

4305 Ave. H Corp. v Auto Serv. By S

2024 NY Slip Op 33708(U)

October 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 518126/2024

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of October 2024

HONORABLE FRANCOIS A. RIVERA

-----X
4305 AVENUE H CORPORATION

Plaintiff,

- against -

AUTO SERVICE BY S and SHMUEL GANCZ,

Defendants.

-----X
SHMUEL GANCZ

Defendant/Third-Party Plaintiff

- against -

DANIEL SCHONBRUN,

Third-Party Defendant

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on January 4, 2024, under motion sequence five, by Daniel Schonbrun (hereinafter Shonbrun or the movant) for an order pursuant to CPLR 3211(a)(1), (5) and (7) granting the movant’s motion to dismiss the defendant/third party complaint of Schmucl Gancz (hereinafter Gancz). The motion is opposed by Gancz.

- Notice of motion
- Affirmation in support
 - Exhibits A-C
- Affidavit of Shonbrun in support
 - Exhibits A-B
- Affirmation in opposition
- Affirmation in reply

¹ By notice of motion filed on November 17, 2023, Gancz sought an order severing the third-party action from the main action. By order issued on May 2, 2024, the Court granted the motion and severed the third-party action under index number 520031/2022 from the main action. The severed third-party action was assigned a new index number 518126/2024. By order issued October 10, 2024, all pleading filed under the prior index number of 520031/2022 are deemed filed under the new index number of 518126/2024.

DECISION & ORDER

Index No.: 518126/2024¹

BACKGROUND

On July 14, 2022, the plaintiff commenced the instant action by filing a summons and verified complaint with the King's County Clerk's office (KCCO). On August 30, 2022, defendant Gancz joined issue by interposing and filing a verified answer with the KCCO.

On August 30, 2022, defendant Gancz filed a third-party summons and verified third party complaint against Schonbrun with the KCCO. On October 31, 2022, Schonbrun filed a verified answer to the third-party complaint with the KCCO.

By order issued on October 4, 2023, the motion by Gancz to amend the third-party complaint was granted. The Court deemed third-party defendant Schonbrun served with the amended third-party complaint and gave Schonbrun thirty days from the entry of the order to answer the amended third-party complaint.

In lieu of answering the amended third-party verified complaint, Schonbrun filed the instant motion seeking to dismiss the amended third-party verified complaint pursuant to CPLR 3211 (a) (1), (5) and (7) with the KCCO.

The amended third-party verified complaint contains twenty-four allegations of fact in support of four denominated causes of action. The first cause of action is for breach of contract. The second cause of action seeks a declaratory judgment for contractual indemnity. The third cause of action is for common law indemnity. The fourth cause of action is for contribution.

The amended third-party verified complaint alleges the following salient facts. Approximately ten years ago, Gancz owned and operated an auto repair business, Auto Service By S, Inc. (hereinafter "Auto Service"), jointly with Schonbrun. On or about July 1,

2010, Gancz sold his interest in Auto Service to Schonbrun. In or about October 2009, 4305 Avenue H Corporation (hereinafter "Avenue H"), as landlord, and Auto Service, as tenant, had entered a lease (hereinafter the "lease") for the premises of 4305 Avenue H, Brooklyn, New York, 11210, Block 07727, Lot 0005 (the "premises"). Auto Service had extended their option to extend the Lease of the Premises by five years, and later became a month-to-month occupant once the lease extension expired. In or about October 2009, Gancz guaranteed to Avenue H, payment under the lease with Avenue H.

When Gancz sold his interest in Auto Service to Schonbrun, Schonbrun agreed to have Gancz released from his guaranty, and implicitly agreed to indemnify, and to hold Gancz harmless from all claims and damages under the lease.

According to the underlying complaint of Avenue H, the following occurred. In or about January 2020, Avenue H commenced a holdover summary proceeding in Kings County and was granted possession of the premises. Auto Service and Gancz failed to vacate the premises before the agreed upon date of March 31, 2021. In or about January 2022, the landlord and tenant Court issued a judgment of possession in favor of Avenue H, and a warrant of eviction was issued on February 8, 2022. After Auto Service's bankruptcy case was filed on February 10, 2022, and later dismissed on May 20, 2022, Auto Service was evicted from the premises on July 6, 2022. Auto Service was obligated to pay for the use and occupancy of the premises while it remained in possession, its share of real estate taxes, its share of water and sewage charges, as well as all attorney's fees incurred in connection with the various actions to which it was a party. In or about July 2022, Avenue H commenced the

instant action under index no. 520031/22 for breach of contract and monetary damages

arising out of Auto Service's failure to pay the amounts due under the lease. Gancz filed an answer in the main action.

The terms of the sale agreement between Gancz and Schonbrun state that Gancz would no longer remain an owner in the business and that all leases, partnership agreements, operating agreements and any other agreement that was currently in place pertaining to the business, shall be dissolved and Gancz's name taken off within a reasonable time. Thus, all leases, partnership agreements, operating agreements and any other agreements that were in place at the time Gancz was bought out by Schonbrun were supposed to be dissolved, and Gancz to be released from the guarantees.

LAW AND APPLICATION

Schonbrun seeks an order pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the amended third-party complaint of Gancz. It is more efficient to first evaluate whether the verified complaint pleads a cognizable claim. If it does not, the issues of whether the action was timely commenced or whether documentary evidence provides a complete defense need not be reached.

“On a motion pursuant to CPLR 3211 (a) (7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Shah v Exxis, Inc.*, 138 AD3d 970, 971 [2d Dept 2016]). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not

whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852 [2d Dept 2012]).

“Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Silvers v Jamaica Hosp.*, 218 AD3d 817, 818 [2d Dept 2023], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). “Unlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties’ evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings” (*Silvers*, 218 AD3d at 818).

Breach of Contract

“The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*We Transp. v Westbury Union Free Sch. Dist.*, 219 AD3d 865 [2d Dept 2023]).

“[T]o state a cause of action to recover damages for a breach of contract, the plaintiff’s allegations must identify the provisions of the contract that were breached” (*Pierce Coach Line, Inc. v Port Wash. Union Free Sch. Dist.*, 213 AD3d 959, 960 [2d Dept 2023], citing *NFA Group v Lotus Research, Inc.*, 180 AD3d 1060, 1061 [2d Dept 2020], quoting *Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 751 [2d Dept 2011]).

Gancz admitted in the third-party complaint that in October 2009, Avenue H, as
landlord, and Auto Service, as tenant, had entered a lease for the premises of 4305 Avenue

H, Brooklyn. In or about October 2009, Gancz guaranteed to Avenue H, payment under the lease with Avenue H.

On July 1, 2010, Gancz entered a written contract with Schonbrun in which Schonbrun bought out Gancz from the auto repair business for \$30,000.00. Gancz claims that Schonbrun violated paragraph five of the written contract by not terminating his guaranty obligation with Avenue H.

The specific provision states:

“Shmuel agrees that upon the signing of this Receipt and Memorandum, he will no longer remain an owner in the business and that all leases, partnership agreements, operating agreements an [sic] any other agreement that is currently in place pertaining to the business, shall be dissolved and his name taken off within a reasonable time.”

The cited paragraph, however, did not and could not operate to release Gancz from his guaranty with Avenue H. Avenue H was not a party to the sales agreement and not bound by the agreement between Gancz and Schonbrun. Nor did the language in the cited paragraph provide that Schonbrun would make himself responsible for the guaranty that Gancz entered with Avenue H. Such a promise to be enforceable had to be in writing and executed by the person to be charged (General Obligations Law § 5-701(a) (2); *see also Schulman v Westchester Mechanical Contractors, Inc.*, 56 AD2d 625 (2d Dept 1977). Also, such a promise had to be clear and explicit (*PNC Capital Recovery v Mechanical Parking Systems, Inc.*, 283 AD2d 268 (1st Dept 2001). Here, there is no explicit promise by which Schonburn to make himself responsible for Gancz’s debts or obligations to third parties.

The explicit language of sales agreement itself establishes that Schonbrun did not promise to take over Gancz’s debt. Therefore, Gancz claim that Shonbrun breached the sales

agreement by not assuming Gancz's debts and obligations is flatly contradicted by the agreement itself.

Contractual Indemnity

Gancz cites the same language in the sales agreement in support of the second cause of action. The second cause of action seeks a declaration that Schonburn. is contractually obligated to indemnify Gancz for any claims asserted by Avenue H against him. For the same exact reason, the agreement does not contractually bind Schonbrun to indemnify Gancz.

Common Law Indemnity

“[T]o establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor. . .was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury” (*Zubaidi v Hasbani*, 136 AD3d 703, 704 [2d Dept 2016], quoting *Wahab v Agris & Brenner, LLC*, 102 AD3d 672, 674 [2d Dept 2013]). “Indemnification is the right of one party to shift the entire loss to another and may be based upon an express contract or an implied obligation. The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party” (*Lamela v Verticon, Ltd.*, 185 AD3d 1319, 1321-22 [3d Dept. 2020]).

The instant third-party complaint is premised on a written agreement between Gancz and Schonbrun and its alleged breach. The action is premised on contract theory and not on

tort liability. Consequently, issues of negligence and common law indemnity do not apply to the action.

Contribution

“[C]ontribution arises automatically when certain factors are present and does not require any kind of agreement between or among the wrongdoers” (*Fox v County of Nassau*, 183 AD2d 746, 747 [2d Dept 1992], quoting Siegel, N.Y. Prac. § 169 [Jan. 2017 Update]). “Indemnity, on the other hand, arises out of a contract which may be express or may be implied in law to prevent a result which is regarded as unjust or unsatisfactory” (*Fox*, 183 AD2d at 747, quoting *Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985]). “Further, where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent. . . . Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy” (*Fox*, 183 AD2d at 747 [internal quotations omitted], citing *Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988], quoting *D’Ambrosio v City of New York*, 55 NY2d 454, 462 [1982]). “Whether indemnity or contribution applies depends not upon the parties’ designation but upon a ‘careful analysis of the theory of recovery against each tort-feasor’ (*Fox*, 183 AD2d at 747, quoting *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568 [1987]).

As previously stated, the action is premised on contract theory and not on tort liability. Consequently, issues of negligence and contribution do not apply to the action.

In sum, Gancz's third-part complaint does not plead a cognizable claim against Schonbrun and is dismissed pursuant to CPLR 3211 (a) (7). Accordingly, the court does not reach the movant's motion to dismiss the action pursuant to CPLR 3211 (a) (1) and (5).

CONCLUSION

The motion by defendant third-party defendant Daniel Schonbrun for an order pursuant to CPLR 3211(a) (7) dismissing the defendant/third party complaint of Schmucl Gancz is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA