SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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INTERSTATE INDEMNITY COMPANY,

Plaintiff,

- v –

EAST 77 OWNERS CO., LLC,

Defendant.

INDEX NO. 650794/2022

MOTION DATE 09/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action to recover proceeds owed pursuant to a settlement agreement and release between the plaintiff, Interstate Indemnity Company (Interstate), and defendant, East 77 Owners Co., LLC (Owners), Owners moves, pre-answer, pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the complaint in its entirety, or, in the alternative, pursuant to 22 NYCRR 1200.00 to disqualify the law firm of Bruno, Gerbino, Soriano & Aitken, LLP (BGSA), and Alfred C. Polidore, Esq. (Polidore). Interstate opposes the motion. The motion is granted in part.

II. BACKGROUND

According to the complaint, Interstate provided insurance coverage to Owners and its property at 436 East 77th Street in Manhattan (the premises) during the period from June 1, 2004, through June 1, 2005, pursuant to an insurance policy number NYP2000440 (the policy).

Interstate made payment to Owners under the policy in the sum of $800,093.97 for damages sustained at the premises as the result of a loss that occurred on January 7, 2005 (the incident). In connection with the incident, Owners and/or Interstate, as Owners' subrogee, commenced four actions in the Supreme Court, New York County, captioned (1) East 77 Owners Co., LLC v King Shah Group, Inc. et al., Index No. 603340/07, (2) East 77 Owners Co., LLC v Richard J. Zaloum, P.C., Index No. 114895/07, (3) East 77 Owners Co., LLC v Richard J. Zaloum, Index No. 600105/08, and (4) Interstate Indemnity Company, as subrogee of East 77 Owners Co. , LLC v King Shah Group, Inc. et al, Index No. 114015/07 (collectively, the litigation).

In April 2011, Interstate and Owners entered into a settlement agreement and release (the settlement agreement), pursuant to which Interstate assigned and transferred all of its rights in the litigation, including Interstate's subrogration action, to Owners. Owners agreed to pay Interstate's attorneys $30,000.00 out of the first amounts collected via settlements or judgments in the litigation and to substitute its own counsel for Interstate's counsel in the litigation. In addition, the remaining proceeds of any settlements of or judgments in the litigation actually collected by Owners were to be allocated as follows: as to all proceeds at or below $1,200,000.00, Owners was to retain 100%; and as to all proceeds above $1,200,000.00, Owners was to retain 88% and Interstate was to receive 12%. Payment was to be made to Interstate within 45 days of the collection of proceeds by Owners.

Subsequent to the execution of the settlement agreement, on or about April 19, 2012, Owners entered into an agreement with S.T.A. Parking Corp. (STA), King Shah Group, Inc. (King Shah), Certified Testing Laboratories, Inc. (CTL), and Richard J. Zaloum (Zaloum), each a defendant in the litigation, to resolve the litigation in part for the sum of $1,400,000.00 (the litigation settlement agreement). In consideration of the payments required by the agreement,

Owners was to provide releases to, and to discontinue the litigation against, King Shah, CTL, and Zaloum. Owners did not release or discontinue as against STA or any defendant other than the foregoing. Owners duly paid Interstate $24,000.00 of the $1,400,000.00 upon receipt, representing Interstate's 12% interest as allocated in the settlement agreement.

On May 25, 2012, unbeknownst to Interstate, Owners entered into a separate assignment agreement with STA (the assignment agreement). The assignment agreement describes itself as a "companion" to the litigation settlement agreement, "meant to provide additional terms solely as between" Owners and STA. Pursuant to the assignment agreement, the issue of liability between Owners and STA was to be determined by the court, with the amount of damages to be established at an inquest. Owners and STA agreed that any monies owed on judgments would be recoverable from STA solely from the proceeds of any settlements with, or judgments obtained against, any insurer of STA, or any non-settling party/ any insurer to a non-settling party to the litigation, including Lancer Insurance Company (Lancer), Federal Insurance Company (Federal), Golden Vale Construction Corp. (Golden Vale), Axis Specialty Insurance Company (Axis), and General Star Indemnity Company (General Star). Further, STA agreed to continue to pursue claims against its insurers, any non-settling party, and any insurer to a non-settling party to the litigation. This was to include STA's pursuit of an inquest on damages against Golden Vale, against whom a default judgment had been entered in the litigation. STA and Owners agreed to share the benefits of STA's recoveries in such actions as follows: Owners was to receive 40% of the proceeds, STA was to receive 20%, Owner's counsel was to receive 20%, and STA's counsel was to receive 20%.

Interstate learned from a pleading filed in a federal action brought by STA against General Star in 2019 in furtherance of the assignment agreement that on November 7, 2013,

Owners had obtained a judgment against STA in the sum of $3,417,051.19 in the litigation. Also in November 2013, STA obtained a judgment against Golden Vale in the sum of $3,848,596.62 on indemnification claims it asserted in a third-party complaint in the litigation. Axis, as Golden Vale's insurer, made payment to STA in the sum of $1,000,000.00 on October 6, 2016. Interstate further learned, based upon interrogatory responses served by STA in an action STA brought in Supreme Court, New York County, against Federal, again in furtherance of the assignment agreement, that Owners had received $1,376,842.96 from STA in January 2021.

Upon learning of the sums received by Owners, Interstate sent Owners a claim letter dated November 2, 2021, seeking payment in accordance with the settlement agreement. After it did not receive payment, Interstate commenced the instant action. Interstate seeks to recover (1) 12% of Axis's $1,000,000.00 payment to STA, since such sum constituted proceeds of insurance for Golden Vale, one of the defendants in the litigation against whom a judgment was entered (first cause of action) and (2) 12% of STA's $1,376,842.96 payment to Owners (second cause of action). In the third cause of action, Interstate seeks an accounting from Owners setting forth each and every settlement or judgment Owners have collected in connection with the litigation.

III. DISCUSSION

A. Dismissal under CPLR 3211

Owners seeks to dismiss the complaint in its entirety as barred by documentary evidence (CPLR 3211[a][1]), including the release included in the settlement agreement (CPLR 3211[a][5]), and for failure to state a cause of action (CPLR 3211[a][7]). Owners argues that the settlement agreement does not provide a basis for recovery of payments collected pursuant to the assignment agreement because the lawsuits commenced by STA pursuant to the assignment

agreement were not explicitly included in the settlement agreement and Interstate agreed to release any other claims arising from the incident or the litigation. Even if such payments were covered, Owners avers that the first cause of action should be dismissed because it is less than the $1,200,000.00 threshold provided for in the settlement agreement and that the third cause of action should be dismissed because Interstate does not state a cognizable accounting claim. The court addresses these arguments in turn.

Each of the first two causes of action asserted in the complaint sound in breach of the settlement agreement. The elements of a cause of action for breach of contract are "(1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). On its face, the complaint properly makes out each element of a breach of contract claim with respect to payments received by Owners pursuant to the assignment agreement, which Interstate avers are covered by the allocation provision of the settlement agreement.

Owners' contention that the amounts it recovered pursuant to the assignment agreement with STA are not recoverable is erroneous. The settlement agreement provides that 12% of "[t]he proceeds of any settlements of or judgments in the Litigation that are actually recovered from the defendants or their insurers" in excess of $1.2 million shall be allocated to Interstate. STA and the parties it has pursued in subsequent lawsuits were each a party to the litigation or an insurer of a party to the litigation. Owners entered into both the litigation settlement agreement, wherein it did not release its claims against STA, and the "companion" assignment agreement to resolve its claims in the litigation. Thus, each constitutes a settlement of Owners' claims in the

litigation. The proceeds Owners collects pursuant to *both* agreements are covered by the settlement agreement.

Furthermore, even if the assignment agreement is not considered a settlement within the meaning of the settlement agreement, the settlement agreement plainly provides for the recovery of amounts collected on judgments. Judgment against STA in the sum of $3,417,051.19 was entered in the litigation. However Owners chose to negotiate collection on its judgment, such collection is covered by the settlement agreement's allocation provision. Put differently, if STA and Owners never entered into the assignment agreement, there is no question that the judgment ultimately entered against STA and in favor of Owners in the litigation would be recoverable by Interstate, if collected. Owners does not avoid its obligations under the settlement agreement by subsequently agreeing to collect on such judgment via payments made to STA by other parties to the litigation and their insurers.

Nor does Owners establish that the settlement agreement is inapplicable because the sum purportedly paid by Axis is less than $1,200,000.00. The settlement agreement provides that allocation is required when the proceeds of any settlements of or judgments in the litigation that are actually recovered are above $1,200,000.00. It refers to "proceeds" broadly and nowhere indicates that the threshold applies to discrete payments towards a total judgment or settlement amount. Since Owners have collected well over $1,200,000.00 in connection with judgments and settlements in the litigation, Interstate is entitled to its percentage allocation on all further collections.

As to Owners' release argument, Paragraph 3 of the settlement agreement provides that Interstate releases and forever discharges Owners from "any and all claims, rights, damages, debts, liabilities, accounts, attorneys' fees, obligations, costs, expenses, liens, actions, and causes

of action of every kind and nature whatsoever… arising out of, based upon, by reason of, or in any way involving the Incident and Litigation, *except those rights specifically set forth in this agreement*." (emphasis added). Interstate's claims are based in their entirety upon the rights conferred to it in Paragraph 9 the settlement agreement. Thus, they are expressly carved out from ambit of the release.

Owners correctly contend, however, that no cause of action for an accounting lies where, as here, there has been no allegation of a fiduciary or confidential relationship, money entrusted to the defendant imposing the burden of an accounting, the absence of a legal remedy, or a demand and refusal. See Metropolitan Bank & Trust Co. v Lopez, 189 AD3d 443, 446 (1st Dept. 2020). In demanding that Owners provide information regarding monies it has collected in connection with the litigation, Interstate's equitable cause of action for an accounting appears more like a discovery demand on the issue of damages which may be made during the normal course of discovery. The third cause of action is dismissed.

B. Disqualification under 22 NYCRR 1200.00

"Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131 (1996). Thus, a party seeking to disqualify an attorney for an opposing party on the ground of a conflict of interest has the burden of demonstrating: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. See Tekni-Plex, Inc. v Meyner & Landis, supra; Mediaceja v

Davidov, 119 AD3d 911 (2nd Dept. 2014); Campbell v McKeon, 75 AD3d 479 (1st Dept. 2010); Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9.

The sole basis for disqualification propounded by Owners is that BGSA and Polidore represented Interstate, as Owners' subrogee, in one of the actions comprising the litigation. Owners does not allege any facts that would support the formation of an attorney-client relationship between Owners and BGSA or Polidore based on such representation. To be sure, it is black-letter law that a subrogee succeeds to the position of a subrogor and stands in the subrogor's shoes, (see Millenium Holdings, LLC v Glidden Company, 176 AD3d 423, 423 [1st Dept. 2019]); the subrogee does not merge with the subrogor. Nor does Owners identify any authority for its proposition that an attorney-client relationship is automatically formed between counsel for a subrogee and a subrogor. The branch of Owners' application seeking to disqualify BGSA and Polidore is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of East 77 Owners Co., LLC, pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the complaint in its entirety, or, in the alternative, pursuant to 22 NYCRR 1200.00 to disqualify the law firm of Bruno, Gerbino, Soriano & Aitken, LLP, and Alfred C. Polidore, Esq., is granted to the extent that the third cause of action of the complaint, seeking an accounting, is dismissed, and the motion is otherwise denied; and it is further

ORDERED that East 77 Owners Co., LLC, shall file an answer to the remaining causes of action within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference, to be held via Microsoft Teams, on March 9, 2023, at 11:30 a.m.

This constitutes the Decision and Order of the court.

DATED: January 6, 2023

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON