M & R Real Estate LLC v Islip Apt. Corp.
2020 NY Slip Op 32617(U)
June 25, 2020
Supreme Court, Suffolk County
Docket Number: 11193/2014
Judge: Joseph Farneti

SHORT FORM ORDER **INDEX NO. 11193/2014**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

M & R REAL ESTATE LLC f/k/a M & R REAL ESTATE,

Plaintiff,

-against-

ISLIP APARTMENT CORP., 2ND STREET DEVELOPMENT CORP., KENNETH TURRISI, MILKATHY CORP., ACTION READY MIX CONCRETE OF L.I. CORP., JP MORGAN CHASE & CO., SYNCO CHEMICAL CORPORATION,

Defendants.

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MILKATHY CORP.,

Third-Party Plaintiff,

-against-

AFCO PRECAST CORP., AFCO PRECAST SALES CORP., OLDCASTLE PRECAST, INC., OLDCASTLE PRECAST EAST, INC., ACTION READY MIX CONCRETE OF L.I. CORP., RICHARD AFFENITA, and ROBERT AFFENITA,

Third-Party Defendants.

ORIG. RETURN DATE: DECEMBER 22, 2016
FINAL SUBMISSION DATE: FEBRUARY 16, 1017
MTN. SEQ. #: 004
MOTION: MD

ORIG. RETURN DATE: JANUARY 12, 2017
FINAL SUBMISSION DATE: FEBRUARY 16, 2017
MTN. SEQ. #: 005
MOTION: MG

ORIG. RETURN DATE: FEBRUARY 16, 2017
FINAL SUBMISSION DATE: FEBRUARY 16, 2017
MTN. SEQ. #: 006
CROSS-MOTION: XMG

ORIG. RETURN DATE: FEBRUARY 16, 2017
FINAL SUBMISSION DATE: FEBRUARY 16, 2017
MTN. SEQ. #: 007
CROSS-MOTION: XMD

ORIG. RETURN DATE: JUNE 7, 2019
FINAL SUBMISSION DATE: SEPTEMBER 19, 2019
MTN. SEQ. #: 008
MOTION: MD

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Upon the following papers read on the application of third-party plaintiff Milkathy Corp. for an Order, pursuant to CPLR 3101 and 3108, for the issuance of an open commission to take the testimony of Richard Affenita, for an Order granting third-party plaintiff leave to serve and file a second amended third-party complaint and, pursuant to CPLR 3215, granting third-party plaintiff Milkathy Corp. a default judgment against third-party defendants Afco Precast Corp., Afco Precast Sales Corp., Oldcastle Precast East, Inc. and Action Ready Mix Concrete of L.I. Corp. (mot. seq. #004): Notice of Motion and Affirmation dated October 26, 2016, Exhibits 1 to 19 annexed thereto and Memorandum of Law; upon the following papers read on the application of third-party defendants Afco Precast Corp., Afco Precast Sales Corp., and Robert Affenita for an Order, pursuant to CPLR 3211 (a) (5), (7), and (10), dismissing the third-party complaint (mot. seq. #005): Notice of Motion and Affirmation dated December 8, 2016, Exhibits 1 to 10 annexed thereto, Affidavit of defendant Robert Affenita and Exhibits A and B annexed thereto and Memorandum of Law; Supplemental Affirmation dated December 23, 2016 with Exhibits A to C; upon the application of third-party defendants Afco Precast Corp. and Afco Precast Sales Corp. for an Order dismissing the third-party complaint pursuant to CPLR 3211 (a) (5) and (7), or in the alternative, for leave to serve and file a third-party answer (mot. seq. #006): Notice of Cross-Motion dated January 6, 2017, Affidavit dated January 4, 2017 with Exhibits A and B annexed thereto, Memorandum of Law and Affirmation in Opposition dated January 29, 2017 with Exhibits 1 to 8 annexed thereto; upon the following papers read on the application by third-party plaintiff Milkathy Corp. for an Order, pursuant to CPLR 3025, granting third-party plaintiff leave to serve and file a third amended third-party complaint, for an Order, pursuant to CPLR 3124, compelling third-party defendants to produce certain records, and related relief (mot. seq. #007): Notice of Cross-Motion and Affirmation dated January 29, 2017 with Exhibits 1 to 11 annexed thereto and Memorandum of Law; Affirmation in Opposition of third-party defendants Oldcastle Precast, Inc. and Oldcastle Precast East, Inc. dated February 9, 2017 and Exhibit A annexed thereto; Affirmation in Opposition dated February 10, 2017 with Exhibits A through

F annexed thereto and Memorandum of Law; Reply Affirmation dated February 14, 2017; and upon the following papers read on the application of plaintiff M & R Real Estate LLC for an Order, pursuant to CPLR 603 and 1010, severing its action for adverse possession from the third-party action (mot. seq. #008): Notice of Motion dated May 9, 2019 and Affidavit in Support dated March 20, 2019, Memorandum of Law dated May 9, 2019 with Exhibits A and B annexed thereto; Affirmation in Opposition dated June 5, 2019 with Exhibits 1 to 4 annexed thereto; Affirmation in Opposition dated June 6, 2019, Reply Affidavit dated July 8, 2019 and Reply Affirmation; it is,

ORDERED that the motions (mot. seq. #004, #005, #006, #007 and #008) are consolidated for purposes of a determination herein; and it is further

ORDERED that the motion (seq. #004) by defendant/third-party plaintiff Milkathy Corp. ("third-party plaintiff" or "Milkathy") for an Order:

(1) pursuant to CPLR 3101 and 3108, providing for issuance of an open commission to take the testimony of third-party defendant Richard Affenita, sometimes referred to as Richard Affenita, Jr., on the ground that this testimony is material and necessary to the defense of this action, and the prosecution of the third-party action;

(2) pursuant to CPLR 3025, granting to third-party plaintiff leave to serve and file a Second Amended Third-Party Complaint in the form submitted, in order to assert existing claims against third-party defendant Robert Affenita and the third-party defendants affiliated with Afco Precast Corp. ("Afco") on the ground that leave to amend is freely given where there is no prejudice and where the claims are not clearly without merit;

(3) pursuant to CPLR 3215, granting to third-party plaintiff a default judgment against the third-party defendants that are in default, namely Afco, Afco Precast Sales Corp. ("Afco Sales"), Oldcastle Precast, Inc. ("Old Castle"), and Action Ready Mix Concrete of L.I. Corp. ("Action Ready"), and pursuant to CPLR 603, severing the claims against these third-party defendants and reserving to the third-party plaintiff the right, upon the filing of a note of issue herein, or upon such other procedural event in this case when it is appropriate to have a hearing on the allegations of the third-party action against the parties in default, to take further proceedings against these third-party defendants to enforce the default against these parties to assess damages,

is hereby **DENIED** for the reasons set forth herein; and it is further

ORDERED that the motion (seq. #005) by third-party defendants Afco, Afco Sales and Robert Affenita (collectively "Afco defendants") for an Order, pursuant to CPLR 3211 (a) (1), (5), (7) and (10), dismissing the third-party action, awarding judgment in favor of the Afco defendants and against third-party plaintiff and awarding the Afco defendants the costs and disbursements of this action, including reasonable attorneys' fees, is hereby **GRANTED** to the extent set forth herein; and it is further

ORDERED that the cross-motion (seq. #006) by Afco and Afco Sales for an Order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the third-party action as against them, awarding judgment in favor of Afco and Afco Sales and against third-party plaintiff, awarding the costs and disbursements of this motion, including reasonable attorneys' fees if counsel for third-party plaintiff refuses to withdraw his motion for default, and alternatively, if either the first Amended Third-Party Complaint or the proposed Second Amended Third-Party Complaint remains after the instant motion practice, and if either or both of Afco and Afco Sales were to remain in the third-party action, that leave be granted to serve an answer to whichever version of the Third-Party Complaint the Court determines to be the operative third-party pleading, is hereby **GRANTED** to the extent set forth herein; and it is further

ORDERED that the cross-motion (seq. #007) by third-party plaintiff for an Order:

(1) pursuant to CPLR 3025, granting to third-party plaintiff leave to serve and file a third amended third-party complaint, in the form submitted, in order to satisfy the deficiencies claimed by third-party defendants in the motion to dismiss, on the ground that leave to amend is freely given where there is no prejudice and where the claims are not clearly without merit; or in the alternative, resolving this motion without prejudice to a future application for leave to amend, because as discovery information is produced, additional facts are revealed, permitting further clarification of the applications in the pleadings;

(2) pursuant to CPLR 3124, compelling the third-party defendants to produce the entire closing file for the sale of the assets of Afco and Robert Affenita to third-party defendant Oldcastle in June 2001, on the ground that same was requested by Milkathy's counsel in June 2016, third-party defendants stated same was "disposed," then in December 2017, third-party defendants attached selected excerpts from the documents to its motion herein;

(3) pursuant to the inherent power of the Court, consolidating motion seq. #005 and this cross-motion (seq. #007), with motion seq. #004 and cross-motion seq. #006, on the ground that there is repetition, and in order to avoid inconsistency and to promote efficiency;

(4) denying all of the pending motions and cross-motions to dismiss the third-party action; and

(5) prohibiting Robert Affenita, Afco, and Afco Sales from making any further motions to dismiss pursuant to CPLR 3211 (a) (1), (5) and (10), on the grounds that these defendants have exceeded the permissible limit set forth in CPLR 3211 (e) for making such motions, and because at this time, all of the motions to dismiss by these defendants are procedurally improper,

is hereby **DENIED** as set forth herein; and it is further

ORDERED that the cross-motion (seq. #008) by plaintiff M & R Real Estate LLC ("plaintiff" or "M & R") for an Order, pursuant to CPLR 603 and 1010, severing plaintiff's action from the third-party action, is hereby **DENIED** for the reasons set forth hereinafter, without prejudice to renewal.

This is an action for adverse possession commenced in 2014 by plaintiff concerning certain property in Bohemia, New York. Plaintiff claims that by virtue of adverse possession, plaintiff acquired certain real property measuring approximately 50 feet by 250 feet (the "disputed land"), which is part of a parcel adjacent to property that plaintiff alleges it owns in fee simple. M & R alleges that it used the disputed land since 1985 for a picnic table, a dumpster, as storage space for wooden pallets, and to maneuver tractor trailer trucks to a loading dock, among other things.

In November of 2015, defendant and third-party plaintiff Milkathy filed the within third-party action. Milkathy was the record owner of the real property that includes the disputed land, which is adjacent to M & R's property. Milkathy sold the property in 2004 to defendants Islip Apartment Corp., 2nd Street Development Corp. and Kenneth Turrisi. Milkathy then amended its complaint by the amended third-party complaint dated February 22, 2016. Milkathy alleges in its amended third-party complaint, and in its subsequent proposed amended third-party complaints, that if it is liable for any damages as a result of the allegations against it in the underlying adverse possession action, that the third-party defendants are liable to Milkathy pursuant to an indemnification provision in a ground lease entered into between Milkathy and Afco, which covered a period

from 1996 until 2001 (the "subject ground lease"). More specifically, Milkathy alleges that Afco, as the tenant, agreed to erect a boundary fence and to indemnify Milkathy from the precise harm presented to Milkathy by this lawsuit. Milkathy additionally alleges that by operation of law, because of the failure of the Afco defendants to follow corporate formalities, or by virtue of their own actions, they are liable for the obligations of Afco to Milkathy.

Presently before the Court are several motions, some of which are duplicative in that similar relief is requested. In particular, the motion by third-party plaintiff Milkathy for leave to serve and file a second amended third-party complaint is **DENIED** as academic, as to third-party defendants Afco and Afco Sales, inasmuch as Milkathy later filed a motion for leave to serve and file a third amended third-party complaint against these same third-party defendants.

Addressing first the application by third-party plaintiff Milkathy for an Order, pursuant to CPLR 3108 and 3101, directing the issuance of an open commission enabling it to issue a subpoena for the deposition of non-party Richard Affenita, Jr., the brother of third-party defendant Robert Affenita, such relief is appropriate under the circumstances to the extent that this non-party witness has any information relevant to the claims or defenses asserted by any of the parties herein (*see* ***Meckert v Sears Roebuck & Co.,*** 275 AD2d 308, 712 NYS2d 56 [2d Dept 2000]; ***Kekis v Park Slope Emergency Physician Serv.,*** 244 AD2d 463, 664 NYS2d 609 [2d Dept 1997]; ***Goldblatt v Avis Rent-A-Car Sys.,*** 223 AD2d 670, 637 NYS2d 188 [2d Dept 1996]; ***Stanzione v Consumer Bldrs.,*** 149 AD2d 682, 540 NYS2d 482 [2d Dept 1989]; ***Wiseman v American Motor Sales Corp.,*** 103 AD2d 230, 479 NYS2d 528 [2d Dept 1984]). However, the motion must be **DENIED** at this time, as Milkathy failed to establish which court in Arizona has the appropriate jurisdiction to receive the commission and issue a subpoena to Richard Affenita, Jr., directing him to appear for a deposition and failed to support their motion with a copy of a proposed Order and commission designating the court in Arizona.

Next, the motion by third-party plaintiff Milkathy for a default judgment is **DENIED**,[1] inasmuch as the purported defaulting third-party

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[1] Third-party plaintiff Milkathy submits its amended third-party complaint with its moving papers and not the original complaint. The "original complaint was superceded by the amended complaint" (***Golia v Vieira,*** 162 AD3d 863, 864, 80 NYS3d 297, 298 [2d Dept 2018]). Thus, the Court considers Milkathy's motion for a default judgment with respect to its amended third-party complaint, which constitutes the operative complaint for purposes of its default motion (*see* ***id.***; ***Taub v Schon,*** 148 AD3d 1200, 51 NYS3d 127 [2d Dept 2017]).

defendants Afco and Afco Sales were never served with the amended third-party complaint nor was an additional copy of the amended third-party complaint served on them pursuant to CPLR 3215 (g) (4) (i) (*see* ***Jian Hua Tan v AB Capstone Dev., LLC,*** 163 AD3d 937, 83 NYS3d 86 [2d Dept 2018] [additional notice requirement is required where a domestic corporation is served pursuant to BCL 306 (b)]; ***Confidential Lending, LLC v Nurse***, 120 AD3d 739, 992 NYS2d 77 [2d Dept 2014]); ***Schilling v Maren Enterprises, Inc.,*** 302 AD2d 375, 754 NYS2d 564 [2d Dept 2003]; ***Town of Brookhaven v MMCCAS Holdings, Inc.,*** 2015 WL 11198874, No. 70312014 [Sup Ct, Suffolk County 2015]). The affidavits of service attached to Milkathy's moving papers are with respect to the original third-party complaint, indicating therein service pursuant to BCL 306 (b), but not as to service of the amended third-party complaint to which Milkathy attaches to its moving papers and from which it is seeking a default judgment.[2] Notwithstanding, third-party defendants Afco and Afco Sales have provided a reasonable excuse for any alleged default in answering and a meritorious defense (*see* CPLR 5015). In any event, the amended third-party complaint does not assert any claims against Afco Sales. The request for a default judgment against third-party defendant Oldcastle is **DENIED** as well, inasmuch as an answer to the amended complaint dated March 15, 2016 was served herein. As to the request for a default judgment against third-party defendant Action Ready, same is **DENIED** also, as there is no affidavit of service of the amended third-party complaint attached to Milkathy's moving papers. Indeed, all of the affidavits of service submitted by Milkathy in support of its motion for a default judgment are with respect to the original third-party complaint, not the amended third-party complaint. In addition, there are no direct allegations in the amended third-party complaint against Action Ready nor does the affidavit of Walter Romanek, Vice-President of Milkathy sworn to on April 27, 2016 (the "Romanek affidavit"), state any allegations against third-party defendant Action Ready. As such, third-party plaintiff Milkathy has not established a *prima facie* claim against Action Ready and, therefore, is not entitled to a default judgment against it (*see* CPLR 3215 [f];

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[2] To the extent Milkathy submits additional documents in its reply papers, same cannot be considered by the Court, as they were not included in its moving papers (*see, e.g.,* ***All State Flooring Distribs., L.P. v MD Floors, LLC,*** 131 AD3d 834, 16 NYS3d 539 [2d Dept 2015]; ***American Express Centurion Bank v Cutler,*** 81 AD3d 761, 763, 916 NYS2d 622 [2d Dept 2011], *quoting* ***Yeum v Clove Lakes Health Care & Rehabilitation Ctr., Inc.,*** 71 AD3d 739, 895 NYS2d 742 [2010]; ***Ritt v Lenox Hill Hosp.,*** 182 AD2d 560, 562, 582 NYS2d 712 [1st Dept 1992] *citing* ***Lazar v Nico Indus.,***128 AD2d 408, 409-410 [1st Dept 1987]; *see also* ***Rubens v Fund,*** 23 AD3d 636; 805 NYS2d 640 [2d Dept 2005], *citing* ***Sanz v. Discount Auto***, 10 AD3d 395, 780 NYS2d 763 [2d Dept 2004]; ***Matter of TIG Ins. Co. v Pellegrini,*** 258 AD2d 658, 685 NYS2d 777 [2d Dept 1999]; ***Dannasch v Bifulco,*** 184 AD2d 415, 417, 585 NYS2d 360 [1st Dept 1992]).

Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 [2d Dept 2011]; ***Interboro Ins. Co. v Johnson***, 123 AD3d 667, 1 NYS3d 111 [2d Dept 2014]; ***Miterko v Peaslee,*** 80 AD3d 736, 736-737, 915 NYS2d 314 [2d Dept 2011]; ***Levine v Forgotson's Cent. Auto & Elec., Inc.,*** 41 AD3d 552, 553, 840 NYS2d 598 [2007]; ***599 Ralph Ave. Dev., LLC v 799 Sterling Inc.,*** 34 AD3d 726, 825 NYS2d 129 [2006]; ***Green v Dolphy Constr. Co., Inc.,*** 187 AD2d 635, 590 NYS2d 238 [2d Dept 1992]). The Court notes that Milkathy requests a default judgment against Richard Affenita in its attorney's affirmation; however, the notice of motion does not request this relief. As such, the default judgment against third-party defendant Richard Affenita is **DENIED**. Further, the Court was advised by way of affidavit of Robert Affenita sworn to on December 8, 2016, that his father, third-party defendant Richard Affenita, passed away in 2012 and no default judgment application can be sought against him in the absence of a proper application for substitution.

The Court next considers the application of third-party plaintiff Milkathy to serve and file a third amended third-party complaint to address, among other issues, the substitution upon the passing of Richard Affenita. Third-party plaintiff Milkathy further seeks an Order, pursuant to CPLR 3124, compelling the third-party defendants to produce the entire closing file of the sale of the assets of Afco and Robert Affenita to third-party defendant Oldcastle in June of 2001.

In its proposed third amended third-party complaint, Milkathy seeks to add a "John Doe" defendant as administrator or executor of the Estate of Richard Affenita and seeks to hold Robert Affenita liable for the debts of Afco because of a "disregard of corporate formalities," that Robert Affenita used the property of Afco for personal use, caused the dissolution of Afco in 2002 "without arranging for the satisfaction by Afco of its obligations under the lease with Milkathy," failing to use the proceeds of the sale of Afco to Oldcastle to adequately provide for the debt and obligations to Milkathy, failing to include in the sales agreement the obligation of Afco to erect a security fence, to restore the lands owned by Milkathy, and to indemnify Milkathy for the claim of adverse possession by M & R, and other alleged misuses of Afco funds and assets. Third-party plaintiff Milkathy further alleges that third-party defendants wrongfully dissipated the assets of Afco through fraudulent conveyances and other wrongful activities. Third-party plaintiff Milkathy seeks declaratory relief, to wit: indemnification against third-party defendants for the claims asserted by M & R and that third-party defendants are to defend Milkathy in the action brought by M & R. Third-party plaintiff Milkathy further seeks to hold third-party defendants Oldcastle liable for the alleged breach of contract by Afco and Afco Sales in

failing to indemnify Milkathy, in that the Oldcastle third-party defendants are the alter-egos and assignees of Afco and Afco Sales. Third-party Milkathy further alleges that third-party defendants are liable "in indemnity" to Milkathy in that they actively participated in the "course of actions that resulted in the claims of adverse possession by plaintiff M & R." The Court notes that the only claims asserted in the third-party complaint are for indemnification and contribution. Milkathy does not seek damages against any of the third-party defendants directly and it does not allege that the third-party defendants are directly liable to it for breach of contract, fraud, or for any other alleged misconduct or otherwise.

As to Milkathy's motion for leave to serve and file its proposed third amended third-party complaint, CPLR 3025 (b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." "Leave to amend a pleading should be freely granted unless the amendment sought is palpably improper as a matter of law or unless prejudice or surprise results from the delay" (***Uliano v Entemann's, Inc.***, 148 AD2d 604, 605, 539 NYS2d 70 [2d Dept 1989]; *see also* ***Clark v Clark,*** 93 AD3d 812, 941 NYS2d 192 [2d Dept 2012]). No evidentiary showing of merit is required on a motion under CPLR 3025 (b) (*see* ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). Whether to grant or deny leave to amend is committed to the court's discretion (***Edenwald Contr. Co., Inc. v City of New York***, 60 NY2d 957, 959, 471 NYS2d 55 [1983]). "Mere lateness is not a basis for denying an amendment; it must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine. The burden of establishing prejudice is on the party opposing the amendment" (***Krakovski v Stavros Associates, LLC,*** 173 AD3d 1146, 103 NYS3d 553 [2d Dept 2019]).

Being that the motion to dismiss by the Afco defendants addresses Milkathy's proposed third amended third party complaint, the Court will consider their motion to dismiss in relation thereto. It is well-established that on a motion to dismiss a complaint pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Connaughton v Chipotle Mexican Grill, Inc.,*** 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]; ***Rosenblum v Island Custom Stairs, Inc.,*** 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015];***Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization,*** 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], *quoting* ***Schneider v. Hand,*** 296 AD2d 454, 744 NYS2d 899 [2002]). "The test of the sufficiency of a pleading is 'whether it gives

sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments' " (***Hampshire Prop. v BTA Bldg. and Developing, Inc.,***122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], *quoting* ***Leon v Martinez,*** 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994]; *see also* (***JPMorgan Chase v J.H. Electric of N.Y., Inc.,*** 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], *quoting* ***Moore v Johnson,*** 147 AD2d 621, 621, 538 NYS2d 28 [1989]; CPLR 3013). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (***Muka v Greene County***, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; *see* ***DiMauro v Metropolitan Suburban Bus Auth.***, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; ***Melito v. Interboro Mut. Indem. Ins. Co.***, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; ***Greschler v Greschler***, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). "Dismissal of the complaint is warranted if they plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (***Connaughton v Chipotle Mexican Grill, Inc.,*** 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]).

The relief requested in the proposed third amended third-party complaint is for indemnification only. The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Sovereign Bank v Biagioni***, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; ***Kader v City of NY. Hour. Preserv. & Dev.***, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Indemnification provisions are "strictly construed" (***Davis v Catsimatidis***, 129 AD3d 766, 768, 12 NYS3d 141 [2d Dept 2015]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017] [internal quotation marks and citations omitted]; ***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011], *quoting* ***George v Marshalls of MA, Inc.***, 61

AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; *see also* ***Drzewinski v Atlantic Scaffold & Ladder Co.***, 70 NY2d 774, 521 NYS2d 216 [1987]; ***Blank Rome, LLP v Parrish***, 92 AD3d 444, 938 NYS2d 284 [1st Dept 2012]; ***Torres v LPE Land Dev. & Constr. Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Canela v TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 491, 549 NYS2d 365 [1989]; ***see Heimbach v Metropolitan Transp. Auth.***, 75 NY2d 387, 553 NY.2d 653 [1990]). Stated differently, "[t]he language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (***Niagra Frontier Trans. Auth. v Tri-Delta Constr. Corp.***, 107 AD2d 450, 453, 487 NYS2d 428 [4th Dept], *affd* 65 NY2d 1038, 494 NYS2d 695 [1985]).

The aim of the court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*see* ***Pellot v Pellot***, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; ***Gonzalez v Norrito***, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; ***Joseph v Creek & Pines, Ltd.***, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; ***see also Matter of Matco-Norca, Inc.***, 22 AD3d 495, 802 NYS2d 707 [2d Dept 2005]; ***Tikotzky v City of New York***, 286 AD2d 493, 729 NYS2d 525 [2d Dept 2001]; ***Partrick v Guarniere***, 204 AD2d 702, 612 NYS2d 630 [2d Dept], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). As it is a question of law whether or not a contract is ambiguous (***W. W. W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (***see Chimart Assoc. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). Where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language and given its " 'plain and ordinary' meaning" (***Scottsdale Indem. Co. v Beckerman,*** 120 AD3d 1215, 1219, 992 NYS2d 117 [2d Dept 2014]; *see also* ***R/S Assocs. v N.Y. Job Dev. Auth.***, 98 NY2d 29, 32 [2002]). It is well-settled that "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (***W.W.W.***

Assoc., 77 NY2d at 162, 565 NYS2d 440, 566 NE2d 639; *see* ***Alt v Laga***, 207 AD2d 971, 971, 617 NYS2d 84 [4th Dept 1994]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (*see* ***Ashland Management v Janien***, 82 NY2d 395, 401-402 [1993]; ***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; ***Mallad Constr. Corp. v County Fed. S&L Ass'n,*** 32 NY2d 285, 290-91 [1973]; ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]). It is well-established that any ambiguity in a contract is to be construed against the party who drafted such contract (*see* ***Guardian Life Ins. Co. of Am. v Schaefer***, 70 NY2d 888, 524 NYS2d 377 [1987]).

The indemnification provision of the subject ground lease between Milkathy, as Landlord, and Afco, as Tenant, provides:

> Tenant covenants to indemnify and save harmless Landlord against any and all claims arising from the conduct or management of, or from any work or anything whatsoever done in or about the demised premises of any building structure or equipment thereon during the lease term, or arising from any accident, injury, or damage whatsoever, however caused, to any person or persons, or to the property of any person or persons, corporation or corporations, occurring, during such term on, in, or about the leased premises, and from and against all costs, counsel fees, expenses, and liabilities incurred in or about any such claim or any action or proceedings brought thereon.

The subject indemnification provision is clear and unambiguous in that it requires an affirmative act by Afco during the lease term for it to be triggered. The claim of adverse possession of the disputed property by M & R is alleged to have occurred prior to the execution of the ground lease between Milkathy and Afco in 1996, which is a date after M & R's alleged adverse possession claim ripened. Specifically, M & R alleges in its complaint that it has adversely possessed the disputed property for thirty years, commencing in 1985. The adverse possession claim of M & R, as alleged in its complaint, is based upon the affirmative acts M & R took to acquire the disputed property, which it further alleges occurred years prior to the subject ground lease between Afco and

Milkathy. Counsel for Milkathy acknowledges in his affirmation dated January 29, 2017 that Milkathy was aware of the trespassing and encroachment on the disputed property in 1986. More importantly, the Romanek affidavit avers that "until 2004, Milkathy Corp., owned vacant land in Bohemia, N.Y. In or about 1986, it was discovered that one of our neighbors was using the land." Thus, according to the plain language of the indemnification clause, the adverse possession claim does not fall within the parameters of Afco's obligation to indemnify Milkathy, otherwise it would have stated so specifically. In addition, the adverse possession claim is one based upon the affirmative acts of M & R prior to the lease term, not any affirmative acts by Afco. Furthermore, M & R does not seek any damages against Milkathy, only that it be declared the owner of the disputed property by adverse possession and, as such, there are no damages upon which Milkathy can seek indemnification nor does the indemnification provision apply to the affirmative actions of M & R, a non-party to the subject ground lease, in adversely possessing the disputed property. Thus, while the Court notes that the statute of limitations on a claim for indemnification begins to run upon payment of the underlying claim by the party seeking indemnification (*see* ***McDermott v New York***, 50 NY2d 211, 217, 428 NYS2d 643 [1980]), no claim for damages is made by M & R nor could there be any indemnification for an adverse possession claim based upon the circumstances presented herein. The Court further notes that Milkathy's suggestion that Afco "may" have advised M & R that it had permission to use the disputed property would be contrary to any alleged hostile possession of the disputed property by M & R and would refute the claim by M & R that it adversely possessed the disputed property. Thus, any such allegations of permission by Afco would support Milkathy's ownership of the disputed property, not be contrary to it, as Milkathy suggests. Further, the claim by Milkathy that Afco failed to prevent the adverse possession claim by M & R is not an allegation of an affirmative act committed by Afco that would be covered by the indemnification clause, again, especially where, as here, the lease term commenced after the alleged adverse possession claim ripened, of which Milkathy admits it had notice and knowledge in 1986.

Indeed, as stated, the only claims asserted in the third-party complaint are for indemnification. Milkathy does not seek damages against any of the third-party defendants directly and it does not allege that the third-party defendants are directly liable to it for breach of contract, fraud, or otherwise. Notwithstanding, to the extent that Milkathy alleges that Afco breached the ground lease, either by not securing the disputed property, not erecting a fence for that purpose, or otherwise not preventing the adverse possession of the disputed property by M & R, any such claims are barred by the statute of limitations, as they were to be asserted within six years after the alleged breach

occurred (*see* CPLR 213; ***Ely-Cruikshank Co. v Bank of Montreal,*** 81 NY2d 399, 599 NYS2d 501 [1993]). Being that the tenancy between Milkathy and Afco expired in 2001, any claim for breach of the subject ground lease is time-barred. Furthermore, there is no agreement by Afco Sales or Robert Affenita to guaranty or assume the obligations of Afco under the subject ground lease and, without a writing regarding same, no such claims can be asserted against Afco Sales and Robert Affenita with respect thereto (*see* General Obligations Law § 5-701 [a][2]).

As to the assertion that Robert Affenita is liable for any alleged fraud or other wrongful conduct of Afco, the general rule is that corporate officers cannot be held personally responsible for the obligations of the corporation (***Westminster Const. Co., Inc. v Sherman***, 160 AD2d 867, 554 NYS2d 300 [2d Dept 1990]). "A plaintiff seeking to pierce the corporate veil must demonstrate that a court of equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (***Vivir of L I, Inc. v Ehrenkranz,*** 145 AD3d 834, 43 NYS3d 435 [2d Dept 2016]; *see also* ***Morris v New York State Dept. of Taxation & Fin.,*** 82 NY2d 135, 142, 603 NYS2d 807 [1993]; ***Flushing Plaza Assoc. #2 v Albert,*** 102 AD3d 737, 958 NYS2d 713 [2d Dept 2013]; ***East Hampton Union Free School Dist. v Sandpebble Builders, Inc.***, 66 AD3d 122, 127, 884 NYS2d 94 [2d Dept 2009]). The decision whether to pierce the corporate veil "depends on the particular facts and circumstances," which may include evidence that the owner failed to adhere to corporate formalities, commingled assets, and used corporate funds for personal use (***East Hampton v Sandpebble,*** *supra,* 102 AD3d at 739). However, the mere claim that the corporation was completely dominated by the owner will not suffice. "For a complaint to state a cause of action for piercing the corporate veil, the plaintiff cannot rely upon vague or conclusory allegations that the individual defendant abused the corporate form, but instead must articulate actual conduct by the individual that creates a nexus between it and the 'transactions or occurrences' of the complaint" (***East Hampton v Sandpebble,*** *supra*, 66 AD3d at 132). Thus, a showing of a wrongful act or tortious conduct toward the plaintiff is required (***Vivir of L I, Inc. v Ehrenkranz***, *supra;* ***Rothstein v Equity Ventures, LLC,*** 299 AD2d 472, 750 NYS2d 625 [2d Dept 2002]).

Milkathy attempts to capture third-party defendants Afco Sales and Robert Affenita in order to hold them liable for indemnification by alleging that the corporate veil of Afco should be pierced and by asserting that Afco Sales, Robert Affenita, and third-party defendant Oldcastle are the alter-egos of Afco. However, such allegations cannot be the basis for indemnification of the adverse

possession claim asserted by M & R, which is grounded on the affirmative actions of M & R in alleging using the disputed property since 1985. Notwithstanding, there are no allegations in the proposed third amended third-party complaint that these third-party defendants committed any acts or wrongful conduct that harmed Milkathy. Moreover, any alleged wrongful activities of the Afco third-party defendants are alleged to have occurred prior to 2002, more than twelve years prior to the commencement of this third-party action and any such claims regarding same would be time-barred in any event.

Further, Milkathy's claim that the sale of Afco's assets to Oldcastle in June of 2001 was a fraudulent conveyance under New York Debtor-Creditor Law ("NYDCL")[3] likewise cannot be stated. Milkathy alleges that the sale of assets should be set aside and the assets of Afco returned to it in order that such assets can be utilized to satisfy any debts owed to Milkathy, seemingly, the alleged obligation to indemnify Milkathy. Notwithstanding that no such indemnification claim can be stated, a cause of action based upon NYDCL is governed by a six-year statute of limitations (*see* CPLR 213 [8]) and accrues at the time of the alleged fraudulent conveyance, "or within two years of the date the fraud should have been discovered, whichever is later" (*see* ***Ehrler v Cataffo,*** 42 AD3d 424, 425, 840 NYS2d 375 [2d Dept 2007]). The Afco asset sale to third-party defendant Oldcastle occurred in 2001, more than thirteen years prior to the commencement of this third-party action. There are no allegations that any assets of Afco were transferred after 2001. As such, any claims against the Afco third-party defendants under the NYDCL are time-barred. Further, a claim of fraudulent conveyance must be pled with specificity pursuant to CPLR 3016 (b). NYDCL § 273 provides, in pertinent part, that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to her actual intent if the conveyance is made or the obligation is incurred without fair consideration." A transferor is presumed to be insolvent when a transfer is made without consideration (***Capital Distrib. Servs v Duncor Express Airlines, Inc.,*** 440 F Supp 2d 827 [EDNY 2006]; ***U.S. v Alfano***, 34 F Supp 2d 827 [EDNY 1999]; ***St. Teresa's Nursing Home v Vuksanovich***, 268 AD2d 421, 702 NYS2d 92 [2d Dept 2000]; ***American Investment Bank, N.A. v Marine Midland Bank, N.A.,*** 191 AD2d 690, 595 NYS2d 537 [2d Dept 1993]). Here, Milkathy does not allege with specificity the debts that were not paid by Afco or how it can be considered a creditor of Afco. Milkathy further does not assert in what respect the transfer to third-party

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[3] Milkathy, however, does not cite to any section of the NYDCL in its proposed third amended third-party complaint.

defendant Oldcastle was without consideration, as required on this claim (CPLR 3016 [b]). Any other purported claims of negligence or carelessness on the part of the Afco defendants are barred by a three-year statute of limitations (*see* CPLR 214), inasmuch as Afco's tenancy expired in 2001. The Court has considered the other arguments raised herein by third-party defendant Milkathy and finds that they lack merit.

Based upon the foregoing, the third party action is dismissed as against third-party defendants Afco, Afco Sales, and Robert Affenita, as no claim for indemnification exists under the clear and express terms of the subject indemnification clause. To the extent that Milkathy attempts to allege other claims against these third-party defendants, in an effort to form the basis for its indemnification claim, such claims are time-barred or otherwise not stated. Accordingly, the motion by third-party Milkathy for leave to serve and file its proposed third amended third-party complaint is **DENIED** as academic. The Afco defendants, however, are not entitled to an award of attorneys' fees or costs, as same is not authorized by statute, court rule, or agreement between the parties (*see* ***Flemming v Barnwell Nursing Home***, 15 NY3d 375, 379, 912 NYS2d 504 [2010] *citing* ***Hooper Assoc. v AGS Computers,*** 74 NY2d 487, 491, 549 NYS2d 365 [1989]; *see also* ***Stein, LLC v Lawyers Title Ins. Co.,*** 100 AD3d 622, 953 NYS2d 303 [2d Dept 2012]; ***Kantrowitz v Allstate Indem. Co.,*** 48 AD3d 753, 853 NYS2d 151 [2d Dept 2008]) nor are they entitled to an award of sanctions (*see* 22 NYCRR 130-1.1 [a]; ***Berkowitz v 29 Woodmere Blvd. Owners' Inc.,*** 135 AD3d 798, 23 NYS3d 352 [2d Dept 2016] and cases cited therein).

With respect to the motion by Milkathy to compel the production of the entire closing file regarding the sale of the assets of Afco to third-party defendant Oldcastle, counsel for Oldcastle affirms that during the pendency of Milkathy's application, Oldcastle produced the subject asset purchase agreement and requested correspondence. Being that the reply affirmation submitted by counsel for Milkathy does not dispute the production of the records requested, the application pursuant to CPLR 3124 is **DENIED** as academic, inasmuch as the documents were previously provided to counsel for Milkathy and it appears to the Court that this discovery dispute has been resolved (*see* ***Sher v Pellicano,*** 215 AD2d 369, 626 NYS2d 975 [2d Dept 1995]; ***Bard-Rock Corp. v Corutky,*** 110 AD2d 611, 487 NYS2d 366 [2d Dept 1985]).

Addressing next the motion by M & R to sever the third-party action, it is firmly settled that "[t]he grant or denial of a request for severance is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking severance" (***Chiarello v***

Rio, 101 AD3d 793, 797, 957 NYS2d 133 [2d Dept 2012]; *see also* ***Quiroz v Beitia***, 68 AD3d 957, 960, 893 NYS2d 70 [2d Dept 2009]; ***Naylor v Knoll Farms of Suffolk County, Inc.***, 31 AD3d 726, 727, 818 NYS2d 460 [2d Dept 2006]). "[T]his discretion should be exercised sparingly" (***Barrett v New York City Health & Hosps. Corp.,*** 150 AD3d 949, 55 NYS3d 318 [2d Dept 2017], *quoting* ***Shanley v Callanan Indus.***, 54 NY2d 52, 57, 444 NYS2d 585, 429 NE2d 104 [1981]). Generally, severance is inappropriate where there are common factual and legal issues and the interests of judicial economy and consistency of verdicts will be served by having a single trial (***Barrett v New York City Health & Hosps. Corp.,*** 150 AD3d 949, 55 NYS3d 318 [2d Dept 2017]; ***Naylor v Knoll Farms of Suffolk County, Inc.***, *supra,* 31 AD3d at 727; ***Zili v City of New York***, 105 AD3d 949, 963 NYS2d 684 [2d Dept 2013]).

To the extent there are claims remaining against any of the non-moving third-party defendants regarding the subject disputed property, the Court will not sever the third-party action at this time. Plaintiff's motion is **DENIED**, with leave to renew (*see* ***Barrett v New York City Health & Hosps. Corp.,*** 150 AD3d 949, 55 NYS3d 318 [2d Dept 2017]).

The foregoing constitutes the decision and Order of the Court.

Dated: June 25, 2020

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**