

**Wyden v Davidson Dawson & Clark LLP**

2024 NY Slip Op 32122(U)

June 24, 2024

Supreme Court, New York County

Docket Number: Index No. 154565/2022

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M**

*Justice*

-----X

NANCY BASS WYDEN, IN HER CAPACITY AS THE  
EXECUTOR OF THE ESTATE OF PATRICIA BASS AND  
TRUSTEE OF THE PAT AND FRED BASS FAMILY  
FOUNDATION,

Plaintiff,

- v -

DAVIDSON DAWSON & CLARK LLP, LOUISE  
FITZSIMONS,

Defendant.

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DAVIDSON DAWSON & CLARK LLP, LOUISE FITZSIMONS

Plaintiff,

-against-

RAICH ENDE MALTER & CO. LLP,, EISNERAMPER LLP,,  
EISNER ADVISORY GROUP LLC,, ROBERTO VICECONTE,  
CPA,, CHARLES RAICH, CPA,, NANCY WYDEN

Defendant.

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INDEX NO. 154565/2022

MOTION DATE 12/06/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595597/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISSAL.

In May 2022, plaintiff Nancy Bass Walden, as the Executor of the Estate of Patricia Bass (hereinafter, “the Estate”) and Trustee of the Pat and Fred Bass Foundation (“the Foundation”), commenced this legal malpractice action against Davidson, Dawson, & Clark LLP and attorney Louise Fitzsimons (together, “defendants”). Plaintiff alleges that, due to defendants’ malpractice, the Estate incurred a \$4.6 million tax liability that it otherwise would not have owed and, consequently, was unable to fund a planned \$10 million gift to the Foundation. Defendants filed their answer in July 2022 and, in relevant part, asserted comparative negligence as an affirmative defense. Thereafter, in June 2023, defendants commenced a third-party action against accountants Raich Ende Malter & Co. LLP, EisnerAmper LLP and Eisner Advisory Group LLC (“Eisner”), Roberto Viceconte, Charles Raich, and Wyden in her individual capacity (collectively, “Third-Party Defendants”). In this motion sequence (001), third-party defendants

(with the exception of Wyden) move to dismiss the third-party action pursuant to CPLR 3211 (a) (7). Defendants oppose the motion in its entirety. For the following reasons, the motion is granted in part.

## BACKGROUND

As a partner of Davidson, Dawson & Clark (“Davidson”), Louise Fitzsimons has represented Patricia Bass with legal services for approximately twenty-five years. In September 2019, Raich Ende Malter & Co (“Raich Ende”) recommended that Bass revise her estate plan, including her will, to create a charitable lead annuity trust (called a CLAT)—which would fund the Foundation—and to provide it with an initial \$10 million testamentary gift. (NYSCEF doc. no. 1 at ¶ 28, complaint.) According to the complaint, the testamentary gift would carry with it an equal reduction in the Estate’s New York and federal tax obligations. (*Id.* at 30.) Similarly, the charitable purposes that the Foundation would fund through the gift would reduce the Estate’s tax obligation by approximately \$4.6 million. (*Id.* at 31.)

After seeking Fitzsimons and Davidson’s advice concerning the legal implications of the proposed plan, Bass and Wyden, her daughter, communicated that she wanted to move forward with creating and funding the Foundation. (*Id.* at 34-36.) In November 2019, Fitzsimons and Dawson prepared an amended will, which included the \$10 million gift to the CLAT, and the paperwork to form the Foundation. (*Id.* at ¶¶ 46-48.) According to the complaint, an accountant for third-party defendant Raich Ende attended a meeting at Bass’ home where she was to sign the two documents. (*Id.* at ¶ 49.) However, Bass was only provided the paperwork to create the Foundation—not the Amended Will. Accordingly, she formed the Foundation as intended, but not the CLAT which funded it. (*Id.* at ¶ 53.)

Bass died on June 1, 2020, without executing the Amended Will. (*Id.* at 58.) The Estate then retained Fitzsimons and Davidson to provide legal services concerning Bass’ will. Whether or not they were aware that Bass had not created the CLAT, Fitzsimons and Davidson failed to advise the Estate that it could still make a “qualified disclaimer” of \$10 million within nine months of her death, which would have allowed the Estate to fund the Foundation and receive the associated tax savings. (*Id.* at 65.)

After Bass’s Estate commenced this action for legal malpractice, defendants/third-party plaintiffs Fitzsimons and Davidson answered and asserted comparative negligence as an affirmative defense. (NYSCEF doc. no. 12, answer with counterclaims, fifth affirmative defense, seventeenth affirmative defense.) They then impleaded Raich Ende, Eisner, Viceconte, Charles Raich, and Wyden. In relevant part, defendants/third-party plaintiffs allege that they (1) drafted the Amended Will and the Foundation formation documents and (2) sent both to Wyden, Viceconte, and Raich—all of whom had “held themselves out” as Bass’ agents—for comment. (NYSCEF doc. no. 25 at ¶ 30, 33, third-party complaint.) On November 5, 2019, Fitzsimons emailed all three asking whether they wanted to execute the documents together but did not hear back. (*Id.* at ¶ 36.) She alleges that she was not given the direction needed to move forward with the will from either Wyden or Raich. (*Id.* at ¶ 39.) At the November 12th meeting, Fitzsimons alleges that Bass and Wyden met with Viceconte and executed only the finalized Foundation documents (*id.* at ¶ 41) and that, as a result, “Nancy, Viceconte, and Raich all failed to carry out

their respective duties as agents of [Bass] in neglecting to ensure that all necessary documents for Will execution were in their final form and ready for execution.” (*Id.* at ¶ 42.) Or, as they assert in paragraph 51-52, third-party defendants “were negligent in supervising the employees... of [Raich Ende], who provided accounting services to one or more of the plaintiffs.” (*Id.* at ¶¶ 51-52.) Defendants/ Third-Party Plaintiffs Fitzsimons and Davidson assert common-law contribution and indemnification claims against each third-party defendant. In this motion sequence, third-party defendants move to dismiss both claims pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

## DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) The Court is not required to accept factual allegations that consist of bare legal conclusions or that are inherently incredible. (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016].) A court’s inquiry is limited to assessing the legal sufficiency of the plaintiff’s pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

### *Contribution Cause of Action*

Third-party defendants’ motion to dismiss under CPLR 3211 (a) (7) is premised on the fact that, where a defendant has raised the plaintiff’s negligence as an affirmative defense to its own liability, they may not simultaneously seek contribution from their agent. (*See Whitney Group, LLC v Hunt-Scanlon Corp.*, 2010 NY Slip Op. 33805 [U] at \*11-12 [Sup. Ct. NY County 2010], citing *Hercules Chem. Co. v N. Star Reinsurance Corp.*, 72 AD2d 538, 538 [1st Dept 1979].) As the First Department explained, since any culpable conduct on the agent’s part is attributable to the plaintiff under agency principles, the comparative negligence affirmative defense affords the defendant all the protection to which they are entitled. (*Id.*) As such, the contribution claim becomes duplicative and must be dismissed. (*Id.*) On the other hand, if there is a question as to whether the third-party defendants are, in fact, the plaintiff’s agents, the third-party claim will not be considered duplicative. (*Rubin v Duncan, Fish, & Vogel, L.L.P.*, 176 AD3d 609, 609 [1st Dept 2019], citing *Millennium Import, LLC v Reed Smith*, 104 AD3d 190, 196 [1st Dept 2013].)

Here, third-party defendants contend that dismissal is warranted because (1) defendants/third-party plaintiffs’ theory of liability is *solely* based on Raich Ende et. al. being agents to Bass, and (2) by asserting a comparative negligence defense against plaintiffs, defendants/third-party plaintiffs are adequately protected against liability for their alleged negligence as Bass’ agents. In opposition, Fitzsimons and Davidson rely upon paragraphs 51 and 52 of their third-party complaint, which, in their view, demonstrate that their contribution claim is also based upon third-party defendants’ professional malpractice. To reiterate, these paragraphs allege:

“Third-Party Defendants engaged in culpable conduct, violation of statutory duties, breach of contract, misrepresentation, negligence, or other tortious conduct *in providing accounting services to one or more the plaintiffs*. Viceconte and Raich were negligent in supervising the employees, servants, or agents of Third-Party Defendant [Raich Ende], *who provided accounting services to one or more of the plaintiffs*.” (NYSCEF doc. no. 25 at ¶¶ 51-52 [emphasis added].)

Since they allege that Raich Ende et. al committed professional malpractice when representing Bass, Fitzsimons and Davidson contend that their contribution claim is not duplicative of their comparative negligence affirmative defense. The Court agrees. In *Millennium Import, LLC*, a defendant law firm—after having asserted comparative negligence against the plaintiff—impleaded contribution claims against three other law firms based on the allegation that they gave erroneous advice to the plaintiff that contributed to its losses. (*Millennium Import*, 104 AD3d at 192.) The First Department concluded that the defending law firm could maintain the third-party actions even in the presence of the affirmative defense. “[W]here, as here, a defendant charged with legal malpractice has a viable claim against other law firms that represent its client for concurrent or successive malpractice contributing to the client’s damages, the defendant law firm is not necessarily ‘afforded all the protection to which it is entitled.’” (*Id.* at 196.) In this action, defendants/third-party plaintiffs may indeed be protected by the comparative negligence affirmative defense to the extent that Raich Ende et. al. were Bass’ agents. However, the complaint adequately alleges that third-party defendants committed concurrent or successive professional malpractice as Bass’ accountants by failing to provide her with the Amended Will that Fitzsimons and Davidson drafted. Since liability on a professional malpractice theory cannot be imputed to plaintiff, were the Court to find the contribution claim duplicative, Fitzsimons and Davidson would have no avenue for recovery against third-party defendants and, as such, Fitzsimons and Davidson would not be fully protected against liability for any negligence on Raich Ende, et. al.,’s part that contributed to plaintiff’s injuries.<sup>1</sup> (*See Rubin*, 176 AD3d at 609.)

#### *Indemnification Cause of Action*

Fitzsimons and Davidson did not oppose the CPLR 3211 (a) (7) motion to dismiss their common-law indemnification against Raich Ende, Eisner, Roberto Viceconte, and Charles Raich. As such, this cause of action is dismissed without prejudice.

Accordingly, for the foregoing reasons, it is hereby

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<sup>1</sup> In their reply memorandum of law, third-party defendants assert that their original moving papers demonstrated that the professional malpractice claim was premised on conclusory allegations. (*See* NYSCEF doc. no. 59 at 2, reply.)

ORDERED that the branch of third-party defendants' motion to dismiss defendant/third-party plaintiffs' contribution cause of action pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that the branch of third-party defendants' motion to dismiss defendant/third-party plaintiffs' indemnification cause of action pursuant to CPLR 3211 (a) (7) is granted; and it is further

ORDERED that counsel for third-party defendants shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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6/24/2024  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE