Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman LLP

2012 NY Slip Op 31835(U)

July 9, 2012

Supreme Court, New York County

Docket Number: 109657/2011

Judge: Saliann Scarpulla

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[* 1] SCANNED ON 7/13/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 109657/2011
FLINTLOCK CONSTRUCTION
VS.
RUBIN, FIORELLA & FRIEDMAN LLP
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | **No(s).** ____
Answering Affidavits — Exhibits ____ | **No(s).** ____
Replying Affidavits ____ | **No(s).** ____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Motion ~~motion and cross-motion are~~ decided in accordance with accompanying memorandum decision.

FILED
JUL 12 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/9/12

[signature], J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---X

FLINTLOCK CONSTRUCTION SERVICES, LLC,

Plaintiff,

Index No.: 109657/2011
Submission Date: 2/15/12

- against-

RUBIN, FIORELLA & FRIEDMAN LLP,

DECISION AND ORDER

Defendant.

---X

For Plaintiff:
Wormser, Kiely, Galef & Jacobs LLP
825 Third Avenue
New York, NY 10022

For Defendant:
Furman Kornfeld & Brennan LLP
61 Broadway, 26th Floor
New York NY 10006

Papers considered in review of this motion to dismiss:

Notice of Motion 1
Aff in Support 2
Memo of Law. 3
Aff in Opp 4
Memo of Law 5
Reply Aff. 6
Memo of Law 7

FILED
JUL 12 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for alleged malpractice stemming from defendant Rubin, Fiorella & Friedman LLP's ("RFF") representation of plaintiff Flintlock Construction Services, LLC ("FCS") in connection with an underlying litigation, RFF moves to dismiss FCS's complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

As alleged in the complaint, FCS is a general contractor, and RFF is a law firm which was designated by FCS's insurer to represent FCS in a construction dispute.

FCS states in the complaint that on or about March 30, 2004, FCS entered into a standard AIA form contract with owner Well-Come Holdings, LLC ("Well-Come") (the "contract") for the construction of an 8-story condominium apartment project located at 106 Mott Street, in New York City (the "Mott Street project"). FCS alleges that pursuant to the contract, "FCS's responsibilities were limited and its indemnification obligations were limited to damages caused by its own conduct; it had not indemnity or other obligations with respect to the scope of work reserved for Well-Come, and . . . it had no obligations to indemnify Well-Come for Well-Come's own negligence or that of Well-Come's subcontractors or consultants." FCS also pleads that it was required to provide insurance to protect FCS and Well-Come from claims of property damage stemming from performance of the contract.

When FCS entered into the contract, it had two liability policies with American Safety Risk Retention Group ("American Safety") – a primary policy and an excess umbrella policy. The American Safety policies, FCS asserts, complied with contract coverage requirements.

As pled in the complaint, FCS was to provide primary and excess liability coverage that conformed to the limits of coverage which FCS had already procured. Well-Come was responsible for purchasing and maintaining its own "usual liability insurance"

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pursuant to paragraph 11.2.1 of the contract. Accordingly, FCS states that on or about April 23, 2004, New York Marine and General Insurance Company ("Marine") issued Well-Come a general liability policy, with a $1 million limit per occurrence, and a general aggregate limit of $2 million. FCS alleges in the complaint that the Marine policy specifies that it was issued to cover the 106 Mott Street project.

FCS alleges that during the early stages of construction at the Mott Street project in the summer of 2004, one or more "occurrences" took place which allegedly caused property damage to three adjacent property owners. These owners filed three separate lawsuits in Supreme Court, New York County, against Well-Come, FCS and some of Well-Come's subcontractors and consultants (the "underlying litigation").

Well-Come was originally defended in the underlying litigation by Marine pursuant to its liability policy. FCS was defended by American Safety, which assigned the defense to RFF. FCS alleges that at various times from 2004 through 2009, RFF defended multiple claims asserted by numerous parties against FCS at the request and direction of American Safety or American Safety Indemnity Company,[1] and that RFF regularly reported to American Safety's claims personnel about developments and strategies in the defense of the claims against FCS.

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[1] The complaint states that American Safety Indemnity Company and American Safety are affiliated companies, and American Safety Indemnity Company admitted that it issued the polices referenced in the declaratory judgment action, and that it insured FCS.

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At some point, FCS and American Safety came to an agreement whereby FCS would pay the cost of its defense in any given claim up to and including the amount of the self-insured retention under its American Safety policy. Upon exhaustion of the self-insured retention for each claim, as alleged in the complaint, American Safety would pay for FCS's defense.

On or about January 20, 2006, Well-Come initiated a declaratory judgment action in this court, titled *Well-Come Holdings, LLC v. American Safety Indemnity Company and Flintlock Construction Services, LLC*, Index No. 600184/2006 (the "declaratory judgment action"), in which Well-Come sought a declaration that American Safety and/or FCS owed Well-Come a defense and indemnity for the claims made against it in the underlying litigation "for all claims arising in whole or in part from the acts or omissions of [FCS] and its subcontractors. . . ."

FCS alleges in the complaint that although both American Safety and FCS are named as defendants in the declaratory judgment action, RFF entered an appearance and filed pleadings only on behalf of FCS. Further, FCS alleges that American Safety admitted in the declaratory judgment action that it issued both primary and excess coverage to FCS as required by the contract, but denied that Well-Come was an "additional insured" under its policy or that it had any duty to defend or indemnify Well-Come as an additional insured under any insurance policy issued by American Safety to FCS.

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As pled in the complaint, RFF conducted no discovery on the merits of the underlying litigation, and in October 2006 RFF, as counsel to FCS, entered into a stipulation with counsel for Well-Come, agreeing that American Safety and FCS would jointly agree to defend and indemnify Well-Come in the underlying litigation (the "October 2006 stipulation"). FCS acknowledges that it was aware of the October 2006 stipulation, and attached a copy of the October 2006 stipulation to the complaint. However, FCS alleges that unbeknownst to it, but known to RFF, American Safety and/or RFF later refused to proceed in accordance with the October 2006 stipulation.

FCS also attached to its complaint a letter from RFF to FCS dated October 13, 2006 (the "October 2006 letter"). In this letter, RFF advised FCS that American Safety agreed to assume the defense and indemnity of Well-Come going forward, and that American Safety would reimburse Well-Come for the legal fees it had incurred in the defense of the underlying action.

FCS alleges that, without its knowledge and consent and despite the October 2006 letter, counsel for all parties to the declaratory judgement action, including RFF, entered into a stipulation of dismissal with prejudice on March 28, 2007 (the "stipulation of dismissal"), which stated that FCS would pay Well-Come $30,915.50, payable to Marine, for the past defense costs in the underlying action. The stipulation of dismissal also states that FCS agreed to defend and indemnify Well-Come in the underlying actions. FCS alleges that it "believed and had been informed" that America Safety would defend and

indemnify Well-Come, as was provided in the October 2006 stipulation, but that was not made part of the stipulation of dismissal.

FCS alleges that it never authorized or agreed to undertake to defend and indemnify Well-Come in the underlying litigation. It further alleges that it did not authorize, approve or agree to the stipulation of dismissal, and that it was filed and executed by RFF without FCS's approval. FCS alleges that it was never advised by RFF that pursuant to the terms of the stipulation of dismissal, FCS was to defend and indemnify Well-Come for Well-Come's own negligence, and the negligence of Well-Come's subcontractors and consultants. FCS alleges that it did not learn of the terms of the stipulation of dismissal until a year after its entry, during which time American Safety had been paying RFF for the joint defense of FCS and Well-Come.

FCS alleges that RFF knew when it entered into the stipulation of dismissal that American Safety was paying Well-Come's defense costs, and also knew that American Safety was going to pay RFF for the future costs of defending both FCS and Well-Come. FCS further urges that RFF knew or should have known that pursuant to the terms of the stipulation of dismissal, FCS was required to indemnify Well-Come for Well-Come's own negligence, contrary to New York law.

As alleged in the complaint, for approximately 18 months after entry of the stipulation of dismissal in the declaratory judgment action, RFF jointly defended Well-Come and FCS, and submitted its bills directly to American Safety. FCS alleges that in

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early 2009, American Safety stopped paying the defense costs for Well-Come and FCS in the underlying litigation. RFF withdrew from FCS's representation in the underlying litigation on April 14, 2010.

As a result, on or about March 6, 2009, FCS initiated an action against American Safety in the United States District Court, Northern District of Georgia, Atlanta Division (the "Georgia action"), claiming that American Safety wrongly denied coverage on all of FCS's claims, including those involving the underlying litigation. Well-Come intervened in the Georgia action on or about April 15, 2010. In its intervenor complaint, Well-Come referred to the stipulation of dismissal, and asserted that the stipulation of dismissal obligated FCS to defend and indemnify Well-Come in the underlying litigation without limitation. In an order dated May 12, 2011, the district court in the Georgia action found that FCS "is obligated to defend and indemnify Well-Come pursuant to the stipulation."

Here, FCS asserts a cause of action against RFF for breach of the attorney-client relationship, alleging that as a result of RFF's unauthorized action entering into the stipulation of dismissal, FCS now faces a claim by Well-Come and Well-Come's insurers for over $100,000 in attorneys fees and expenses, and faces a potentially much larger obligation in the underlying litigation. FCS also asserts a cause of action for attorney malpractice with respect to the stipulation of dismissal, alleging that RFF breached the standard of care owed by attorneys to their clients by entering into the unauthorized and unlimited stipulation, which potentially expanded FCS's liability beyond any which could

have been imposed upon it under New York law in the declaratory judgment action, and which caused the court in the Georgia action to find FCS liable to defend and indemnify Well-Come for Well-Come's own negligence.

In its third cause of action, FCS alleges that RFF failed to make timely claims against Well-Come, its subcontractors, engineer and/or consultants in the underlying litigation, and that as a result of the timing of the third-party claims the court ordered such claims be severed from the ongoing underlying litigation, requiring FCS to pursuant a second, costly litigation. FCS also asserts that RFF negligently failed to timely engage an expert witness or to defend against the other property owners' damages claims.

RFF moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), on the basis of documentary evidence and for failure to state a cause of action. In support, RFF argues that FCS fails sufficiently to plead the proximate causation element of legal malpractice; that FCS fails to plead and prove that it suffered actual and ascertainable, and not speculative damages; and that FCS cannot establish that RFF failed timely to assert third party claims.

RFF also argues that FCS fails sufficiently to plead proximate cause, as it fails to plead that Well-Come acted negligently. In addition, RFF argues that Well-Come's negligence is not an issue because FCS's subcontractor Diamond Point Excavation Work ("Diamond Point"), and not Well-Come, was responsible for the underpinning and other work at issue in the underlying litigation, pursuant to the subcontract between FCS and

Diamond Point (the "subcontract"). In support of this, RFF submits the subcontract. Exhibit A to the subcontract provides that the work awarded to Diamond Point was for "Excavation, Sheer Piling, Dewatering, Foundations, Underpinnings & Below Grade Concrete work at 106 Mott Street." The subcontract also provides that the scope of Diamond Point's work included, among other things, "[v]ibration monitoring . . . . [and] keep[ing] the vibrations at acceptable levels."

In opposition, FCS asserts that it does plead a cause of action for legal malpractice, that it adequately pleads actual damages and Well-Come's negligence. At oral argument on this motion, FCS conceded that it can not prove proximate cause as to its indemnification obligations under New York law, but claims that the stipulation of dismissal goes further than New York General Obligations Law §5-322.1(1) allows, because the stipulation of dismissal obligates it to indemnify Well-Come without limit, including for Well-Come's own negligence, in contravention of New York law.[2] FCS concludes that RFF should not have entered into the stipulation on FCS's behalf because the stipulation saddles it with indemnification obligations it would not otherwise have.

Discussion

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[2] General Obligations Law § 5-322.1(1) prohibits indemnification clauses in construction contracts which "purport[] to indemnify or hold harmless the promisee against liability arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part. . . ." An agreement that provides for indemnification for an endemnitee's own negligence is void and unenforceable. Gen. Oblig. L. §5-322.1(1).

On a motion to dismiss pursuant to CPLR § 3211(a), the test is not whether the opposing party "has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep't 1998). "On a motion addressed to the sufficiency of the complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Franklin v. Winard*, 199 A.D.2d 220, 221 (1st Dep't 1993); *see also Leder v. Spiegel*, 31 A.D.3d 266 (1st Dep't 2006) *affd* 9 N.Y.3d 836 (2007).

"To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." *Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 N.Y.2d 300, 303-304 (2001) (citations omitted). *See also Leder*, 31 A.D.3d at 267 (to properly plead legal malpractice cause of action, a plaintiff must sufficiently allege three elements: "the attorney's negligence; that the negligence was the proximate cause of plaintiff's loss sustained; and actual damages"). *Leder*, 31 A.D.3d at 267. "In order to establish proximate cause, plaintiff must demonstrate that 'but for' the attorney's negligence, plaintiff would either have prevailed

in the matter at issue, or would not have sustained any 'ascertainable damages.' The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent." *Leder,* 31 A.D.3d at 267-268 (citations omitted).

FCS alleges in the complaint that pursuant to the contract, FCS's responsibilities explicitly excluded controlled inspections and preconstruction surveys of adjoining structures, vibration monitoring of adjoining structures and ongoing survey of adjoining structures during construction. In support, FCS looks to exhibit A to the contract, a letter which lists allowances and exceptions to the contract. The duties FCS asserts were at issue in the underlying litigation are listed under the "exceptions" to FCS' responsibilities. FCS alleges that these matters were the responsibility of Well-Come. FCS further alleges that the damages at issue in the underlying litigation were allegedly incurred while work within Well-Come's scope was being performed.

While, contrary to RFF's assertion, FCS has pled that Well-Come was responsible for the work at issue in the underlying litigation, the subcontract does suggest that the actions at issue in the underlying litigation were Diamond Point's responsibility. This subcontract alone, however, is not enough to conclusively establish that Well-Come was *not* negligent for the underpinning and other work at issue in the underlying litigation. *Leon*, 84 N.Y.2d at 88.

The indemnification provision in the stipulation of dismissal is broad and does not include any limiting language. *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 671 (2d Dep't 2007) ("although an indemnification clause that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such a clause does not violate the General Obligations Law if the provision authorizes indemnification "to the fullest extent permitted by law"). However, "even if an indemnification clause purports to indemnify a party for its own negligence, such a clause may be enforced where the party to be indemnified is found to be free of any negligence." *Balladares*, 40 A.D.3d at 671 (citations omitted). *See also Linarello v. City University of New York,* 6 A.D.3d 192, 193-194 (1st Dep't 2004) ("An indemnification clause that runs afoul of General Obligations Law §5-322.1(1) is enforceable in the even that the indemnitee is found not negligent but nevertheless held vicariously liable to the plaintiff") (citation omitted).

Here, the underlying litigation is still pending, therefore Well-Come's negligence remains an open question. And as RFF acknowledges in reply, before it can be determined whether FCS suffered damages caused by the execution of the stipulation of dismissal, it must first be determined whether Well-Come was negligent.

Moreover, FCS has sufficiently pled the existence of actual damages. FCS states in the complaint that because of the stipulation of dismissal, it now faces a claim by Well-Come and its insurer for in excess of $100,00 in attorneys' fees and expenses incurred in

the defense of Well-Come in the underlying litigation. While FCS also alleges future, speculative damages, the claims it already faces from Well-Come for attorneys' fees are real and ascertainable, and sufficient to plead a cause of action for legal malpractice, established by FCS's submission of correspondence from Well-Come's counsel requesting payment in the amount of $100,395.98. Accordingly, the first and second causes of action of the complaint can not be dismissed.

Lastly, RFF argues that FCS's fails to state a cause of action for a breach of a duty as to the timing of RFF's assertion of third-party claims on behalf of FCS in the underlying litigation. The complaint asserts that RFF failed to timely assert third-party claims against Well-Come, its subcontractors, engineers and/or consultants, and failed to timely engage an expert witness. FCS acknowledges in the complaint that RFF did assert such claims, but because it was done "so late in the litigation" the Court ordered the claims severed, requiring FCS to incur the costs of a second litigation.

RFF properly notes that severing the third-party action was within the Court's discretion, pursuant to CPLR 603. Moreover, FCS fails to plead how the timing of filing third-party claims constituted the breach of any duty.

FCS acknowledges that the third-party claims were made within the statute of limitations, but alleges, without support, that waiting to assert the third-party claims "rais[ed] the spectre [sic] of a separate trial." On the face of the complaint, FCS fails to

plead that the timing of initiating the third-party claims constitutes breach of a duty by RFF. Accordingly, the third cause of action is dismissed.

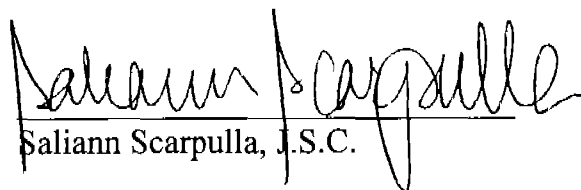
In accordance with the foregoing, it is hereby

ORDERED that defendant Rubin, Fiorella & Friedman LLP's motion to dismiss the complaint of plaintiff Flintlock Construction Services, LLC is granted only to the extent that the third cause of action is dismissed, and is otherwise denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 9, 2012

ENTER:



Saliann Scarpulla, J.S.C.

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