

**Advanced Pain Care Med., P.C. v 2421 Ocean Ave.
Condominium Corp.**

2021 NY Slip Op 31790(U)

May 26, 2021

Supreme Court, Kings County

Docket Number: 505969/2018

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of May, 2021.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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ADVANCED PAIN CARE MEDICAL, P.C.,

Index No. 505969/2018

Plaintiff

-against-

2421 OCEAN AVENUE CONDOMINIUM CORPORATION AND SANDBERG MANAGEMENT CORPORATION

MS 5 & 6

DECISION and ORDER

Defendant

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2421 OCEAN AVENUE CONDOMINIUM CORPORATION AND SANDBERG MANAGEMENT CORPORATION

Third Party Plaintiffs

-against-

2417 MANAGEMENT LLC

Third Party Defendant

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The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and Exhibits

65-71, 80-87

Cross-motions Affidavits (Affirmations) and Exhibits

73-79 89-90

Answering Affidavit (Affirmation)

95, 96

Reply Affidavit (Affirmation)

97

Supplemental Affidavit (Affirmation)

This case involves a claim of property damage by Plaintiff ADVANCED PAIN CARE MEDICAL PC. Plaintiff claims the damage was caused by a leak from a pipe in the ceiling of the commercial condo unit it leases from the Third-Party Defendant 2417 MANAGEMENT LLC, which owns the condo unit.

Plaintiff sued 2421 OCEAN AVENUE CONDOMINIUM CORPORATION (2421 OCEAN), the owner of the common elements of the building, and SANDBERG MANAGEMENT CORPORATION, its management company. The complaint alleges that the Defendants owned and were negligent in maintaining the plumbing and sprinkler systems in the building. Plaintiff has not asserted a claim against its landlord 2417 MANAGEMENT LLC.

2421 OCEAN AVE and SANDBERG in turn commenced this third-party action against 2417 MANAGEMENT LLC. The third-party complaint alleges four causes action: 1) common law indemnification, 2) contribution, 3) contractual indemnification and 4) failure to procure insurance.

2417 MANAGEMENT LLC moves to dismiss the third-party complaint pursuant to 3211(a) (1) and (7), arguing that the facts alleged in the complaint do not establish that Third-Party Plaintiffs would be vicariously liable for the acts of 2417 MANAGEMENT LLC and further that it does not own or have an obligation to maintain the pipe in question.

Defendants/Third-Party Plaintiffs 2421 OCEAN AVE and SANDBERG move to dismiss Plaintiff's first party complaint against them and for summary judgment against 2417 MANAGEMENT LLC on their third-party complaint for indemnification and contribution.

Motion to Dismiss Plaintiff's Complaint

Defendants/Third-Party Plaintiffs argue that Plaintiff's complaint should be dismissed because, pursuant to the condominium plan that was recorded with the deed, the pipes in the commercial unit are owned and are the responsibility of 2717 MANAGEMENT LLC as the owner of the unit, not 2421 OCEAN AVE or SANBERG. The argument, although couched in terms of PJI 2:90, appears to be that the Deed and accompanying Plan of Condominium Unit Ownership (the Plan) constitute documentary evidence which disproves the allegations in Plaintiff's complaint that 2421 OCEAN and SANBERG controlled and maintained the pipe in question.

The Plan states that pipes which service an individual unit are owned and shall be maintained by the unit owner (Fifth Clause Section [B][1] of the Plan), but that the unit owner does not own the pipes running through their unit which service more than one unit (Third Clause Section [12] of the Plan), and that pipes serving more than one unit are general common elements (Fifth Clause Section 5[A][6] of the Plan).

It is not clear from the papers submitted whether the portion of the pipe that is alleged to have leaked services only 2417 MANAGEMENT LLC's unit or services more than one unit.

Thus, it cannot be determined at this point whether 2417 MANAGEMENT LLC or 2421 OCEAN AVE owned the pipe in question or was responsible for maintaining it, therefore dismissal pursuant to 3211 is not warranted.

Third Party Complaint

Third-Party Plaintiffs seek summary judgment on their third-party complaint, while Third-Party Defendant seeks to dismiss all four causes of action in that complaint.

The first cause of action of the third-party complaint, for common law indemnification, should be dismissed because Third-Party Plaintiffs have no relationship with 2417 MANAGEMENT LLC that would make them vicariously liable for the acts of 2417 MANAGEMENT LLC. If Third-Party Plaintiffs are found to be liable to Plaintiff ADVANCED PAIN CARE MEDICAL PC, it will only be based on negligence on their part. Further, if Third-Party Plaintiffs are found not to be responsible for the pipe, then there will be no judgment against them for which they can claim indemnification.

The second cause of action for contribution should not be dismissed. The third-party complaint alleges that if Third-Party Plaintiffs are found to be negligent that negligence on the part of 2417 MANAGEMENT also contributed to Plaintiff's damages.

As discussed above, at this stage it is not clear who owns and has the responsibility to maintain the pipe that Plaintiff alleges caused the damage.

The Plan also provides that pipes which service only one unit are owned and shall be maintained by the unit owner and that pipes that service more than one unit are not owned by the unit owner and are general common elements.

There is no indication in the papers submitted whether the pipe that leaked served more than one unit. Therefore, it cannot be determined whether 2421 OCEAN AVE or 2417 MANAGEMENT LLC owned the pipe in question or had the responsibility for maintaining it.

Additionally, 2417 MANAGEMENT LLC has not produced documentary evidence that it did not take any actions which contributed to causing the leak.

For these reasons, neither Third-Party Plaintiffs nor Third-Party Defendant are entitled to judgement on the second cause of action for contribution.

The third and fourth causes of action for contractual indemnity and for failure to procure insurance, respectively, should be dismissed because 2417 MANAGEMENT LLC

did not enter into a contract with Third-Party Plaintiffs. While the third-party complaint alleges the parties entered into a contract, the contract annexed to that complaint is actually a management agreement between 2421 OCEAN AVE and its manager SANDBERG MANAGEMENT, not with 2417 MANAGEMENT LLC.

WHEREFORE, it is hereby ORDERED that Third-Party Plaintiff's motion to dismiss Plaintiff's complaint and for summary judgment on its third-party complaint is denied; and it is further

ORDERED that that portion of Third-Party Defendant's motion which seeks to dismiss the second cause of action of the third-party complaint, for contribution, is denied; and it is further

ORDERED that the first cause of action for common law indemnity, the third cause of action for contractual indemnity, and the fourth cause of action for breach of contract for failure to procure insurance of the third-party complaint are dismissed.

This constitutes the Decision and Order of this Court.

E N T E R:



JSC