SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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4A GENERAL CONTRACTING CORP., SPIRIDON ANTHOULIS,

Plaintiff,

- v -

LETITIA JAMES, NEW YORK STATE ATTORNEY GENERAL, RLI INSURANCE CO., LUMBERMENS MUTUAL CASUALTY CO.

Defendant.

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INDEX NO. 655027/2020

MOTION DATE 02/24/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 38, 40, 41, 58, 59

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63

were read on this motion to/for DISMISSAL.

Motion sequence numbers 001 and 002 are consolidated for disposition. The motion (MS001) by defendant Letitia James, New York State Attorney General ("AG") to dismiss the complaint is granted. The motion (MS002) by defendant RLI Insurance Company to dismiss the complaint and for summary judgment in lieu of counterclaim is granted in part and denied in part.

Background

Plaintiff 4A claims that it renovated portions of New York City Housing Authority ("NYCHA") buildings and its principal was plaintiff Anthoulis. They acknowledge that they

were defendants in a civil class action that began in 2002 in which their employees claimed that plaintiffs failed to pay them prevailing wages.

In 2006, the AG started a criminal prosecution arising out of the same acts in Queens against plaintiffs (and other parties) by underpaying their employees. Plaintiffs pled guilty and agreed to pay up to $7.2 million in restitution. Plaintiffs maintain that $1 million was initially paid by plaintiff Anthoulis and was deposited with the AG to be held in escrow. Plaintiffs contend that no final amount was ever determined and insist that a final judgment which fails to specify the total amount is invalid.

Plaintiffs claim that the other defendants RLI and Lumbermens (insurance companies that provided payment and performance bonds for certain NYCHA projects) ultimately paid $12 million in connection with the class action although plaintiffs emphasize that they disputed liability and were not parties to the class action settlement. Plaintiffs demand that the AG turn the $1 million over to plaintiffs based on the fact that the class action settled and the plaintiffs were fully compensated. They also seek (what appears to be) a declaration that RLI and Lumbermens are not entitled to any portion of that $1 million

MS001

The AG moves to dismiss and points out that plaintiff Anthoulis was required to pay $1 million in restitution as a condition of his plea agreement before his sentencing. It contends that the $12 million was paid by two bonding companies but that the workers will actually receive much less. The AG insists that returning the money would result in a windfall for plaintiffs and contravene the plea agreement, conviction, and sentence.

The AG points out that the restitution to be paid by plaintiffs was to be no more than $7,260,095.03 as part of the plaintiff's plea agreement and the minimum payment was supposed

to be $1 million. It observes that in November 2007 (after the plea agreements were entered), plaintiffs' attorneys tried to withdraw Anthoulis' plea but this motion was later denied. The $1 million that had already been paid was cited as a credit towards the total restitution. Plaintiffs' efforts to appeal the conviction were unsuccessful.

The AG explains that discussions began about the civil class action and a possible settlement that could include assigning payments in the civil case towards the criminal restitution. The AG suggested that certain withholdings held by NYCHA in connection with the construction projects might be used (about $3.7 million) but that has never been paid due the ongoing liquidation of Centennial (another insurance company). It asserts that the civil class action settlement was approved in February 2020 but that neither plaintiff objected prior to this approval. The AG points out that eight NYCHA construction projects mentioned in the class action settlement were not part of the criminal proceeding run by the AG and four other NYCHA projects were bonded by Centennial (which means they were not part of the $12 million settlement).

The AG concludes that the amount of restitution left to be paid by plaintiffs for projects not covered in the class action is over $4 million. Moreover, it argues that the bonding companies only cover the payment of prevailing wages, not the penalty imposed in the criminal proceeding which totals $946,968.92. The AG concludes that the complaint fails to state a valid cause of action because under any calculation, plaintiffs owe more than $1 million.

It also argues that collateral estoppel applies because plaintiff Anthoulis exhausted his appellate remedies and was unsuccessful. The AG claims that he cannot seek to relitigate how much he is supposed to pay. It also claims that the statute of limitations expired in 2014 because the plea agreement was essentially a contract and even if there was a breach of the plea

agreement (which the AG denies), the time to bring a lawsuit based on such a breach has expired.

In opposition, plaintiffs claim that the class action settlement incorporated all employees who worked for plaintiff 4A and these workers were barred from any further recovery. They argue that a vague judgment is not valid and that the AG made no effort to determine exactly how much the workers should be paid.

Plaintiffs claim that the action is timely because they seek relief pursuant to conversion and the limitations period only began to run when they asked for the money back and the AG refused. Plaintiffs contend the demand occurred on April 14, 2020.

In reply, the AG emphasizes that the $1 million sought by plaintiffs was paid by Anthoulis as part of his plea agreement. It argues that there was no provision that the money would be returned or that the money would be held in escrow.

The Court grants the motion. The plea agreement clearly provides that "Mr. Anthoulis will pay $1,000,000.00 towards restitution to the OAG on or before his sentencing date. The payment of the $1,000,000.00 is separate from the restitution being collected from funds on administrative hold by NYCHA, but shall be applied to Mr. Anthoulis' liability of no more than $7,260,095.03, inclusive of interest and administrative costs" (NYSCEF Doc. No. 11, ¶ 9[a]). There is nothing in the plea agreement that suggests that Mr. Anthoulis would get the money back or that it was to be held in escrow; it was undoubtedly part of his plea agreement.

In other words, Mr. Anthoulis received a lesser prison sentence by admitting his guilt and by paying the $1 million. In fact, the agreement explicitly says that if Mr. Anthoulis did not make the $1 million payment, the AG would recommend that his prison sentence be longer than if he did make this restitution payment (*id.*). That means it was part of the consideration for the

agreement. The Court does not see how plaintiffs would be entitled to get the $1 million back because they believe that a civil action compensated their victims. Plaintiffs cannot renegotiate their plea agreements in this Court. Also, the money paid in the class action was from the bonding companies. This is not a case where there is concern that plaintiff did not receive proper credit for the initial $1 million payment.

Moreover, as the AG argues, the fact is that Mr. Anthoulis had ample opportunity to challenge this plea agreement and those efforts proved unsuccessful. He cannot now seek to invalidate an agreement that he freely and voluntarily entered into. The doctrine of collateral estoppel bars that requested relief.

MS002

In this motion, RLI seeks to dismiss the complaint and for summary judgment in lieu of a counterclaim on its claim for contractual indemnification against plaintiffs. RLI argues that if the AG's motion to dismiss prevails, plaintiffs have no claim against RLI because it has nothing to do with the plea agreement. With respect to RLI's counterclaim, it asserts that pursuant to the Agreement of Indemnity executed by plaintiffs, they are jointly and severally liable to indemnify RLI for its payment bond losses. RLI claims it paid $11.5 million in connection with the class action and must be indemnified.

Plaintiffs oppose and cross-move for summary judgment against RLI. They claim the settlement in the class action was not made in good faith nor was it reasonable. Plaintiffs assert that plaintiff 4A's counsel participated in the class action and attended the final hearing. They also attach their brief to the Second Circuit which they claim shows Anthoulis' lack of liability to the workers.

In reply, RLI noted that plaintiffs have not explained how they have standing to bring a cause of action against RLI. It also asserts that plaintiffs failed to raise a material issue of fact in opposition—RLI emphasizes that plaintiffs obtained the benefit of the payment bonds. RLI argues that plaintiffs do not dispute liability under the terms of the indemnity agreement. It maintains that its ability to settle the class action is not conditioned upon whether plaintiffs had a valid claim or defense. RLI points to the plea agreements as evidence that plaintiffs underpaid their workers. RLI argues the agreement was not made in bad faith and, therefore, there is no basis to deny RLI's requested relief against plaintiffs.

In reply to the cross-motion, plaintiffs argue that the class action settlement was not in good faith and was not reasonable under the circumstances.

The Court grants the motion to the extent that RLI seeks dismissal of this action. As stated above, plaintiff Anthoulis agreed to pay $1 million as part of his plea agreement. He is not entitled to get this money back; moreover, RLI had nothing to do with this plea agreement. Therefore, the relief against RLI, which appears to be some sort of declaration that RLI is not entitled to the $1 million, is denied as plaintiffs have no say in what happens to this money.

However, the Court denies the branch of the motion which seeks summary judgment in lieu of counterclaim. As an initial matter, the Court observes that a defendant may seek summary judgment in lieu of a counterclaim (*see Acorn Partners II v Kiley*, 193 AD2d 397, 597 NYS2d 63 [1st Dept 1993]). "CPLR 3213 begins with the seemingly straightforward—though stringent—requirement that the action be based on an instrument for the payment of money only or a judgment. The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time" (*Weissman v Sinorm*

Deli, Inc., 88 NY2d 437, 443-44, 646 NYS2d 308 [1996] [internal quotations and citations omitted]). An indemnity agreement that relies on extrinsic evidence to determine the amount due is not a proper basis for relief under CPLR 3213 (*id*. at 445).

Here, the indemnity agreement is not an instrument for the payment of money only. It does not specify a sum certain that plaintiffs would have to pay to RLI. In order to calculate the amount due to RLI, the Court would have to rely on the class action settlement (an action that dealt with additional construction firms other than plaintiffs). And the indemnity agreement relies on future actions by plaintiffs and RLI in order for it to be triggered. It is not an agreement where plaintiffs agreed to pay RLI on a date certain; instead, plaintiffs are liable to RLI if certain events occurred which requires reliance on facts outside the agreement.

Because the Court grants the AG's motion to dismiss and the branch of RLI's motion to dismiss the complaint, it sees no reason to convert the counterclaim into a separate pleading. In fact, the Court of Appeals has held that CPLR 3213 does not require a court to deem the papers in a CPLR 3213 motion as the complaint and answer in the event the motion is denied (*Schulz v Barrows*, 94 NY2d 624, 628, 709 NYS2d 148 [2000]). Similarly, there is no basis to grant plaintiffs' cross-motion for summary judgment against RLI, especially where issue has not been joined and plaintiffs have not met their prima facie burden.

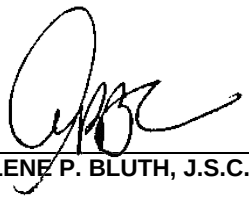
The Court also dismisses the case against defendant Lumbermens because there is no affidavit of service for this defendant on the docket and the time to serve this defendant has expired.

Accordingly, it is hereby

ORDERED that the motion (MS001) by defendant Letitia James, New York State Attorney General to dismiss is granted; and it is further

ORDERED that the motion by defendant RLI Insurance Co. is granted to the extent that the complaint is dismissed against it and denied as to the remaining relief requested; and it is further

ORDERED that the case is dismissed against the remaining defendant because this defendant was not timely served.



3/1/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE