

Guerrero v Mbahuma
2020 NY Slip Op 31036(U)
March 2, 2020
Supreme Court, Bronx County
Docket Number: 23324/2019E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

EMMANUEL GUERRERO

Index No. 23324/2019E



-against-

Hon. MARY ANN BRIGANTTI

PUVITANDA MBAHUMA, et al.

Justice Supreme Court

The following papers numbered 1 to 4 were read on this motion (Seq. No. 6)
for DISMISSAL noticed on October 16, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3
Replying Affidavit and Exhibits	No(s).	4

Upon the foregoing papers, the third party defendants William Michaelis Jr. and Amenda J. Stent (the "Third Party Defendants") move for an order (1) pursuant to CPLR 3211(a)(7), dismissing the third-party complaint of the third party plaintiffs Puvit Anda Mbahuma and Kaura Rakatjuukua ("Third Party Plaintiffs") for failure to state a cause of action; or alternatively (2) pursuant to CPLR 2004, permitting Third Party Defendants to serve an answer within 40 days from entry of an order of this Court. The Third Party Plaintiffs oppose the motion.

Background

This matter arises out of an alleged three-car motor vehicle accident that occurred on May 21, 2016. The plaintiff Emmanuel Guerrero ("Plaintiff") commenced this action against Third Party Plaintiffs, contending that their vehicle negligently struck the vehicle in which Plaintiff was a passenger. In support of this motion, Third Party Defendants submit a certified copy of the police accident report allegedly generated after the accident. According to this report, Plaintiff's vehicle (vehicle 1) and Third Party Plaintiff's vehicle (vehicle 2) were stopped in heavy traffic when Third Party Defendant's vehicle (vehicle 3) rear-ended vehicle 2, pushing vehicle 2 into the rear of vehicle 1. Third Party Defendants also provide an amended certified police accident report. This report now states that vehicle 1 and vehicle 3 were stopped in heavy traffic, when vehicle 2 struck the rear of vehicle 3, pushing vehicle 3 into the rear of vehicle 1.

Third Party Plaintiffs then commenced a third-party action against the Third Party Defendants by filing a summons and complaint on August 12, 2019. The third party complaint asserts, in pertinent part that "[i]f Plaintiff sustained injuries and damages as alleged in the Verified Complaint... said Third Party Defendant is primarily liable for any damages sustained by Plaintiff herein, and will be required to indemnify the Defendants/Third-Party Plaintiffs for any damages suffered as a result of this accident"

Motion is Respectfully Referred to Justice:
Dated:

(Third Party Complaint at Par. 11). In lieu of filing an answer, the Third Party Defendants made this motion.

Standard of Review

On a motion to dismiss pursuant to this section of the CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997])[on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]. In order to survive a dismissal motion under this subsection, the complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 A.D.3d 836, 839 [1st Dept. 2011])[internal quotations omitted].

Applicable Law and Analysis

In this matter, Third Party Defendants have established that Third Party Plaintiffs have failed to state a cause of action against them for common-law indemnification. "Common-law indemnification is available to one who has committed no wrong but is held liable to the injured party because of some relationship with the tortfeasor 'or obligation imposed by law'" (*Elkman v. Southgate Owners Corp.*, 246 A.D.2d 314 [1st Dept. 1998])[internal citation omitted]. Consequently, "...a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364 [1st Dept. 2006]). Here, the third-party complaint does not allege the existence of any prior relationship between the Third Party Plaintiffs and the Third Party Defendants, nor does it allege that the Third Party Defendants owed a duty to the Third Party Plaintiffs (*see Razdolskaya v. Lyubarsky*, 160 A.D.3d 994, 997-98 [2d Dept. 2018]). Furthermore, the Third Party Plaintiffs have no viable common-law indemnification claim against the third-party Defendants because their liability in this action is premised upon their own acts or omissions rather than vicarious liability (*see Consolidated Rail Corp. v. Hunts Point Term. Produce Coop. Ass'n Inc.*, 11 A.D.3d 341, 342 [1st Dept. 2004]; *Guzman v. Haven Plaza Housing Development Fund*, 69 N.Y.2d 559 [1987]; *Tereshchenko v. Lynn*, 36 A.D.3d 684, 686 [2d Dept. 2007]; *Williams v. New York City Transit Authority*, 9 A.D.3d 308, 309 [1st Dept. 2004]). In other words, since the Third Party Plaintiff's liability, if any, will be based on their own negligence, they have no claim for common-law indemnification (*Chunn v. New York City Hous. Auth.*, 83

A.D.3d 416, 417 [1st Dept. 2011]). "A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification" (*Esteva v. Nash*, 55 A.D.3d 474 [1st Dept. 2008], quoting *Mathis v. Central Park Conservancy*, 251 A.D.2d 171, 172 [1st Dept. 1998]).

