

<b>New York City Energy Efficiency Corp. v Suria</b>
2020 NY Slip Op 30315(U)
January 23, 2020
Supreme Court, New York County
Docket Number: 655339/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

NEW YORK CITY ENERGY EFFICIENCY CORPORATION,
Plaintiff,

INDEX NO. 655339/2017
MOTION DATE 10/21/2019
MOTION SEQ. NO. (MS) 004

- v -

RAVINDRANATH SURIA, BFC002 11 WEST 126TH STREET LLC, BUILDFORWARD CAPITAL LLC, 11 WEST 126TH HOLDINGS LLC, VAMANA REAL ESTATE EQUITIES I, LP, DAVID FINEHIRSH, URBAN ARTISAN DM1 LLC, AND JOHN AND JANE DOES 1-100,

DECISION + ORDER ON MOTION

Defendants.

RAVINDRANATH SURIA, BFC002 11 WEST 126TH STREET LLC, BUILDFORWARD CAPITAL LLC, 11 WEST 126TH HOLDINGS LLC, VAMANA REAL ESTATE EQUITIES I, LP.

Third-Party
Index No. 595587/2019

Plaintiffs,

-against-

11 WEST 126TH STREET LENDER 1 LLC, 11 WEST 126TH STREET LENDER 2 LLC

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 83, 84, 85, 86, 87

were read on this motion to/for DISMISS

In this action regarding an alleged fraudulent conveyance of a mortgage, third-party defendants 11 West 126th Lender 1 LLC ("Lender 1") and 11 West 126th Lender 2 LLC ("Lender 2") move to dismiss the above-captioned third-party plaintiffs' amended verified third-party complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and CPLR 3211(a)(5) based upon an alleged release. The third-party plaintiffs oppose the motion.

BACKGROUND

Plaintiff New York City Energy Efficiency Corp. ("NYCEEC") initiated this action on August 14, 2017, alleging that defendants, including Lender 1 and Lender

2, fraudulently conveyed a mortgage on a property located at 11 West 126<sup>th</sup> Street in the city, county, and state of New York that was partially financed by plaintiff (NYSCEF #1). At the same time, plaintiff filed a Notice of Pendency (NYSCEF #2). All the defendants except for Lender 1 and Lender 2 moved to dismiss the complaint and vacate the Notice of Pendency (NYSCEF #20, 26, and 48)<sup>1</sup>. Lender 1 and Lender 2 filed a foreclosure action on March 1, 2018, claiming that the instant action caused a default. On February 11, 2019, this court issued an order denying, in significant part, the third-party plaintiffs' motion to vacate the Notice of Pendency (NYSCEF #52).

Subsequent to the February 11 order, the third-party plaintiffs filed a third-party complaint against Lender 1 and Lender 2 alleging that plaintiff had entered into an agreement with Lender 1 and Lender 2 to fraudulently obtain the property at issue via Lender 1 and Lender 2's foreclosure action (NYSCEF #72 – Amended Third-Party Complaint). The third-party plaintiffs allege that a week after the February 11 order, NYCEEC dismissed Lender 1 and Lender 2 from this action despite a central issue to this action is whether Lender 1 and Lender 2 improperly obtained the mortgage rights to the property (*id.*; NYCEEF #53 – February 20, 2019 Stipulation of Discontinuance). The third-party plaintiffs allege that, in furtherance of NYCEEC and Lender 1 and Lender 2's plan, NYCEEC canceled the Notice of Pendency by stipulation in early March 2019 (NYSCEF #72; NYCEEF # 54 – Cancellation of Notice of Pendency).

The third-party plaintiffs' amended complaint seeks contribution from Lender 1 and Lender 2 based on the allegations made in plaintiff's amended complaint, which are that the third-party plaintiffs and Lender 1 and Lender 2 acted in concert to fraudulently convey the mortgage to Lender 1 and Lender 2 (NYSCEF #72 at ¶¶17-25). The specific allegations in plaintiff's amended complaint are: “[defendant] BFC002 did not have the authority to assign the mortgage”; that “[Lender 1] knew from due diligence of NYCEEC's ownership of, and rights in and to, the mortgage and of BFC002's incapacity to assign the mortgage, and nevertheless fraudulently accepted the assignment for less than adequate consideration and with the actual intent to hinder, delay and/or defraud NYCEEC”; that defendants acting in concert with “[Lender 1] made the transfer with the actual intent to hinder, delay, and/or defraud NYCEEC”; and that defendants transferred “rights in the project and property to [Lender 1] and [Lender 2], with the actual intent to hinder, delay, and/or defraud NYCEEC” ((NYSCEF #65 – Amended Complaint at ¶¶ 88, 89, 102).

The third-party plaintiffs allege that the settlement between plaintiff and Lender 1 and Lender 2 does not preclude a claim for contribution because the claims are pursuant to the Debtor-Creditor Law, which falls outside the scope of General

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<sup>1</sup> Defendants/third-party plaintiffs' motion to dismiss were granted in part and denied in part (NYSCEF #56 – March 15, 2019 Decision and Order).

Obligations Law § 15-108 (NYSCEF #72 at ¶23). The third-party plaintiffs allege that any injuries or damages sustained by them were caused by the acts of Lender 1 and Lender 2 (*id.* at ¶24). They argue that “[i]n the event judgment is recovered... against third-party plaintiffs pertaining to the first or second causes of action in [plaintiff’s] amended complaint, said third-party plaintiffs will be damaged thereby and will be entitled to common law contribution from third-party defendants for any judgment that may be recovered by plaintiff or any other party against third-party plaintiffs, or for that portion thereof that is shown to be the responsibility of third-party defendants, together with all costs, fees and expenses incurred in defending the main action and prosecuting the third-party action” (*id.* at ¶25).

## DISCUSSION

Lender 1 and Lender 2 (the third-party defendants) move pursuant to CPLR 3211(a) to dismiss all of the third-party plaintiffs’ claims. In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). “The court must determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY2d at 88). However, the court need not accept “conclusory allegations of fact or law not supported by allegations of specific fact” or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

The third-party defendants’ motion is denied. First, the third-party defendants’ argument – that the third-party action is barred in this breach of contract action because CPLR 1401 restricts contribution claims to tort actions – is flawed. CPLR 1401 states that

“Except as provided in section 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers’ compensation law, or the workers’ compensation law of any other state or the federal government, 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” (CPLR 1401).

The third-party defendants’ characterization of plaintiff’s complaint as a simple breach of contract action is incorrect. Plaintiff’s first cause of action is for fraudulent conveyance under Debtor-Creditor Law (DCL) §§ 276, 278, and 279. This cause of action relates to “injury to property” as plaintiff’s allegation is that the third-party plaintiffs improperly conveyed the 11 West 126<sup>th</sup> Street mortgage. Since

plaintiff's complaint is not predicated solely on breach of contract, the third-party plaintiffs are not prohibited from seeking contribution on the DCL claims (see *Tower Building Restoration, Inc. v 20 East 9th Street Apartment Corp.*, 295 AD2d 229, 229-230 [1st Dept 2002]; *Masterwear Corp. v Bernard*, 3 AD3d 305, 306-307 [1st Dept 2004]). As such, the third-party plaintiffs have stated a cause of action for contribution.


The third-party defendants next argue that the release between plaintiff and them in this matter prohibits claims for contribution pursuant to General Obligations Law (GOL) § 15-108 and CPLR 3211(a)(5). GOL § 15-108 states that "[a] release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rule" (GOL § 15-108).

However, the third-party defendants did not attach the alleged release or aver to the contents of the alleged release. The failure to provide the release is fatal to the third-party defendants' motion (see *Masterwear Corp.*, 3 AD3d at 307; *Pine v Solow*, 69 AD2d 760 [1st Dept 1979] ["Defendant Solow's argument that Haskell's cross claim is subject to dismissal under section 15-108 of the General Obligations Law because plaintiff has released Solow, is similarly unavailing because it is based only on Solow's conclusory assertion that such release was given. There is no supporting proof in the form of an affidavit from plaintiff or of the release itself, and knowledge of the release is within the exclusive possession of the signatories"]). As such, on the record currently provided to the court, there is no basis to dismiss third-party plaintiffs' claim for contribution.

Accordingly, it is hereby ORDERED that third-party defendants' 11 West 126th Street Lender 1 and 11 West 126th Street Lender 2 motion to dismiss (MS4) is denied.

This constitutes the Decision and Order of the court.

1/23/2020  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE