

Labusov v Bachner
2022 NY Slip Op 34338(U)
December 21, 2022
Supreme Court, New York County
Docket Number: Index No. 650524/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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LABUSOV, PAVEL

Plaintiff,

- v -

BACHNER, MICHAEL

Defendant.

INDEX NO. 650524/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 010, 011

**DECISION + ORDER ON
MOTION**

-----X

MICHAEL BACHNER

Plaintiff,

-against-

WILLIAM REDFERN, EQUITY TRUST COMPANY

Defendant.

Third-Party
Index No. 595535/2020

-----X

MICHAEL BACHNER

Plaintiff,

-against-

SEIDEN LAW GROUP LLP, MICHAEL CILENTO, DANIEL
ESTRIN

Defendant.

Second Third-Party
Index No. 595577/2022

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 169, 170, 171, 172, 173, 174, 175, 176, 177, 187, 189, 192, 194

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 179, 180, 181, 182, 183, 184, 185, 188, 190, 191, 193

were read on this motion to/for DISMISSAL.

Motion sequence numbers 010 and 011 are consolidated for disposition. Third-party defendants' Seiden Law Group LLP, Michael Cilento, and Daniel Estrin motions to dismiss are granted.

Background

In 2020, plaintiffs Pavel and Alina Labusovs ("Labusovs") filed an action in this Court alleging that defendant Michael Bachner breached his fiduciary duty to them as an escrow agent in an underlying action. In that underlying action, plaintiffs sued Bachner's client, defendant William Redfern, and that case ultimately reached a settlement. A condition of the settlement was that Bachner would hold in escrow Redfern's IRA account, which defendant Equity Trust Company valued at \$444,027.26. If Redfern breached the settlement, then Bachner would turn over the account to the Labusovs.

Redfern did breach the settlement agreement, and the Labusovs made a demand for the entirety of the IRA account. Bachner claims that when he attempted to liquidate the IRA account, he learned the value of the account was never \$444,027.26 and alleges that both Redfern and Equity Trust Company made false representations to him regarding the value of the account.

The Labusovs filed this suit against Bachner alleging that he breached his fiduciary duty to them and for gross negligence as an escrow agent. Bachner filed a third-party complaint against Redfern and Equity Trust Company for indemnification and contribution. Additionally, Bachner filed third-party complaints against Seiden Law Group ("Seiden"), Daniel Estrin, and Michael Cilento, the attorneys representing the Labusovs in the underlying action, for indemnification and contribution. In his complaint, Bachner alleged that Seiden, Estrin and Cilento owed a duty of care to the Labusovs to protect their interests in the settlement agreement

and should have advised the Labusovs before they entered into the agreement. Because Redfern ultimately breached the agreement, Seiden, Estrin, and Cilento breached their duty of care. Furthermore, Bachner alleges that Seiden, Estrin, and Cilento never contacted Equity Trust to investigate Redfern's representation of the value of the IRA account. Bachner alleges plaintiffs sustained their damages as a result of Seiden, Estrin, and Cilento's breach of their fiduciary duty.

Seiden and Cilento bring a motion to dismiss (MS 010) the claims for indemnification and contribution, citing CPLR 3211(a)(1) and (7). Seiden and Cilento contend that they did not sign the Escrow Agreement or Settlement Agreement and no relationship whatsoever exists between them and Bachner that could render the parties vicariously liable to one another. Additionally, Seiden and Cilento claim they had no duty to advise the Labusovs not to enter the settlement agreement and thus cannot be sued for contribution. Seiden and Cilento maintain that the allegation they should have advised them to avoid the agreement because Redfern was "a crook" is illogical because it would require that Seiden and Cilento communicate with Redfern, who was not their client. Additionally, Seiden and Cilento had no ability to communicate with Equity Trust to confirm the value of the IRA account, and if they did, they claim that they would have received the same information given to Bachner. Finally, Seiden and Cilento contend that the Labusovs' claims are contractual in nature, and contribution is not available for breach of contract claims.

Estrin brings a separate motion to dismiss (MS 011) with substantively similar arguments. Estrin asserts that an indemnification claim requires that Estrin owed a duty to Bachner, but this is impossible as Estrin and Bachner represented adverse parties. Therefore, indemnification must fail. Additionally, Estrin contends that the complaint fails to allege that Bachner delegated to Estrin the duty to notify the Labusovs of Redfern's breach of the agreement

as well as the duty to provide the Labusovs with a certified check in the amount of \$444,027.26. Furthermore, Estrin contends that the Labusovs' complaint alleges Bachner breached his escrow agreement obligations via specific wrongdoing, precluding implied indemnification allegations. Estrin further contends that Bachner's claim for contribution should be dismissed because Estrin did not owe a duty to Bachner. While Estrin had a duty to the Labusovs as their attorney, there is no basis for contribution to Bachner based on this attorney-client relationship or any other relationship. Finally, Estrin contends he had no duty to guarantee a particular outcome in the settlement agreement, meaning he had no duty to predict that Redfern would or would not perform his obligation.

In response to both motions (MS 010 and MS 011), Bachner claims that any breach of duty to the Labusovs regarding the value of the IRA account was entirely in the control of Seiden, Cilento and Estrin as counsel for the Labusovs. Because of this, any damages sustained by the Labusovs are attributable to Seiden, Cilento and Estrin as they played a party in causing or augmenting the Labusovs' damages. Additionally, Bachner contends that New York law allows for attorneys to commence third-party indemnification claims against another attorney whose negligence proximately caused a plaintiff's damages. Bachner asserts that Seiden, Cilento and Estrin failed to assess the value of the IRA account despite their duty to the Labusovs to do so. In failing to perform this duty, the Labusovs suffered damages that were proximately caused by Seiden, Cilento and Estrin.

In reply, Seiden and Cilento assert that Bachner offers caselaw regarding indemnification claims where the attorneys all represented the same client whereas here Seiden and Cilento were opposing counsel in the underlying action. Seiden and Cilento maintain that there was no relationship between them and Bachner that gave rise to a duty of care to Bachner. Seiden and

Cilento further contend that although Bachner cites many cases of attorney indemnification, his cases are tort claims. Because the Labusovs seek relief limited to the value of the IRA account, Seiden and Cilento contend the Labusov claims are actually contract claims masquerading as tort claims, thus Bachner's caselaw is not applicable to the circumstances at hand.

In a separate reply, Estrin asserts virtually the same arguments as his co-defendants.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted])

“Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,” (*Leon v Martinez*, 84 NY2d 83, 88).

“Dismissal under CPLR 3211(a)(7) is warranted if the 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” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 150 NYS3d 79 [2021] [internal citations and quotations omitted]).

The Court grants the motions to dismiss. There is no basis to find that Seiden, Cilento, and Estrin liable for indemnification or contribution. Bachner acted as the attorney for Redfern and the escrow agent, and the underlying litigation was settled, including a provision that the Labusovs receive the contents of the account if Redfern did not pay. If the Labusovs' attorneys had an obligation to verify the actual value of the account so their client would not be left with nothing, then that duty was to the Labusovs, not to Bachner. Bachner does not point to a single representation made to him by the movants which could form the basis of Bachner's causes of action against them.

In the underlying action, movants represented plaintiffs and Bachner represented defendant; opposing counsel had no tort or contractual relationship with each other. And certainly, the plaintiffs' attorney had no duty to warn the defendant's attorney that his client was a crook. No plaintiff sues a defendant because the plaintiff thinks the defendant is a great, honorable person who fulfills his obligations.

Bachner's assertion that an attorney may bring a third-party suit against another attorney for contribution and indemnification is inapposite and does not apply to the instant situation. The entire basis of this case is that the value of the account was way less than what Redfern and Equity Trust claimed. Bachner has cited no law for the proposition that the plaintiffs' attorney is liable to the defendant's attorney when the defendant lies.

Accordingly, it is hereby

ORDERED that the motions 010 and 011 by defendants Seiden Law Group LLP, Michael Cilento, and Daniel Estrin to dismiss the second third-party complaint herein is granted and the second third-party complaint is dismissed in its entirety as against said defendants, along with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is

directed to enter judgment accordingly in favor of said defendants upon presentation of proper papers therefor; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of these parties and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office within 21 days, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)].

The Court observes a conference is already scheduled in this matter for January 25, 2023 at 10:30 a.m.

By January 18, 2023, the parties shall upload a discovery update with the court via stipulation or letter detailing the areas of dispute. If nothing is uploaded by January 18, 2023, the Court may adjourn the conference or order a note of issue be filed.

12/21/2022
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
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