In opposition, Third Party Plaintiffs allege that the submitted police reports are inadmissible and the prior arbitration decision is non-binding, and the movants failed to submit an affidavit in support of the motion. These claims are unavailing since the movants demonstrated that the common-law indemnification claims are subject to dismissal as a matter of law, even without reliance on these materials, and a motion under CPLR 3211(a)(7) does not require an affidavit from an individual with personal knowledge of the facts.

To the extent that the third-party complaint is making an claim of "negligence" against the Third Party Defendants, such a claim is time-barred. A negligence claim is subject to a three-year statute of limitations (CPLR 214[5]). This accident occurred on May 21, 2016 and the third-party complaint was not filed until August 12, 2019 - outside of the three-year limitations period. Third Party Plaintiffs nevertheless argue that their claim is not barred because "the third party action relates back to the date of the original filing of the summons and complaint..." However, the third-party action's attempt to rely on the relation-back doctrine to render this third party action timely is improper since the Third Party Plaintiffs are not seeking to amend a pleading in a timely-commenced action (*Davis v. Sanseverino*, 145 A.D.3d 519, 520 [1st Dept. 2016]; CPLR 203[f]). In addition, the relation-back doctrine only applies to claims against a new defendant where three conditions are satisfied: "(1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Cintron v. Lynn*, 306 A.D.2d 118, 119-120 [1st Dept. 2003][internal citations omitted]). Here, while the claims arise out of the same accident, the Third Party Plaintiffs and Third Party Defendants are not "united in interest," and Third Party Plaintiffs have failed to establish that Third Party Defendants "knew or should have known that, but for mistake by the plaintiff as to the identity of the proper parties" they would have been sued in the original action as well.

Finally, with respect to a claim for common-law contribution,"all that must be shown... to set forth a viable claim for contribution is that both parties owed a duty to [Plaintiff] and that both contributed to [Plaintiff's] harm by breaching their respective duties" (*see Tower Building Restoration, Inc. v. 20 East 9th Street Apartment Corp.*, 295 A.D.2d 229 [1st Dept. 2002]; *Raquet v. Braun*, 90 N.Y.2d 177 [1997]). In this case, the third-party complaint sets forth the pertinent facts, and alleges that the Third Party Defendants'

vehicle came into contact with Third Party Plaintiffs' vehicle, and if Plaintiff suffered injuries and damages, the Third Party Defendants "is primarily liable" and will have to indemnify the Third Party Plaintiffs "in whole or in part." While this cause of action does not specifically use the word "contribution," on a dismissal motion under CPLR 3211(a)(7), after accepting all allegations as true, drawing all inferences in a light most favorable to the Third-Party Plaintiffs, a Court must determine "whether a cognizable cause of action can be discerned thereon, not whether one has been properly stated" (*MatlinPatterson ATA Holdings LLC*, 87 A.D.3d at 839, citing *Rovello v. Orofino Realty Inc.*, 40 N.Y.2d 633 [1976]). Here, the Third Party Complaint's factual allegations sufficiently set forth a cognizable cause of action for common-law contribution, and therefore Third Party Defendants failed to establish their entitlement to dismissal of such claims pursuant to CPLR 3211(a)(7). The statements contained in the police accident report(s) fail to establish movants' entitlement to dismissal, as they constitute inadmissible hearsay (*Fay v. Vargas*, 67 A.D.3d 568 [1st Dept. 2009]). The prior arbitration decision is not binding because it is not evident that Third Party Plaintiffs had a full and fair opportunity to contest the matter (*see generally Schwartz v. Public Administrator of Bronx County*, 24 N.Y.2d 65, 71 [1969]). The Court also notes that a cause of action for contribution is considered one for express or implied contractual rights, and is therefore governed by a six-year statute of limitations (CPLR 213[2]; *McDermott v. City of New York*, 50 N.Y.2d 211 [1980]). Such a cause of action does not accrue until a payment is made by the party seeking contribution (*id.*).

Conclusion

Accordingly, it is hereby

ORDERED, that Third Party Defendants' motion to dismiss is granted only to the extent of - dismissing any claim for common-law indemnification or negligence, and it is further,

ORDERED, that the Third Party Defendants' motion to dismiss the Third Party Plaintiffs' claims for common-law contribution is denied, and it is further,

ORDERED, that Third Party Defendants are directed to file and serve an answer within thirty (30) days after service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of this Court.

Dated: 3/2/20

Hon. Mary Ann Brigantti
Hon. Mary Ann Brigantti J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT