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SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. JAMES P. MCCORMACK,

Justice

SINCLAIR HABERMAN and BELAIR BUILDING, LLC.,

Plaintiffs,

-against-

XANDER CORP., RHODA WAGNER as Excutirx of the Estate of AARON WAGNER, DENNIS BERKOWSKI, HERMAN NEUMAN, JEANNETTE IANNUCCI and FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Defendants.

XANDER CORP.,

Third-Party Plaintiff,

-against-

MICHAEL G. ZAPSON and DAVIDOFF MALITO & HUTCHER, LLP,

Third-Party Defendants.

TRIAL/IAS, PART 29
NASSAU COUNTY

Index No. 21508/10

Motion Seq.: 005
Motion Submitted: 11/20/15

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Third-party Defendants, Michael G. Zapson (Zapson) and Davidoff Malito and Hutcher (DMH)(collectively "the Zapson Defendants), move this court for an order,

pursuant to CPLR §3212, granting them summary judgment on the First Cause of Action in the Amended Third-Party Complaint. Third-Party Plaintiff, Xander, Corp., (Xander) opposes the motion.

This case and two related cases all involve, in one form or another, Plaintiff Sinclair Haberman and Belair Building, LLC (collectively "Haberman") attempting to build on property they own in Long Beach, County of Nassau. Xander owns the property adjacent to land owned by Haberman, and when Haberman began taking steps to build, Xander, *inter alia*, brought an action for adverse possession of the property, based upon the fact that many of Xander's residents used the Haberman property to park their cars. Zapson was Xander's original counsel for the adverse possession case, and when Zapson joined DMH, he brought Xander to that firm with him as a client. The adverse possession case went to trial and Haberman prevailed. Subsequently, Haberman sought a CPLR §6315 hearing to ascertain damages incurred as a result of a preliminary injunction issued in the adverse possession case, and also brought a separate action against Xander for malicious prosecution and abuse of process. Xander then brought a third-party action against the Zapson Defendants sounding in common law indemnification and contribution.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material

issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

The concept of common law indemnification allows one who has been directed to pay for the wrongs of another to recover what it was directed to pay from the wrongdoer. (*Tiffany at Westbury Condominium By Its Bd. of Managers v. Marelli Development Corp.*, 40 A.D.3d 1073 [2nd Dept. 2007]). The party moving to be indemnified must have delegated full authority for the actions giving rise to the claim to the alleged wrongdoer, and must not have committed any wrongdoing itself. (*Id., quoting 17 Vista Fee*

Associates v. Teachers Ins. and Annuity Ass'n of America, 259 A.D.2d 75 [1st Dept. 1999]). The Zapson Defendant point to Haberman's complaint, brought solely against Xander and alleging Xander as the party who committed the malicious actions. It is undisputed that Xander was the Petitioner in the adverse possession case and was the successful movant in receiving the improperly-obtained preliminary injunction. As Xander is the party who committed the alleged wrongdoing, the Zapson Defendants have established entitlement to summary judgment as a matter of law. The burden shifts to Xander to raise a material issue of fact requiring a trial of the action. (*Zuckerman v. City of New York, supra*).

Xander does not deny being a wrongdoer, but argues any wrongs they committed were done so solely based upon the advice of the Zapson Defendants. It was the Zapson Defendants who advised them to bring an action for adverse possession and to move for the preliminary injunction. Xander appears to be arguing a lack of intent. If they are wrongdoers, they are wrongdoers solely because they followed the advice of their attorneys. Assuming such a statement is true, would that absolve them of responsibility?

Attorneys are not responsible to third parties for the actions of their clients, except where the attorneys improperly exercised their authority, or committed fraud, collusion, or a malicious or tortious act. (*Singer v. Whitman & Ransom*, 83 A.D.2d 862 [2nd Dept. 1981]; *Dallas v. Fassnacht*, 42 N.Y.S.2d 415 [NY Sup. 1943]). The third-party complaint herein accuses the Zapson Defendants of acts constituting negligence. While

the Amended Third-Party Complaint does not contain a cause of action for legal malpractice, if Xander were to establish entitlement to indemnification or contribution, it follows logically they have done so because the Zapson Defendants committed the tort of legal malpractice. However, it is not Haberman, a third party, making a claim against the Zapson Defendants. It is Xander, and their claim is in the nature of indemnification. While they may have an argument they received questionable advice, they cannot deny being the wrongdoers under these circumstances. If they are the wrongdoers, then the law is clear they cannot seek indemnification. While it may appear inequitable, this court has found no authority which carves out an exception where an attorney inspires the client to be the wrongdoer based upon questionable advice. As such, the court finds Xander has failed to raise a material issue of fact.

Accordingly, it is hereby

ORDERED, that the Zapson Defendants' motion for summary judgment on the First Cause of Action in the Amended Third-Party Complaint is GRANTED. The First Cause of Action in the Amended Third-Party Complaint is dismissed.

All other arguments raised but not addressed have been considered by the court and found to be without merit.

This constitutes the Decision and Order of the Court.

Dated: January 12, 2016
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

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