

**AIG Prop. Cas. Co. v Cohen**

2023 NY Slip Op 33726(U)

October 23, 2023

Supreme Court, New York County

Docket Number: Index No. 150395/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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AIG PROPERTY CASUALTY COMPANY a/s/o  
SHERMAN INVESTORS 2020 LLC, EDWARD  
PANTZER and PAMELA PANTZER,

Plaintiffs,

- v -

GLORIA COHEN, MILLER & RAVED, INC., and  
FORWARD MECHANICAL CORP.,

Defendants.

-----X

FORWARD MECHANICAL CORP.

Third-Party Plaintiff,

-against-

Z.W. PLUMBING & HEATING CORP. and ON SITE  
DEMOLITION & TRUCKING, CORP.

Third-Party Defendants.

-----X

MILLER & RAVED, INC.

Second Third-Party Plaintiff,

-against-

Z.W. PLUMBING & HEATING CORP., and ON SITE  
DEMOLITION & TRUCKING, CORP.

Second Third-Party Defendants.

-----X

FORWARD MECHANICAL CORP.

Third Third-Party Plaintiff,

-against-

THE RITZ TOWER, INC., THE BOARD OF DIRECTORS OF  
THE RITZ TOWER, INC., RICHARD A. VEFFER, MANAGING  
DIRECTOR C/O THE BOARD OF DIRECTORS OF THE RITZ  
TOWER, INC.

Third Third-Party Defendant.

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INDEX NO. 150395/2022  
MOTION DATE 03/07/2023  
MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595650/2022

Second Third-Party  
Index No. 595131/2023

Third Third-Party  
Index No. 595559/2023

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, and after oral argument which occurred on May 23, 2023 with Lawrence B. Lambert, Esq. appearing for Plaintiffs AIG Property Casualty Company a/s/o Sherman Investors 2020 LLC (“AIG”), Edward Pantzer and Pamela Pantzer (together “Plaintiffs”), Robert Fumo, Esq. appearing for Second Third-Party Plaintiff Miller & Raved, Inc. (“Miller”), Patricia Lynn DeSalvo, Esq. appearing for Second Third-Party Defendant On Site Demolition & Trucking Corp. (“On Site”), and Kimberly A. Miller, Esq. appearing for Defendant/Third-Party Plaintiff Forward Mechanical Corp. (“Forward Mechanical”), On Site’s motion for an Order, pursuant to CPLR 3211(a)(1), 3211(a)(5), and 3211(a)(7), dismissing Miller’s Second Third-Party Complaint (NYSCEF Doc. 65), is denied, in its entirety.

### **I. Factual and Procedural Background**

The pending motion arises out of an underlying action involving alleged property damages sustained on August 2, 2021 in connection with plumbing work performed at a construction project located at 101 East 57th Street, NYC a/k/a/ 465 Park Avenue, NYC (the “project”) (NYSCEF Doc. 87 at p. 6). On January 13, 2022, Plaintiffs commenced an action for monetary damages against Cohen, Miller, and Forward Mechanical (together “Defendants”) alleging, *inter alia*, that prior to August 2, 2021, “Miller was retained to perform certain construction and/or renovation work...in the Cohen Unit,” and “Forward was retained to perform certain plumbing work in connection with the [r]enovation [w]ork in the Cohen [u]nit, which included, but was not limited to, placing a metal plug and/or cap...in a riser pipe located in the vicinity of the Cohen unit” (NYSCEF Doc. 1 ¶¶ 10-11). The Complaint further alleges that on August 2, 2021, “the Plug installed by Miller and/or Forward and/or their agents, representatives,

employees and/or servants failed...and water flowed out of the...riser pipe and into and throughout” Apartment 10B (the “Sherman Unit”) at the Project, “causing damages to the Sherman Unit and the property contained therein” (NYSCEF Doc. 1 at ¶12).

On February 14, 2023 Miller filed a Second Third-Party Summons and Complaint against Second Third-Party Defendants Z.W. Plumbing & Heating Corp. (“Z.W.”) and On Site, alleging a first cause of action for common-law indemnification and a second cause of action for contribution. (NYSCEF Doc. 65 at pp. 11-14). Specifically, Miller’s Second Third-Party Complaint alleges that “prior to the subject alleged incident, demolition work was performed at the building and on the eleventh floor units by the second third-party defendants at the subject property at 465 Park Avenue in New York, New York” (NYSCEF Doc. 65 at ¶10). Miller’s Second Third-Party Complaint further asserts that “in connection with their work, the Third-Party Defendants’ employees removed metal piping and/or placed, or caused, or interfered with, and/or removed the metal plug in the subject pipe riser capping off a branch line to a fixture / appliance to the eleventh floor unit that later deteriorated due to the improper configuration of the plug within the subject pipe riser and caused the damages complained of by Plaintiff” (NYSCEF Doc. 65 at ¶11). On March 8, 2023 Z.W. filed a Verified Answer to Miller’s Second Third-Party Complaint (NYSCEF Doc. 88).

On March 7, 2023 On Site brought the instant motion to dismiss Miller’s Second Third-Party Complaint in its entirety (NYSCEF Doc. 71). In support of its motion, On Site filed an Affidavit of Isuf Rexhaj, the Principal and Owner of On Site (NYSCEF Doc. 72), an Affirmation of On Site’s attorney Patricia Lynn Desalvo, Esq. (NYSCEF Doc. 73) and a Memorandum of Law (NYSCEF Doc. 87). Miller filed an Affirmation in Opposition dated March 29, 2023 (NYSCEF Doc. 89). On April 3, 2023 On Site filed an Affirmation in Reply (NYSCEF Doc. 96).

## II. Discussion

On Site moves to dismiss Miller's Second Third-Party Complaint on the grounds that: (1) pursuant to CPLR 3211(a)(1) a defense is founded upon documentary evidence; (2) pursuant to CPLR 3211(a)(5) Miller's action may not be maintained because the applicable statute of limitations has run; and (3) pursuant to CPLR 3211(a)(7) Miller's pleading fails to state a cause of action (NYSCEF Doc. 71).

### A. On Site's Motion to Dismiss Pursuant to CPLR 3211(a)(1) is Denied

CPLR 3211(a)(1) states that a party "may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." It is well settled that a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

On Site contends that the NYC Department of Building ("DOB") permits and contract "both clearly and unequivocally demonstrate that On Site had no involvement in the plumbing phase of the project" (NYSCEF Doc. 87 at p. 12). Specifically, On Site argues that the DOB permits and contract indicate that On Site's role was strictly limited to demolishing "[e]xisting partitions and plumbing fixtures" (NYSCEF Doc. 87 at pp. 12-13). The DOB records conclusively establish that On Site was to perform demolition of "existing partitions and

plumbing fixtures to be demolished on part of the 11<sup>th</sup> floor in space occupied by Cohen Residence” (NYSCEF Doc. 81 at p. 74). However, the documentary evidence proffered by On Site fails to definitively contradict Miller’s allegation that “in connection with their work, the Third-Party Defendants’ employees removed metal piping and/or placed, or caused, or interfered with, and/or removed the metal plug in the subject pipe riser...that later deteriorated due to the improper configuration of the plug within the subject pipe riser and caused the damages complained of by Plaintiff” (NYSCEF Doc. 65 at ¶11).

**B. On Site’s Motion to Dismiss Pursuant to CPLR 3211(a)(5) is Denied**

CPLR 3211(a)(5) provides for dismissal of an action based upon the expiration of the applicable statute of limitations (*see Hahn v Dewey & LeBoeuf Liquidation Trust* 143 AD3d 547 [1st Dept 2016]). It is well settled that indemnification claims “do not accrue for the purposes of the Statute of Limitations until the party seeking indemnification has made payment to the injured person. This principle stems from the nature of indemnification claims and does not vary according to the breach of duty for which indemnification is sought” (*McDermott v New York*, 50 NY2d 211, 216 [1980]). In *McDermott*, the Court of Appeals held that in the context of an action for indemnification, “since the cause of action is not complete until loss is suffered, familiar Statute of Limitations principles dictate that accrual occurs upon payment by the party seeking indemnity (*McDermott* at 217). The Appellate Division has held that although

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at one time it was thought that the cause of action for indemnity could not be brought by impleader in the main action since the indemnity claim was premature, it is well settled that an indemnity claim may be asserted in the main case by a third-party action... The impleader of a third-party defendant does not vitiate the requirement of a showing of actual loss before there may be recovery but does permit an indemnitee to obtain a conditional judgment fixing the potential liability without the need for payment until it is shown that the judgment fixing the potential liability without the need for payment until it is shown that the judgment in the principal action has been satisfied in whole or in part (*DiPerna v American Broadcasting Cos.* 200 AD2d 267, 270-271 [1st Dept 1994])[internal citations omitted].<sup>1</sup>

Accordingly, because claims for common law indemnification and contribution do not accrue until a payment by the party seeking indemnity and contribution has been made, the Statute of Limitations serves as no bar to Miller's Third-Party action for common law indemnity and contribution (*McDermott* at 219).

C. On Site's Motion to Dismiss Pursuant to CPLR 3211(a)(7) is Denied

CPLR 3211(a)(7) states that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "the pleading fails to state a cause of action." When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d

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<sup>1</sup> See *American Constr., Inc. v Cirocco & Ozzimo, Inc.* 205 AD3d 568, 570 [1st Dept 2002] (holding that while "claims for indemnification and/or contribution do not accrue for purposes of the statute of limitations until the party seeking indemnification and/or contribution has made payment to the injured person... indemnification or contribution claims may be asserted by way of a third-party action, even if technically premature.")

358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted only if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Pursuant to the standard of analysis on a pre-answer motion to dismiss for failure to state a claim, On Site's motion to dismiss Miller's second third-party claim for contribution is denied. CPLR 1401 states that "two or more persons who are subject to liability for damages for the same...injury to property...may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." The Court of Appeals has held that "the existence of some form of tort liability is a prerequisite to [the] application of [CPLR 1401]" (*Board of Education v Sargent, Webster, Crenshaw & Folley* 71 NY2d 21, 27-28 [1987]). The Court of Appeals has further held that the "critical requirement for apportionment by contribution under CPLR Article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 183 [1997]) [internal citations omitted].

Here, Miller's Third-Party Complaint asserts that "the Third-Party Defendants' employees removed metal piping and/or placed, or caused, or interfered with, and/or removed the metal plug in the subject pipe riser capping off a branch line to a fixture / appliance to the eleventh floor unit that later deteriorated due to the improper configuration of the plug within the subject pipe riser and caused the damages complained of by Plaintiff" (NYSCEF Doc. 74 at ¶11). Affording Miller the benefit of all favorable inferences, and accepting all of its allegations as true, the Court finds that Miller has successfully alleged facts which, when taken as true,

sufficiently establish that On Site's negligence in configuring the metal plug had a part in causing or augmenting the injury for which contribution is sought.

Similarly, On Site's motion to dismiss Miller's second third-party claim for common law indemnification is denied. CPLR 1007 states that "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." Affording Miller the benefit of all favorable inferences, and accepting all of its allegations as true, for the reasons outlined about with respect to miller's second third-party claim for contribution, the Court finds that Miller has successfully alleged facts which establish a cause of action for common law indemnification.

Accordingly, it is hereby,

ORDERED that Second Third-Party Defendant On Site Demolition & Trucking Corp.'s motion for an Order dismissing Second Third-Party Plaintiff Miller & Raved, Inc.'s Second Third-Party Complaint, is denied in its entirety; and it is further

ORDERED that on or before November 7, 2023, the parties are directed to submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed preliminary conference order, the parties are directed to appear for an in-person preliminary conference with the Court in Room 442, 60 Centre Street, on November 8, 2023 at 9:30 a.m.; and it is further

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ORDERED that within ten (10) days of entry, counsel for Second Third-Party Defendant On Site Demolition & Trucking Corp. shall serve a copy of this Decision and Order, with notice of entry, on all parties to this case; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>10/23/2023</u> DATE					<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE