

Dickson v Eagle Team Dev., LLC
2020 NY Slip Op 31893(U)
June 18, 2020
Supreme Court, New York County
Docket Number: 155011/12
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
MAURICE DICKSON, INDIVIDUALLY AND ON
BEHALF OF ALMAJO, LLC,

Index No. 155011/12

Plaintiff,

-against-

EAGLE TEAM DEVELOPMENT, LLC, CAROL
ASIMOU, as Executor of the Estate of
ALPHONSE ROSSI and STEPHEN M. APOLLO,

Motion Sequence Nos. 008 & 009

Defendants.

-----X
CAROL ASIMOU, as Executor of the Estate of
ALPHONSE ROSSI,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590446/14

STEPHEN M. APOLLO, ESQ. and JOHN DOES 1-3,

Third-Party Defendants.

-----X
DAVID B. COHEN, J.:

Motion sequence numbers 008 and 009 are consolidated for disposition.

This is an action for, inter alia, breach of contract and legal malpractice arising out of the formation, opening, and operation of an adult entertainment club known as the Mile High Club located at 248-56 Rockaway Boulevard in Rosedale, New York (hereinafter, the Club). Plaintiff Maurice Dickson, suing individually and on behalf of Almajo, LLC (Almajo), was an investor in the Club, which was ultimately shut down because it did not have appropriate licenses.

Defendant/third-party plaintiff Carol Asimou, as executor of the estate of Alphonse Rossi (Rossi) (hereinafter Asimou), moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing the amended complaint; and (2) summary judgment dismissing the cross claims

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asserted by defendant/third-party defendant Stephen M. Apollo (Apollo) against her (motion sequence number 008).

Asimou subsequently withdrew the portion of her motion seeking summary judgment dismissing the amended complaint (NY St Cts Elec Filing [NYSCEF] Doc No. 284). However, Asimou did not withdraw the portion of her motion for summary judgment seeking dismissal of Apollo's cross claims against her (*id.*).

Apollo moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing the amended complaint; (2) summary judgment dismissing the third-party complaint; and (3) summary judgment dismissing the cross claims asserted against him (motion sequence number 009).

BACKGROUND

It is undisputed that defendant Eagle Development Team, LLC (Eagle) was formed on or about July 6, 2011 in order to operate the Club. Rossi, an attorney, was a managing member of Eagle.

Dickson, Alan Fischer (Fischer), and Joseph Maselli (Maselli) are members of Almajo, which was set up by their attorney, Apollo, to purchase 50% of the shares of Eagle for the purpose of owning and operating the Club (NYSCEF Doc No. 188, Dickson tr at 15-16, 26-27). Dickson, Fischer, and Maselli met with Rossi and Christopher DiGiorgio on a few occasions to discuss a potential investment opportunity in the Club (*id.* at 17-21). At these meetings, Rossi introduced himself as an attorney, and provided the members with a business model (*id.* at 18-19; NYSCEF Doc No. 260, Fischer tr at 27). Fischer testified that he believed that Rossi was Eagle's attorney (NYSCEF Doc No. 260, Fischer tr at 12, 13, 53-54).

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Apollo's engagement agreement dated July 18, 2011 with Dickson, Fischer, and Maselli,

states that:

"the scope of this engagement is for representation of you and/or a Limited Liability Company to be formed in New York for the purchase of fifty (50%) per cent of the shares of Eagle Development Team, LLC, for the purpose of owning and operating and [sic] adult entertainment establishment located at 248-56 Rockaway Boulevard, Rosedale, New York"

(NYSCEF Doc No. 195). In addition, Apollo's services were to include:

"all necessary and appropriate action to negotiate and prepare a purchase and sale agreement with the members of Eagle Development Team, LLC, a New York Limited Liability Company recently formed; to analyze the present lease agreement for the premises, and to negotiate and review a potential new lease with owner of the premises; to oversee and track the progress of the seller's obtaining a cabaret license, liquor license and temporary liquor license liquor license from the governmental authorities in New York, and/or to expedite same; to prepare an operating agreement for the Limited Liability Company among the three of you"

(*id.*).

