further

ORDERED that Beth Coplan's cross motion is granted solely to the extent that Mr. Polland concedes his withdrawal as counsel for Thomas Kaufman; and it is further

ORDERED that Thomas Kaufman and Joan Kaufman shall file an answer to the Third Party Complaint within 30 days of this decision and order; and it is further

ORDERED that the parties shall appear for a compliance conference at Room 238, 60 Centre Street on March 2, 2020 at 11:30 am.



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1/28/2020
DATE

ANDREW BORROK, J.S.C.

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