

**Katz v Petre Glass & Mirror Corp.**

2022 NY Slip Op 34881(U)

March 29, 2022

Supreme Court, Westchester County

Docket Number: Index No. 51644/19

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
MICHAEL KATZ,

Plaintiff,

-against-

PETRE GLASS AND MIRROR CORP.,

Defendant.

Index No.: 51644 / 19

Motion Date: 5 / 13 / 21

Motion Seq. No. 6

DECISION AND ORDER

-----X  
-----X  
PETRE GLASS AND MIRROR CORP.,

Third-Party Plaintiff,

-against-

Third-Party Action

CHRISTOPHER DAHER,

Third-Party Defendant.

-----X  
HUBERT, J.

The following documents were read on these motions by Third-Party Defendant, Christopher Daher (hereafter, "Daher"),

(A) for an order pursuant to rule 3211(a)(7) of the Civil Practice Law and Rules dismissing as against him the third-party complaint in the above-captioned third-party action, and

(B) for an order pursuant to CPLR 1007 dismissing the above-captioned third-party action as not permitted by said statute:

- Notice of Motion - Affidavits - Exhibits
- Affirmation in Opposition - Exhibit
- Reply Affidavit

Upon consideration of all of the foregoing, and for the following reasons, the motions are denied.

### Factual and Procedural Background

Plaintiff commenced the above-captioned action by filing a Complaint via the New York State Courts E-Filing system (hereafter, “NYSCEF”) on March 29, 2019, in which pleading Plaintiff alleges three separately stated and numbered causes of action for breach of contract, breach of warranty and negligence concerning Petre’s manufacture and installation of a shower enclosure in Plaintiff’s home. According to the allegations in the Complaint: Plaintiff and Petre entered into an agreement for such manufacture and installation in February 2013; upon completion of the installation Plaintiff paid Petre \$2,675.00 in full satisfaction of his obligations under the agreement; within months thereafter the enclosure began to leak; in May 2017, Petre’s Chief Executive Officer admitted to Plaintiff that the leakage problem was the result of Petre’s faulty installation, but; Petre refused Plaintiff’s request to remedy the problem unless it was paid an additional sum for the work.

On January 21, 2021, Petre commenced the above-captioned third-party action by filing via NYSCEF a Third-Party Summons and Verified Third-Party Complaint (hereafter, “Third-Party Complaint”); proof of service upon Daher was filed via NYSCEF on March 1, 2021. The Third-Party Complaint pleads four separately stated and numbered causes of action for common law indemnification, contribution, contractual indemnity, and breach of contract.

Petre alleges that “[p]rior to February 5, 2013, [Petre] entered into a contract with [Daher, and] . . . pursuant to the terms of said agreement [Daher] was to perform certain construction, repair, renovation, maintenance work, in connection with [Plaintiff’s home]” (Third-Party Complaint [NYSCEF DOC. NO. 68] at ¶¶6-7), and that the damages which Plaintiff seeks from Petre are the result of Daher’s “negligence and/or culpable conduct” in the performance of, and its failure to perform, its obligations under said contract.

In lieu of an answer, Daher made the instant motions pursuant to CPLR 3211(a)(7) and 1007 by filing via NYSCEF on April 5, 2021.

On April 21, 2021, Petre filed via NYSCEF papers in opposition to the instant motions.

On April 26, 2021, Daher filed via NYSCEF reply papers in further support of his motions.

The motions were deemed fully submitted on May 13, 2021, the date to which the original

return date had been adjourned at the parties' request.

### Discussion

The motion pursuant to CPLR 3211(a)(7) is denied.

On a motion pursuant to CPLR 3211(a)(7) to dismiss a pleading for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. However, where evidentiary material is submitted and considered on [the motion] the question becomes whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. An affidavit submitted by the movant will almost never warrant dismissal under CPLR 3211 unless it establishes conclusively that the proponent of the pleading has no cause of action. Dismissal should not eventuate unless it has been shown that a material fact as claimed by the proponent to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it (internal citations omitted) (*Cajigas v Clean Rite Cleaners, LLC*, 187 AD3d 700, 701 [2d Dept 2020]).

Accepting as true all facts alleged in the Third-Party Complaint and according Petre the benefit of every possible favorable inference therefrom, the Court determines that such facts do fit within cognizable legal theories.

Daher submits in support of his motions, two affidavits of his attorney, and four exhibits consisting of copies of the Third-Party Complaint, the Complaint, Petre's Verified Answer to the Complaint and a transcript of the examination before trial of Daher. Neither the affidavits nor the first three exhibits constitute evidentiary material, and none of the submissions – either individually or in combination – are sufficient to show that a material fact claimed by Petre in the Third-Party Complaint is not a fact at all and that no significant dispute exists regarding it.

Therefore, the motion pursuant to CPLR 3211(a)(7) for an order dismissing the Third-Party Complaint is denied.

The motion pursuant to CPLR 1007 to dismiss the third-party action as not permitted by the

statute is denied.

Pursuant to CPLR 1007, [a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant.”

Daher argues that the third-party action is not permitted for the following reasons:

[F]or Plaintiff to recover on any of the three causes of action in the underlying Complaint, Plaintiff must prove that the cause of the leak and the resulting damage was [Petre's] failure to apply a proper seal between the enclosure and the marble at the location where the marble was cut according to [Petre's] specifications (Reply Affidavit In Support Of Motion To Dismiss Third-Party Complaint [NYSCEF DOC. NO. 95] at ¶9).

Even more specifically, the underlying Complaint alleges and Plaintiff must prove that the individual who failed to apply a proper seal was [Petre's] Chief Executive Officer (*id.* at ¶10).

In this case, [Petre] can only implead Daher on grounds *arising from or conditioned upon* [the] *failure* [of Petre's Chief Executive Officer] *to apply a proper seal* (emphasis in original) (*id.* at ¶12).

Essentially, Daher contends that CPLR 1007 permits a third-party action only where the third-party plaintiff specifically alleges that the third-party defendant must indemnify the third-party plaintiff for any damages resulting from the specific conduct for which the plaintiff has alleged that the third-party plaintiff is liable to the plaintiff. This argument is unavailing.

While it is true that the doctrine of impleader has its roots in strict indemnity, . . . the device is no longer wedded to this single theory of recovery. The language of CPLR 1007 serves only to identify the persons against whom a third-party claim may be brought. It places no limit upon . . . the legal theories which may be asserted as a basis for the claim (*George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 51 NY2d 358, 365 [1980]; *see also Gair Co., Inc. v Cambridge Carpet, Ltd.*, 160 AD2d 371, 372 [1<sup>st</sup> Dept 1990] [holding that elements of claims asserted in third-party complaint may be missing from or inconsistent with claims asserted in complaint in main action]).

It is required only that “the liability sought to be imposed upon a third-party defendant must

arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action (internal quotation marks and citations omitted)” (*Sunbelt Rentals, Inc. v Tempest Windows, Inc.*, 94 AD3d 1088, 1089 [2d Dept 2012]). That is the case here.

Moreover, even assuming *arguendo* that the Third-Party Complaint was not permitted, the motion pursuant to CPLR 1007 to dismiss would not be granted. Where, as here, the claims asserted in the third-party complaint have survived a motion to dismiss pursuant to CPLR 3211(a)(7), rather than dismissal, the better practice is for the motion court to sever the third-party action from the plaintiff’s complaint (*see Qosina Corp. v C & N Packaging*, 96 AD3d 1032, 1035 [2d Dept 2012]). “The availability of another procedural remedy is, however, not a reason to narrowly construe the impleader statute” (*George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 51 NY2d at 366).

Therefore, the motion pursuant to CPLR 1007 for an order dismissing the third-party action is denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of Third-Party Defendant, Christopher Daher, pursuant to CPLR 3211(a)(7) for an order dismissing as against him the Third-Party Complaint in the above-captioned third-party action, is denied, and it is further

ORDERED that the motion of Third-Party Defendant, Christopher Daher, pursuant to CPLR 1007 for an order dismissing the above-captioned third-party action, is denied, and it is further

ORDERED that Third-Party Plaintiff, Petre Glass And Mirror Corp., shall within ten days of entry of this decision and order serve Third-Party Defendant, Christopher Daher, and Plaintiff, Michael Katz, with notice of entry, and it is further

ORDERED that Third-Party Plaintiff, Petre Glass And Mirror Corp., shall within ten days after service as aforesaid file proof of service by uploading to the New York State Courts E-Filing system, and it is further

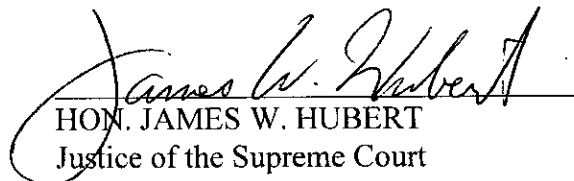
ORDERED that Third-Party Defendant, Christopher Daher, may within ten days after service of notice of entry of this decision and order as aforesaid, serve upon Third-Party Plaintiff, Petre Glass And Mirror Corp., and file via the New York State Courts E-Filing system, pleadings responsive to the Third-Party Complaint, and it is further

ORDERED that the above-captioned third-party action is hereby referred to the Preliminary Conference Part for the scheduling of a preliminary conference.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 29, 2022

ENTER,

  
HON. JAMES W. HUBERT  
Justice of the Supreme Court