On July 18, 2011, a closing was held at Rossi's office, and the parties entered into Eagle's operating agreement (NYSCEF Doc No. 261, Apollo 3/8/19 tr at 34-35). Both Apollo and Rossi attended the closing (*id.* at 68). Apollo testified that Rossi represented Eagle at the closing (*id.* at 93). At the closing, Dickson paid his capital contribution in the amount of \$70,000 directly to Eagle (NYSCEF Doc No. 259, Dickson tr at 101-102). Almajo's other two members contributed approximately \$70,000 each, for a total investment in Eagle of \$210,000 (*id.* at 40-41).

Apollo testified that he did not draft Eagle's operating agreement; he added some terms to it based upon what the principals agreed upon, and prepared some of the exhibits (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 71, 86; NYSCEF Doc No. 191, Apollo 3/19/19 tr at 135-138). Apollo stated that the reason that he did this was because Rossi "was unable to do so or didn't do so or couldn't, whatever reason. The deal had to be closed" (*id.* at 137). Dickson testified that

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Rossi didn't have the capacity to physically do that in his office, so they discussed the details of the operating agreement, and Apollo apparently then, now that I recall, had it printed" (NYSCEF Doc No. 188, Dickson tr at 61). Eagle's operating agreement identifies three members of Eagle: Rossi, Sharon DiGiorgio, and Maselli, as nominee for a limited liability company to be formed (Maselli LLC) (NYSCEF Doc No. 194). Exhibit B to the operating agreement, entitled "Members and Capital and Capital Contributions," indicates that Sharon DiGiorgio and Rossi each owned 25% of Eagle, and that Maselli LLC contributed \$150,000 in capital and owned 50% of Eagle (*id.*). Apollo did not recall whether the operating agreement was ever revised to "swap" Almajo for Maselli LLC (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 76, 80-81; NYSCEF Doc No. 191, Apollo 3/19/19 tr at 43-45).

With respect to Almajo's operating agreement, Apollo testified that he "prepared a draft of an operating agreement and disseminated it to the clients for their review and comments for the end of finalizing what their agreement among the three of them was" (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 49-50). He testified that he did not receive any substantive comments from the clients about the operating agreement, but recalled that the operating agreement was never signed (*id.* at 50). He followed up with the clients (*id.*). However, he did not recall whether the agreement contained all of the terms that the clients contemplated (*id.* at 51). Dickson told him that he did not know that the agreement had not been signed (NYSCEF Doc No. 191, Apollo 3/19/19 tr at 27-29). Apollo explained to his clients that it was advisable to execute the operating agreement (*id.* at 28-29).

Apollo further testified that Maselli applied for the liquor license for the Club (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 43, 46). Apollo learned that the Club had a temporary liquor license (*id.* at 43). Apollo "made inquiries" about the license from Maselli, Dickson, and Fischer

NYSCEF Doc No. 191, Apollo 3/19/19 tr at 114). At some point, Dickson told him that there was no liquor license (*id.*). The Club did not obtain a permanent liquor license (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 98).

(*id.* at 44). Apollo ascertained that there was a temporary [license], that they could continue on the existing license” (*id.* at 97). He advised his clients that they could continue to sell liquor with a temporary liquor license (NYSCEF Doc No. 191, Apollo 3/19/19 tr at 114). At some point, Dickson told him that there was no liquor license (*id.*). The Club did not obtain a permanent liquor license (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 98).

Apollo negotiated the lease assignment for the Club (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 87-88). Apollo admitted that he never conducted a title search on the property, which would have revealed the existence of a mortgage on the property (NYSCEF Doc No. 191, Apollo 3/19/19 tr at 147-148). The mortgage note on the property contained a provision which required approval of the bank before entering into the lease (*id.* at 150).

In addition, Apollo testified that he discussed the current lease with Almajó’s members (NYSCEF Doc No. 261, Apollo 3/8/19 tr at 41). Although he recommended that a new lease be entered into with the owner, he did not negotiate a potential new lease with the owner or review a potential new lease (*id.* at 42).

According to Apollo, Dickson told him that the managing members of Eagle, including Rossi, had not obtained insurance policies or they let them lapse (NYSCEF Doc No. 261, Apollo 3/8/19 tr at 44). Apollo contacted an insurance broker to obtain insurance policies (*id.*). Dickson testified that he never received copies of insurance policies, even though he requested them (NYSCEF Doc No. 259, Dickson tr at 140).

On July 26, 2011, the Club received a letter from the bank’s attorney indicating that it intended to evict the Club, based on the Club’s violation of the mortgage provision requiring bank approval of any lease (NYSCEF Doc No. 202).

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Fischer testified that “[t]he City came in and shut us down for not having a cabaret and/or liquor license,” not long after it opened (NYSCEF Doc No. 189, Fischer tr at 49).

The landlord commenced eviction proceedings against the Club for nonpayment of rent (NYSCEF Doc No. 259, Dickson tr at 126-127). Dickson testified that the Club had paid about \$30,000 in rent (*id.* at 127). In addition, the City of New York commenced an action alleging violations of the Liquor License Law, which allegedly resulted in the court entering an injunction enjoining the Club from conducting business on the premises (*id.* at 128).

On July 30, 2012, plaintiff commenced the instant action against Eagle and Rossi (NYSCEF Doc No. 1). On January 22, 2014, Rossi commenced a third-party action against Apollo (NYSCEF Doc No. 7). Plaintiff subsequently moved to amend the complaint to add Apollo as a direct defendant (NYSCEF Doc Nos. 69-74). By decision and order dated March 4, 2015 (Mills, J.), the court granted plaintiff’s motion to serve an amended summons and complaint to add Apollo as a direct defendant and to supplement the allegations and causes of action (NYSCEF Doc No. 87). The amended complaint asserts the following nine causes of action: (1) fraud/fraud in the inducement; (2) breach of contract; (3) breach of fiduciary duty; (4) accounting; (5) violation of Limited Liability Company Act § 409; (6) tortious interference with contract; (7) conversion; (8) legal malpractice against Rossi; and (9) legal malpractice against Apollo (NYSCEF Doc No. 185).

In his answer, Apollo asserts two cross claims for common-law indemnification and contribution against Rossi (NYSCEF Doc No. 186).

Rossi died during the pendency of this action. By decision and order dated January 11, 2016, the court (Katz, J.) granted plaintiff’s application to amend the caption to substitute Carol

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96).

Plaintiff filed the note of issue on March 19, 2019 (NYSCEF Doc No. 180).

By stipulation of discontinuance dated May 14, 2020, signed by counsel for plaintiff and counsel for Asimou, plaintiff discontinued the action with prejudice as against Asimou (NYSCEF Doc No. 286).¹

DISCUSSION

It is well settled that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (*Ryan v Trustees of Columbia Univ. in the City of NY, Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (*id.*). “Once this showing has been made . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court’s function on a motion for summary judgment is “issue-finding, rather than issue-determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *reargued* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]).

A. Asimou’s Motion for Summary Judgment (Motion Sequence Number 008)

1. Apollo’s Cross Claim for Contribution Against Asimou

¹ The stipulation of discontinuance is ineffective because it was not “signed by the attorneys of record for all parties” (CPLR 3217 [a] [2]; *see also Phillips v Trommel Constr.*, 101 AD3d 1097, 1098 [2d Dept 2012]).

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Asimou argues that Apollo's cross claim for contribution should be dismissed because:

(1) Rossi did not owe plaintiff or Apollo a duty of care and did not breach any duty; and (2) the damages sought by plaintiff relate solely to economic loss.

Apollo did not specifically oppose dismissal of his cross claim for contribution against Asimou. Rather, Apollo only argues that he is entitled to indemnification from Asimou (NYSCEF Doc No. 245 at 10-13).

CPLR 1401 provides that “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.” “[P]urely economic loss resulting from a breach of contract does not constitute ‘injury to property’ within the meaning of New York’s contribution statute” (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). The First Department has determined that “the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein” (*Children’s Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]). Inasmuch as there is no dispute that plaintiff’s claims seek economic damages resulting from a breach of contract, contribution is unavailable (*see id.*).

Accordingly, Apollo’s cross claim for contribution against Asimou is dismissed.

2. *Apollo’s Cross Claim for Common-Law Indemnification Against Asimou*

Asimou contends that Apollo’s cross claim for common-law indemnification fails because plaintiff seeks to hold Apollo liable based upon his own wrongdoing, not on a theory of vicarious liability.

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Apollo counters that Asimou has failed to establish prima facie entitlement to summary

judgment. In addition, Apollo argues that the record is devoid of evidence that he failed to provide the legal services for which his clients retained him, or that his services departed from the standard of care. More specifically, Apollo argues that “the services provided were fully consistent with his engagement to help form the LLC, and included the filing of the certification of organization, obtaining an EIN from the Internal Revenue Service, conducting a name search and reserving the name (ultimately ‘Almajo’)” (NYSCEF Doc No. 245 at 8).

“Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer” (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1st Dept 1985]; see also *County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 47 [2d Dept 1984], *aff’d* 66 NY2d 642 [1985]). “Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003] [internal quotation marks and citation omitted]).

Here, Asimou has established that Apollo’s liability to plaintiff, if any, would be for legal malpractice based upon his own negligence, and not for vicarious liability for Rossi’s negligence (see *Rehberger v Garguilo & Orzechowski, LLP*, 118 AD3d 765, 767 [2d Dept 2014]; *Lovino, Inc. v Lavallee Law Offs.*, 96 AD3d 909, 910 [2d Dept 2012]; cf. *17 Vista Fee Assoc. v Teachers Ins. & Indem. Assn. of Am.*, 259 AD2d 75, 81 [1st Dept 1999]).

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Apollo denies preparing Eagle's operating agreement. However, in an email dated July 17, 2011, Apollo stated, "I never received the promised form of Operating Agreement containing substantive provisions, from Arthur Thunelius, so I am doing it myself" (NYSCEF Doc No. 197). Apollo also testified that he added terms to a form operating agreement, and prepared the exhibits to the agreement (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 71, 86; NYSCEF Doc No. 191, Apollo 3/19/19 tr at 64-65, 135-138). At his deposition, Apollo did not recall whether Eagle's operating agreement was ever revised to include Almajo as a member of Eagle (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 76, 80-81; NYSCEF Doc No. 191, Apollo 3/19/19 tr at 43-45).

In addition, Apollo was retained "to analyze the present lease agreement for the premises, and to negotiate and review a potential new lease with owner of the premises" (NYSCEF Doc No. 195). Apollo testified that, although he prepared an assignment, assumption and modification of the lease, he never conducted a title search on the property, which would have revealed the existence of a mortgage on the property (NYSCEF Doc No. 191, Apollo 3/19/19 tr at 147-148, 150). The mortgage note on the property contained a provision requiring bank approval before entering into a lease (*id.* at 150).

Although Apollo argues that the Club was shut down because it failed to obtain a liquor license, his engagement agreement expressly required him "to oversee and track the progress of the seller's obtaining a cabaret license, liquor license and temporary liquor license from the applicable governmental authorities in New York, and/or otherwise to expedite same" (NYSCEF Doc No. 195). Apollo testified that he "made inquiries" about the liquor license, and advised that the Club could sell liquor with a temporary license (NYSCEF Doc No. 190, Apollo 3/8/19 tr at 43-44; NYSCEF Doc No. 191, Apollo 3/19/19 tr at 114). Nevertheless, there is no

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dispute that the Club was shut down not because it was illegally selling liquor (NYSCEF Doc No. 189, Fischer tr at 49; NYSCEF Doc No. 190, Apollo 3/8/19 tr at 104). Apollo has failed to raise an issue of fact.

Therefore, Apollo's cross claim for common-law indemnification against Asimou is dismissed.

B. Apollo's Motion for Summary Judgment (Motion Sequence Number 009)

Apollo moves for summary judgment: (1) dismissing the amended complaint; (2) dismissing the third-party complaint; and (3) dismissing any and all cross claims against it.

In opposition, plaintiff and Asimou argue that Apollo's motion is untimely because Apollo moved for summary judgment one day after the deadline to move for summary judgment. Plaintiff and Asimou point out that, on Monday, July 22, 2019, the court advised Apollo that his documents were returned for correction because they were blank. Plaintiff and Asimou assert that, on Friday, July 26, 2019, Apollo uploaded a "corrected" notice of motion (NYSCEF Doc No. 240); however, the affirmation in support and memorandum of law remained blank. Counsel for plaintiff and Asimou also contend that several attempts were made to contact Apollo's counsel, to address the blank papers that were uploaded to NYSCEF (NYSCEF Doc Nos. 241-243). On July 31, 2019, Apollo served the affirmation in support of summary judgment and memorandum of law in support of summary judgment (NYSCEF Doc No. 242). However, as pointed out by plaintiff and Asimou, NYSCEF still contains a blank affirmation in support and memorandum of law.

In reply, Apollo contends that the court may search the record and grant summary judgment in his favor. Apollo, however, does not appear to dispute that his motion was untimely.

Here, the preliminary conference order directed that motions for summary judgment were

to be made within 120 days after the filing of the note of issue (NYSCEF Doc No. 98 at 2). Plaintiff filed the note of issue on March 21, 2019 (NYSCEF Doc No. 180). Thus, Apollo was required to move for summary judgment by Friday, July 19, 2019. Apollo moved for summary judgment on Saturday, July 20, 2019 (NYSCEF Doc No. 204), one day late. Moreover, even though Apollo's motion was uploaded to NYSCEF one day late, it was served on opposing counsel almost two weeks after the deadline to move for summary judgment, and remains incomplete on NYSCEF. Therefore, Apollo's motion for summary judgment is untimely.

Apollo has failed to demonstrate any good cause for the delay in his moving papers (*see* CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004] ["'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy"]). Even in his reply, Apollo does not offer any good cause, or explain why the papers are missing on NYSCEF.² Apollo's "failure to address the missed filing deadline or offer, let alone show, good cause for the delay in filing, is fatal to [his] motion" (*Cullity v Posner*, 143 AD3d 513, 514 [1st Dept 2016]; *see also Connolly v 129 E. 69th St. Corp.*, 127 AD3d 617, 618 [1st Dept 2015] [denying motion for summary judgment one day late as untimely]; *Milano v George*, 17 AD3d 644, 645 [2d Dept 2005] [motion for summary judgment was correctly denied as untimely where the record did not establish "good cause" for the delay]; *cf. Bik-Lung Lee v Nassau Health Care Corp.*, 162 AD3d 628, 630 [2d Dept 2018] [counsel

² The Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases for Supreme Court, New York County provides that "[i]n the event that counsel fails to e-file a document, it will not be part of the court record" (*see Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases*, available at www.nycourts.gov/supctmanh [last visited June 17, 2020]).

emergency the day the motion was due").

Accordingly, Apollo's motion for summary judgment is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 008) of defendant/third-party plaintiff Carol Asimou, as Executor of the Estate of Alphonse Rossi is granted to the extent of dismissing the cross claims of defendant/third-party defendant Stephen M. Apollo for contribution and common-law indemnification, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 009) of defendant/third-party defendant Stephen M. Apollo is denied in its entirety.

Dated: 6-18-2020

ENTER:



J.S.C.

HON. DAVID B. COHEN
J.S.C.