

LM Ins. Corp. v Hull Heating & Plumbing

2021 NY Slip Op 32027(U)

February 5, 2021

Supreme Court, Tompkins County

Docket Number: EF2018-0542

Judge: Joseph A. McBride

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 4th day of December 2020.

PRESENT: HON. JOSEPH A. MCBRIDE
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

LM INSURANCE CORPORATION a/s/o
ZACHARY CLOPTON,
Plaintiff,

-vs-

DECISION AND ORDER

Index No. EF2018-0542

HULL HEATING & PLUMBING, ALEX USFERY,
JOHN DOES 1-X (names being fictitious) and
ABC CORPORATIONS 1-X (names being fictitious),

Defendants.

HULL HEATING & PLUMBING, CO., LLC
erroneously sued herein as HULL HEATING &
PLUMBING, and ALEX USSERY, erroneously
being sued herein as ALEX USFERY,

Third-Party Plaintiffs,

-vs-

HOLT BROTHERS REAL ESTATE AND
CONSTRUCTION, LLC, HOLT BROTHERS
CAPITAL PARTNERS, LLC, JOHN HOLT and
ALYSSA B. ASPEL,

Third-Party Defendants.

APPEARANCES:

Counsel for Plaintiff:	SANTACROSE & FRARY By: Sean Tomko, Esq. Columbia Circle Office Park One Columbia Circle Albany, NY 12203
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Counsel for Defendant: <i>Hull Heating & Plumbing</i> <i>Alex Ussery</i>	COUGHLN & GERHART, LLP By: Jim O'Brien, Esq. PO Box 2039 Binghamton, NY 13902
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Counsel for Third-Party Defendant <i>Alyssa Apsel</i>	THE CROSSMORE LAW OFFICE By: Kirstin Tiffany, Esq. 115 West Seneca Street Ithaca, NY 14850
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Counsel for Third-Party Defendant <i>Holt Brothers</i>	MILLER MAYER, LLP By: Adam Schaye, Esq. 215 East State Street, Suite 200 PO Box 6435 Ithaca, NY 14851
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JOSEPH A. MCBRIDE, J.S.C.

This matter comes before the Court as a pre-answer Motion to Dismiss pursuant CPLR §3211 for failure to state a claim filed by the Third-Party Defendants Holt Brothers Real Estate and Construction, LLC (“Holt Real Estate”) and Holt Brothers Capital Partners, LLC (“Holt Capital”) (collectively “Holt Brothers”). The Court received and reviewed moving papers filed electronically and maintained by the County Clerk and decided as discussed below.

BACKGROUND FACTS

Originally, LM Insurance Corporation (“LM Insurance”) filed a subrogation action on behalf of insured Zachary Clopton (“Clopton”) against Hull Heating & Plumbing (“Hull”) and Alex Usfery¹ / Alex Ussery (“Ussery”) seeking to recover insurance proceeds for damages from

¹ Erroneously misspelled in the original complaint and has yet to be amended.

a house fire alleging Hull and Ussery were negligent responsible parties. Hull and Ussery filed a third-party complaint against Holt Brothers, John Holt (“Mr. Holt”) and Alyssa Apsel (“Ms. Apsel”) alleging they were the responsible parties for the negligence that led to the fire damage. Hull and Ussery answered the original complaint. Hull and Ussery were granted additional time to serve Mr. Holt. Ms. Apsel answered the third-party complaint and alleged a crossclaim against Mr. Holt. Holt Brothers filed this current pre-answer motion to dismiss for failure to state a claim. Hull and Ussery as well as Ms. Apsel filed opposition to said motion. The parties appeared (except for Mr. Holt) for oral argument on December 4, 2020, and the Court decides as described below.

ANALYSIS AND DISCUSSION

When reviewing an action in the scope of a motion to dismiss for failure to state a claim, “a complaint is liberally construed, the facts as alleged are accepted as true and the plaintiff is accorded the benefit of every favorable inference.” Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc., 106 A.D.3d 1255, 1258 (3rd Dept. 2013). The Court must determine, “whether the facts as alleged fit within any cognizable legal theory.” Id. To that extent, “the Court must grant the motion if plaintiff has failed to state a cause of action.” Monaco v. Saint Mary’s Hospital of Troy, Inc., 184 A.D.2d 985 (3rd Dept. 1992).

Here, each entity, Holt Real Estate and Holt Capital have two separate arguments for their involvement in this matter. First, Holt Capital argues that even taking the allegations as true, Holt Capital is an improper party to this litigation. Holt Real Estate was formed after the date of the fire. Therefore, there could be no responsibility or cognizable legal theory against them, as they did not exist. At oral argument, Hull and Ussery conceded that point and agreed that Holt Capital should be discontinued from the action. Therefore, the motion to dismiss as it pertains to Holt Capital only shall be granted and that cause of action shall be dismissed.

Next, Holt Real Estate argues they are not liable for any damage and the true third-party defendants are Ms. Apsel and Mr. Holt, just one of the brothers that comprise Holt Brothers. Holt Real Estate argues that they were named in the lawsuit merely because they are a business entity attached to Mr. Holt’s name, but not responsible for any work that could have led to the circumstances that led to the fire. In opposition, Ms. Apsel submits an affidavit and alleged that Holt Real Estate did work on the house with Mr. Holt and are responsible. At this stage, since

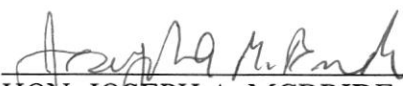
the facts alleged are accepted as true, the Court must consider Ms. Apsel's recollection as true. Therefore, the Court finds that Holt and Ussery's claim fits into a cognizable legal theory and the motion to dismiss as to Holt Real Estate is DENIED.

CONCLUSION

Based upon the foregoing, Defendant's motion to dismiss for failure to state a claim is DENIED in part and GRANTED in part consistent with the discussion as set forth above. Holt Real Estate is directed to file an answer within 20 days of the date of entry of this Decision and Order.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 2/5, 2021
Norwich, New York



HON. JOSEPH A. MCBRIDE
Supreme Court Justice

Entered 02/05/2021