

McCallum v Westchester Ambulette Serv., Inc.

2025 NY Slip Op 31047(U)

March 21, 2025

Supreme Court, New York County

Docket Number: Index No. 159209/2018

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER **PART** **08**

Justice

-----X

ALISHA MCCALLUM, individually and on behalf of all other persons similarly situated,

Plaintiff,

INDEX NO. 159209/2018

MOTION DATE 01/28/2025

MOTION SEQ. NO. 005

- v -

WESTCHESTER AMBULETTE SERVICE, INC.,
COUNTYWIDE TRANSPORTATION, INC., and any other affiliated entities that employed Plaintiff and members of the putative class, and WAYNE SOIFER,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

WESTCHESTER AMBULETTE SERVICE, INC.,
COUNTYWIDE TRANSPORTATION, INC., and WAYNE SOIFER,

Third-Party Plaintiffs,

Third-Party
Index No. 595223/2024

-against-

UNITED SERVICE WORKERS UNION, LOCAL 455, IUJAT,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for DISMISSAL

In this class action, commenced in October 2018, plaintiff, on behalf of herself and other individuals presently or formerly employed by defendants as bus drivers, ambulette drivers, matrons and/or monitors, seeks to recover unpaid wages, minimum wages, overtime compensation, show-up pay, uniform maintenance pay, and spread of hours pay under the Labor Law and the NYCRR. In March 2024, shortly after the court granted plaintiffs' motion for class certification (MOT SEQ 004) and more than five years into this litigation, defendants (hereinafter, the "Employers") filed a third-party complaint against the plaintiffs' union, third-party defendant United Service Workers Union, Local 455, IUJAT (the "Union), asserting a

single cause of action for common-law indemnification, which they subsequently amended to include two additional causes of action for contribution and breach of the parties' collective bargaining agreement ("CBA"). The Union now moves pre-answer to dismiss the amended third-party complaint pursuant to CPLR 3211(a)(7). The Employers oppose the motion. The motion is granted.

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-42 [2017], quoting *Simkin v Blank*, 19 NY3d 46, 52 [2012]). Dismissal is warranted if "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], quoting *Connaughton*, 29 NY3d at 142).

Dismissal is warranted because the Employers fail to adequately plead any of their three causes of action. With respect to the first cause of action, "the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee," and thus "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept. 1985]; see *Esteva v Nash*, 55 AD3d 474, 475 [1st Dept. 2008] ["A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification"], quoting *Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1st Dept. 1998]). There is no factual allegation either in the underlying complaint or the amended third-party complaint that the Union had any role in the payment of the plaintiff employees' wages, or that it had anything at all to do with the Employers' alleged violations of their statutory obligations under the Labor Law to properly pay their employees.

The absence of any non-conclusory allegations of misconduct by the Union that contributed to the alleged failure to properly pay the plaintiff employees is likewise fatal to the second cause of action for contribution (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept. 2003] [“Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person.”] [internal quotation marks and citations omitted]). While the Employers insist that they “have no liability whatsoever for any judgment that the Class may obtain” and that, if they are ultimately held liable to the Class, “such liability will be due solely to the misconduct of [the] Union” (NYSCEF Doc. No. 118 [Am. Third-Party Compl.] ¶¶ 10-11; *see also id.* ¶¶ 35-40, 44-48), these allegations are bare legal conclusions not entitled to a presumption of truth (*Connaughton*, 29 NY3d at 141-42).

With respect to the Employers’ third cause of action, a breach of contract claim requires the plaintiff to demonstrate (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 Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445 [1st Dept. 2016]; *Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept. 2010]). The Employers allege the Union breached the CBA by failing to “represent Plaintiff and/or the Class with regard to the acts complained of in this action, in accordance with the CBA’s adjustment procedures” (NYSCEF Doc. No. 118 [Am. Third-Party Compl.] ¶ 53). Specifically, as explained in their motion papers and at oral argument, the Employers contend that the Union breached the CBA by allowing the plaintiff employees to commence the underlying first-party class action rather than compelling them to arbitrate their wage claims. However, review of the CBA reveals that the Union had no such duty.

Article 8 of the CBA provides, in relevant part, that:

All disputes, complaints, controversies, claims and grievances arising between the Employer and the Union, or any group of employees covered by this Agreement with respect to, concerning or growing out of the interpretation, operation, application, performance or claimed breach of any of the terms and conditions of this Agreement shall be adjusted in accordance with the following procedure:

a) The matter shall first be taken up between a representative of the Union and the Employer *after the Union becomes aware such dispute has arisen*. If the said

dispute shall not be adjusted within five (5) working days thereafter, then the grievance shall be reduced to writing by the aggrieved party and the matter *may be submitted to arbitration upon forty-eight (48) hours written notice by either party to the other.*

(NYSCEF Doc. No. 109 [CBA] at 5-6 [emphasis added]). Initially, the plaintiff employees' underlying action is based entirely on alleged statutory violations of the Labor Law and not on any alleged breach of the CBA by the Employers nor on any dispute concerning the interpretation, operation, or application of the CBA. Further, the CBA does not mandate arbitration, but merely states that a dispute "may" be submitted to arbitration should either party seek to arbitrate. The court notes in this regard that, more than six years into this litigation, the Employers have never sought to compel arbitration. Finally, the amended third-party complaint does not allege that the Union was aware of the plaintiffs' wage claims prior to the commencement of the underlying action.

The breach of contract cause of action also fails because the Employers do not adequately allege damages resulting from the Union's alleged breach (*see AmBase Corp. v 111 W. 57th Sponsor LLC*, 193 AD3d 627, 628 [1st Dept. 2021]). Other than the conclusory allegation that, "[a]s a result of the Union's breach, the Employer has been damaged in an amount to be proven at trial" (NYSCEF Doc. No. 118 [Am. Third-Party Compl.] ¶ 54), which is not entitled to a presumption of truth (*Connaughton*, 29 NY3d at 141-42), the amended third-party complaint is devoid of any explanation or detail as to how the Employers were harmed by the Union's purported breach. To the extent that it may be inferred that the damages sought by the Employers consist of the defense costs incurred in litigating this action, their breach of contract claim is barred as a matter of law by the rule against employer indemnification for Labor Law claims, as discussed further below.

It is well established that employers have no right of contribution or indemnification from third parties for claims brought against them pursuant to the Labor Law (*see Robinson v Great Performances/Artists as Waitresses, Inc.*, 195 AD3d 140, 145-46 & n.2 [1st Dept. 2021]; *Delphi Healthcare PLLC v Petrella Phillips LLP*, 158 AD3d 1329, 1329-30 [4th Dept. 2018]). The Employers' common law indemnity and contribution causes of action are thus subject to dismissal on this basis as well. So too is the breach of contract cause of action because "[a] party may not avoid this bar on indemnity by seeking indemnification damages through other legal

theories” (*Delphi Healthcare PLLC*, 158 AD3d at 1330 [dismissing complaint to the extent it sought breach of contract and tort damages for attorneys’ fees associated with an underlying Labor Law class action because seeking such relief “is a request for indemnity”]).

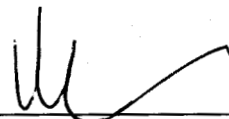
The Employers’ breach of contract claim is a transparent attempt to circumvent the rule against indemnification. The amended third party complaint makes clear that its aim is to shift the Employers’ potential liability in the first-party action onto the Union, stating that “[i]f [the Employers] are held liable to the Class in any respect, such liability will be due solely to the . . . misconduct of [the] Union”, and that “[a]s a result, [the Employers] bring this action seeking damages for breach of the CBA, equitable contribution and/or indemnification from the Union” (NYSCEF Doc. No. 118 [Am. Third-Party Compl.] ¶¶ 11-12). Indeed, as discussed above, the crux of the breach of contract claim is that the Union allowed the class action plaintiffs to commence this action rather than forcing them into arbitration. It follows that the only conceivable damages the Employers could logically seek on such a claim would consist of the costs incurred in defense of the underlying action, which is in effect a request for indemnity (*see Delphi Healthcare PLLC*, 158 AD3d at 1330).

Accordingly, it is

ORDERED that the motion is granted and the amended third-party complaint is dismissed; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

<u>3/21/2025</u> DATE			 LYNN R. KOTLER, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<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