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| Itskovich v Cornerstone Group NY LLC |
| 2021 NY Slip Op 31885(U) |
| June 3, 2021 |
| Supreme Court, Kings County |
| Docket Number: 515024/2020 |
| Judge: Debra Silber |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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RICHARD ITS KOVICH,

Plaintiff,

-against-

**THE CORNERSTONE GROUP NY LLC, RUSSEL NOVA,
and IGOR ZAKHARCHENKO a/k/a IGOR ZAKH,**

Defendants.

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**THE CORNERSTONE GROUP NY LLC, RUSSEL NOVA,
and IGOR ZAKHARCHENKO a/k/a IGOR ZAKH,**

Third-Party Plaintiffs,

-against-

ALEKSANDR LEYKIND a/k/a ALEX LEYKIND,

Third-Party Defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of plaintiff's motion to dismiss defendants' counterclaim and the third-party defendant's motion to dismiss the third-party complaint.

| Papers | NYSCEF Doc. |
|--|---------------------|
| Notice of Motion, Affirmation, Exhibits, and Memoranda | <u>20-24, 30-45</u> |
| Answering Affirmations, Exhibits, and Memoranda | <u>46-52, 55-77</u> |
| Replying Memoranda | <u>54,78</u> |

**Upon the foregoing cited papers, the Decision and Order on these motions
is as follows:**

This action concerns plaintiff's claims relating to compensation he claims he is owed by defendant mortgage brokerage company.

The main action arises from an “Independent Contractor Agreement” (Plaintiff’s Agreement) (Doc 15 [Ex A to plaintiff’s amended complaint]) under which plaintiff rendered services as a “Relationship Manager” for the mortgage brokerage company operated by defendant The Cornerstone Group NY LLC (Cornerstone). In the verified amended complaint, dated November 9, 2020, plaintiff alleges that defendants violated provisions of the Freelance Isn’t Free Act (NYC Admin. Code §§ 20-928, 20-929, and 20-930) as well as the New York Labor Law (e.g. NY Labor Law §§ 193, 198, and 663, pertaining to the minimum wage, overtime, commissions, wage notice, and wage statements). Plaintiff further asserts claims for retaliation under the Labor Law (§ 215) and for breach of the Agreement (Doc 14 [amended complaint]).

The third-party action concerns defendants’ relationship with third-party defendant Aleksandr Leykind. In defendants’ verified answer with counterclaim and their third-party complaint (Doc 18, Doc 26¹), Cornerstone alleges that Leykind, an independent contractor and its “Commercial Lending Advisor,” was required to pay plaintiff’s commissions. They assert that plaintiff “reported to Leykind and had minimal dealings with” Cornerstone or the individual defendants/third-party plaintiffs Russel Nova (Nova) and Igor Zakharchenko a/k/a Igor Zakh (Zakh). Defendants assert three third-party claims against Leykind: (1) contractual indemnification (under their “Compensation Structure” agreement [Compensation Agreement]); (2) common law contribution; and (3) common law indemnification.

Additionally, defendants allege, in support of their counterclaim, that plaintiff “assisted” Leykind in “plotting to start” Leykind’s “directly compet[ing]” mortgage

¹ The court notes that defendants/third-party plaintiffs improperly combine their third-party complaint with their answer to plaintiff’s complaint in a single document.

brokerage company “at the time [plaintiff] was terminated from Cornerstone” in May 2019.² Specifically, defendants allege that plaintiff breached Plaintiff’s Agreement by “assist[ing] Leykind in his plot to directly compete with Cornerstone” in that he misappropriated confidential information, solicited defendants’ clients to leave Cornerstone for their new company, and “diverted business, revenue and commissions to himself and/or other entities he owned or controlled with Leykind, including Equitas.”

In Motion Sequence No.1, plaintiff moves to dismiss the counterclaim, pursuant to CPLR 3211 (a) (7), for failing to state a cause of action. In Motion 2, Leykind moves pre-answer to dismiss the third-party complaint pursuant to CPLR 3211 (a) (1), (5), and (7). He claims his contracts are documentary evidence [(a) (1)], and the release he signed bars the other claims or they fail to state a cause of action [(a) (5) and (7)].

Background

Under the unsigned³ Plaintiff’s Agreement, dated January 15, 2019, plaintiff’s compensation was structured on a “split commission basis” of varying percentages for referrals “given to [plaintiff]” and loans closed by plaintiff. Plaintiff is referred to as an independent contractor in that contract, which contains a non-competition provision restricting plaintiff from competing with Cornerstone for a period of one year after termination “in any area of the 30 Miles of NY in any activity in which [Cornerstone] or its affiliates may have been engaged within three (3) years prior to the termination [sic].” Defendants assert that plaintiff was terminated for cause on May 28, 2019.

² Defendants allege that plaintiff was terminated for cause on May 28, 2019. Leykind’s company, nonparty Equitas Capital Group (Equitas), was allegedly formed in January 2020.

³ The copy of Plaintiff’s Agreement that is e-filed is signed by plaintiff, only. There is no signature on behalf of Cornerstone. However, the validity of this contract is not disputed.

Responding to plaintiff's claims for unpaid wages, commissions, overtime, and violations of various Labor Laws, defendants assert that plaintiff "never earned" the unpaid commissions alleged in the amended complaint and, in any event, plaintiff breached his agreement with Cornerstone by violating the non-compete provision (inasmuch as he misappropriated information and diverted business to himself, Leykind, and/or Equitas).

Defendants' third-party claims concern their relationship with Leykind. Leykind was initially engaged by Cornerstone under a separate "Independent Contractor Agreement," effective as of September 7, 2016 (Leykind Agreement), and a "Compensation Structure" letter agreement, under which he agreed to provide services as Cornerstone's "Commercial Lending Advisor" (Doc 70-71). Thereafter, Leykind obtained a membership interest in Cornerstone, pursuant to a "Unit Sale Agreement" (Unit Agreement), in exchange for \$50,000 (Doc 72). Under the Unit Agreement, Leykind paid the individual defendants \$10,000 each and executed a \$15,000 promissory note in favor of each for the balance. Leykind subsequently defaulted on his payments under the Unit Agreement and he purportedly assigned, in April 2019 pursuant to an "Assignment, Assumption and Release Agreement" (Assignment Agreement), his interest in Cornerstone back to the individual defendants (Doc 36). The Assignment Agreement states:

"The Assignees . . . completely and forever discharge [Leykind], and each of [his] present and former members, employees, contractors, attorneys, agents, representatives, heirs, executors, administrators, predecessors, successors and assigns, in their capacity as such (collectively, the "Related Parties"), from any and all accounts, actions, agreements, bills, bonds, causes of action, claims, complaints, contracts, costs, covenants, damages, debts, demands, executions, judgments, levies, liabilities, liens, losses, obligations, suits, sums of money whatsoever, whether known or unknown,

liquidated or contingent, foreseeable or unforeseeable, direct or derivative, and whether or not alleged or made, in law, admiralty or equity, which [Cornerstone] and/or the Assignee ever had, now has or hereafter can, shall or may have against the Assignor or any of its Related Parties, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of time until the Effective Date” (Doc 36 at 1).

In the Assignment Agreement, the “Effective Date” is [blank] day in April 2019.

After executing the Assignment Agreement, Leykind continued to perform services for Cornerstone pursuant to a new “Compensation Structure” letter agreement, dated May 20, 2019 (2019 Compensation Agreement) (Doc 37). The 2019 Compensation Agreement provides the terms for Leykind’s compensation from Cornerstone for a period of five years beginning on May 20, 2019. Under that agreement, Leykind was to receive a percentage of referrals “given to [him] on Behalf of [Cornerstone] [sic].” It also provides for the amount and structure for the payment of Leykind’s commissions for apparently pre-existing commitments, stating that “[Leykind] shall receive 60% of the Commissions (LESS the Advisors of [plaintiff] and [nonparty] Alexander Nemirovskiy) Both [plaintiff] and [Nemirovskiy] shall be paid by [Cornerstone], which then . . . Leykind shall receive the remaining balance from the TOTAL 60% [sic]” (Doc 37). Further, Leykind would receive “70% on ALL NEW LOANS brought to [Cornerstone] From Alex Leykind [Leykind] will make a choice] on whom to Compensate IE: [plaintiff] or [Nemirovskiy] with their respectful [15%] percentages. Both agents can be compensated as per [Leykind’s] request. Advisors will be paid their commission by [Cornerstone].”

Now, in Motion 1, plaintiff moves to dismiss the counterclaim for failing to state a cause of action. He argues that the breach of contract counterclaim is premised on nothing other than bare legal conclusions and lacks adequate specificity. Defendants

oppose the motion and respond that they adequately plead plaintiff's alleged breach of the covenants not to compete in Plaintiff's Agreement.

In Motion 2, Leykind moves to dismiss the third-party complaint. He argues that there is no basis for contractual indemnification [the first third-party claim] as there is no such provision in his contracts with Cornerstone. He also argues that the common law contribution and indemnification causes of action [the second and third third-party claims] must be dismissed pursuant to the release in the Assignment Agreement. He also argues that there can be no common law indemnification because if the defendants are liable to the plaintiffs, it would not be as a result of any fault on his part. Leykind further seeks as sanctions his attorneys' fees and costs for defending this "frivolous" action.

Defendants respond that they are entitled to implied contractual indemnification under Leykind's Agreement (Leykind's "Independent Contractor Agreement" with Cornerstone) because that contract states: "[Cornerstone] shall not be liable for the acts of [Leykind] or his servants or agents in the performance by [Leykind] of his duties, except for acts caused directly by [Cornerstone] or by [its] agents or employees" (Doc 71). Defendants further argue that the release in the Assignment Agreement is limited to Leykind's default under the Unit Sale and does not apply to or bar these third-party claims. They also respond that the third-party claims are not frivolous, and sanctions are not warranted.

Leykind replies that there is no operative indemnification provision and, in any event, Leykind was released from his "Independent Contractor Agreement" with Cornerstone through the release in the Assignment Agreement. He contends that the

release was comprehensive – not limited to claims relating to the Unit Sale Agreement – and therefore mandates dismissal of the third-party claims asserted here.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts as alleged within the four corners of the complaint and accord the plaintiff the benefit of every possible favorable inference” (*Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244, 244 [2d Dept 2004]). “To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]). “To succeed on a motion to dismiss pursuant to CPLR 3211(a)(7), the evidence must demonstrate that no significant dispute exists as to the facts alleged by the plaintiff” (*Dodge v King*, 19 AD3d 359, 360 [2d Dept 2005]). “[W]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” (*Dinerman v Jewish Bd. of Family & Children’s Services, Inc.*, 55 AD3d 530, 531 [2d Dept 2008] [internal citations and quotation marks omitted]).

In Motion 1, plaintiff concedes that he had a valid contract with Cornerstone. He argues, however, that the facts alleged by defendants fail to adequately plead with sufficient specificity either a breach of Plaintiff’s Agreement or how Cornerstone was damaged. The court disagrees. A claim for breach of contract is not subject to the heightened pleading standards of CPLR 3016 (b) and defendants adequately allege in

their counterclaim, though sparsely, a viable cause of action for breach of Plaintiff's Agreement. The facts surrounding the breach of the contract, though asserted upon information and belief, indicate that plaintiff assisted Leykind in "plotting" to form a competing business, and that plaintiff misappropriated Cornerstone's confidential information, solicited its clients to switch to the new business, and otherwise diverted business and revenues away from Cornerstone in violation of the covenants not to compete in their contract. Accordingly, Motion 1 is denied.

Turning to the third-party complaint, the first third-party cause of action for contractual indemnification is dismissed. There is no provision in any of the contracts submitted in connection with these motions that provides for indemnification of Cornerstone by Leykind. The court cannot infer an intent to indemnify from the liability provision of Leykind's [Independent Contractor] Agreement (Doc 71 [stating that Cornerstone "shall not be liable for the acts of [Leykind] or his servants or agents in the performance by [Leykind] of his duties, except for acts caused directly by [Cornerstone] or by [its] agents or employees"]). This provision disclaims liability by Cornerstone for Leykind's acts which are not directed by defendants; it does not create an obligation to indemnify Cornerstone. Therefore, the first cause of action in the third-party complaint, for contractual indemnification, is dismissed.

Next, the second cause of action in the third-party complaint, for common law contribution, must be dismissed under CPLR 3211 (a) (7). Under New York law, there is no right to contribution under either the common law or CPLR 1401 in contract actions where, as here, the loss is purely pecuniary. "[T]he existence of some form of tort liability is a prerequisite" for a contribution action (see *Board of Educ. of Hudson City School Dist.*

v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 28 [1987]). Likewise, the third third-party cause of action for common law indemnification must be dismissed under CPLR 3211 (a) (7). The third-party complaint “does not allege facts showing that [defendants were] unfairly required to discharge a duty that should have been discharged by another, such that a contract to indemnify should be implied by law” *id.* at 29). The general rule for implied indemnification is that “[w]here payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law” (*McDermott v City of New York*, 50 NY2d 211, 217 [1980]). There is nothing in the pleadings which set forth such a claim.

Specifically, the court notes that the May 2019 Compensation Agreement expressly states that plaintiff’s compensation is to be paid by Cornerstone, not by Leykind, and the contracts as a whole fail to demonstrate that Leykind employed, or was responsible for actually compensating plaintiff in his capacity as Cornerstone’s independent contractor (or, as alleged in the amended complaint, its employee). Defendants also do not allege in their amended answer that Leykind had ever failed to notify Cornerstone when plaintiff had earned a commission so Cornerstone could pay plaintiff. Therefore, the third-party complaint fails to state a cause of action and must be dismissed.

Accordingly, it is **ORDERED** that plaintiff’s motion to dismiss defendants’ counterclaim, Motion Sequence No. 1, is denied; and it is further

ORDERED that the branch of the third-party defendants’ motion to dismiss the third-party complaint, Motion Sequence No. 2, is granted in its entirety and the third-party complaint is hereby dismissed; and it is further

ORDERED that the branch of the third-party defendants' motion which seeks sanctions from the third-party plaintiffs is denied.

This shall constitute the decision and order of the court.

Dated: June 3, 2021

ENTER:



Hon. Debra Silber, J.S.C.