

Lowe v Johnson
2025 NY Slip Op 35478(U)
February 24, 2025
Supreme Court, Rockland County
Docket Number: Index No. 034475/2022
Judge: Thomas P. Zugibe
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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DOLORES LOWE and DAVID D. LOWE,

Plaintiffs,

DECISION AND ORDER

Index No.: 034475/2022

-against-

Mot. Seq. No. 2

JEFFREY JOHNSON and COLLEEN JOHNSON,
LANC & TULLY ENGINEERING AND SURVEYING, P.C.,
AS TOWN CONSULTING MUNICIPAL ENGINEERS FOR
THE TOWN OF STONY POINT, AND JOHN O'ROURKE,
P.E., INDIVIDUALLY AND AS REPRESENTATIVE OF
LANC & TULLY ENGINEERING AND SURVEYING, P.C.,

Defendants.

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ZUGIBE, J.

In connection with the motion of JEFFERY JOHNSON and COLLEEN JOHNSON ("moving Defendants" or the "Johnsons") for leave to amend their Answer to assert cross-claims as against Defendants LANC & TULLY ENGINEERING & SURVEYING, P.C., AS TOWN CONSULTING MUNICIPAL ENGINEERS FOR THE TOWN OF STONY POINT ("L&T") and JOHN O'ROURKE, P.E., INDIVIDUALLY AND AS REPRESENTATIVE OF L&T ("O'Rourke") pursuant to N.Y. CIV. PRAC. L&R ("CPLR") 3025(b), the Court has read and considered the papers designated by NYSCEF as document numbers 68-72, 75, and 76, and hereby renders the following Decision and Order:

By way of brief background, this action was commenced with the filing of a Summons and Complaint with the Rockland County Clerk on October 21, 2022. NYSCEF Doc. 1. The underlying action is premised on alleged nuisance and intrusion on the property owned by the Plaintiffs. *Id.* On December 4, 2023, the moving Defendants filed an Answer that contained a counterclaim alleging private nuisance as against the Plaintiffs. NYSCEF Doc. 55. On May 20, 2024, the moving Defendants attempted to amend their Answer to include cross-claims as against Defendants L&T and O'Rourke. NYSCEF Doc. 59. L&T and O'Rourke rejected the Amended Answer, however, on the ground that it was not timely filed. NYSCEF Doc. 60. Thereafter, this Court conducted a conference, at which time counsel for the Johnsons was directed to file a motion seeking leave to amend their Answer consistent with the proposed Amended Answer filed on May 20, 2024. The instant motion practice followed.

In moving Defendants' application, they outline the bases for their proposed Amendment. They also attach the proposed Amended pleading, as required by CPLR 3025(b). In addition, they argue that the litigation is in its early stages with respect to discovery, insofar as previous motion practice and settlement negotiations have stalled the production of discovery, and as a result, the parties will suffer no prejudice by allowing the amendment.

In oppositions to the motion, L&T and O'Rourke argue that the moving Defendants have not proffered any excuse for their delay in filing the instant application, when the underlying facts were known for some time. In addition, L&T and O'Rourke submit that the proposed amendment is palpably insufficient, as it does not identify the nature of the claims asserted, but rather, only restates the claims from the Complaint and asserts that L&T and O'Rourke are somehow responsible therefor. There are not facts which establish that the Johnsons had any entitlement to contribution from L&T to begin with. L&T and O'Rourke point out that moving Defendants failed to allege that L&T owed any duty to the Plaintiff, such that a claim for contribution can withstand this motion. This Court, by Decision and Order dated May 23, 2023, dismissed this action as against the Town of Stony Point and determined that the Plaintiffs in this action have failed to establish (or even allege) the requirements of a special duty. NYSCEF Doc. 41. The proposed Amended Answer similarly is insufficient, as per L&T and O'Rourke. Therefore, L&T, an agent of the of the Town of Stony Point, owed no special duty to the Plaintiff such that they could be the subject of a contribution claim of the moving Defendants. L&T and O'Rourke argue that they cannot be liable to the moving Defendants for common law indemnification because these Defendants are being sued for their own wrongdoing. Based on the foregoing, L&T and O'Rourke submit that the application for leave to amend the Answer must be denied.

The moving Defendants did not reply to the opposition.

Generally speaking, leave to amend a pleading shall be freely given by the Court "absent prejudice or surprise to the opposing party, unless the proposed amendment is *palpably insufficient or patently devoid of merit*." *Etzion v. Etzion*, 112 A.D.3d 782, 978 N.Y.S.2d 57 (2d Dept. 2013) (emphasis supplied). When evaluating whether a motion to amend a pleading is appropriately granted, the court "shall not examine the legal sufficiency or merits of [the] pleading unless such insufficiency or lack of merit is clear and free from doubt" *Id.* (internal citations omitted); *see also, Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008).

The Court denies the Johnson's motion to amend their Answer. The Court already determined that the Plaintiffs in the underlying action failed to allege any special duty owed to it by the Town, and that the harm to the Plaintiffs was caused by the actions of the Johnsons, and not any alleged acts or omissions of the Town. NYSCEF Doc. 41. These pleading defects were fatal to the Plaintiff's Complaint as it was alleged against the Town, and therefore the Town was dismissed from this proceeding. L&T and O'Rourke did not move for dismissal at that time, and thus while they remain parties to this proceeding, there are no allegations that indicate that they were ever acting outside the scope of their role as the Town's engineer at all relevant times herein.

As per the proposed Amended Answer, Defendant L&T “was and still is appointed as the Town Consulting Municipal Engineers for the Town of Stony Point[.]” NYSCEF Doc. 59. Defendant O’Rourke “was and still is a representative of L&T.” *Id.* The Johnsons’ application to modify their property, specifically by filling a drainage easement and installing a 14 inch +/- HDPE drainage pipe, was reviewed and approved by L&T “on behalf of the Town.” Moving Defendants allege that that it was L&T’s and/or O’Rourke’s unspecified failure(s) to follow proper procedure that somehow has caused the Plaintiff’s damages, and therefore, these Defendants are liable.

“A party seeking contribution must show that the party from whom contribution is sought owed a duty either to him or to the injured party and that a breach of this duty has contributed to the alleged injuries[.]” *Crimi v. Black*, 219 A.D.2d 610, 611, 631 N.Y.S.2d 387 (2d Dept. 1995). The proposed Amended pleading is devoid of allegations regarding the existence of a duty, the manner in which it was breached, and how the breach caused the injuries. Indeed, while counsel for the moving Defendants proffers that there is a “likelihood” that a special duty may have been owed, the proposed Amended Answer does not set forth facts to support such a conclusion.

“Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his [or her] relation to the actual wrongdoer” *Morin v. Heritage Builders Group, Inc.*, 211 A.D.3d 1138, 1143, 179 N.Y.S.3d 436 (3d Dept. 2022) (internal citations omitted). “In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor’s actual negligence contributed to the accident” *Id.* at p. 1143 (internal citations omitted). Further, since the “predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine[.]” *Richards Plumbing & Heating Co., Inc. v. Washington Group Intl., Inc.*, 59 A.D.3d 311, 312, 874 N.Y.S.2d 410 (1st Dept. 2009) (internal citations omitted).

The facts alleged in the Complaint indicate that the Johnsons, without a permit or approval from the Town, unilaterally began filling in the pooling/ponding area located within the drainage easement without any municipal review in an unlawful manner. NYSCEF Doc. 1. Thereafter, the Town issued a violation notice, and subsequently a stop work order, to the Johnsons, at which time they applied for the requisite approvals, and the Town engineers became involved. Taking these facts as true, which this Court must at this stage, it cannot be said that the moving Defendants’ actions were not negligent, and that they are only responsible to Plaintiffs by reason of their relationship to L&T and/or O’Rourke. Moreover, there is no contract alleged to have been entered into between the parties that would implicate any duty of contractual indemnification.

Further and finally, the Court notes once again that the Town has been dismissed from these proceedings. There are not facts alleged whatsoever that indicate that L&T and/or O’Rourke were acting outside the scope of their duties as the Town’s engineers at the time of the complained-of events.

Based on the foregoing, this Court determines that the claims asserted as against L&T and O'Rourke in the proposed Amended Answer are palpably without merit.

Now, it is hereby

ORDERED, moving Defendant's application for leave to amend their Answer is denied in its entirety, and the document filed as NYSCEF Doc. 55 shall be deemed their Answer; and it is further

ORDERED, all counsel are directed to appear in person before the undersigned on ***Tuesday, March 11, 2025, at 9:30 a.m.*** for purposes of a compliance conference.

The above constitutes the Decision and Order of this Court.

Dated: February 24, 2025
New City, New York

ENTER:


THOMAS P. ZUGIBE, J.S.C.