SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

CIT LENDING SERVICES CORPORATION

-v-

MORRISON + FOERSTER LLP

INDEX NO. 653797/2012

MOTION DATE

MOTION SEQ. NO. 003

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 ~~to~~ by Third Party Defendants to dismiss Morrison + Foerster's claim for contribution is GRANTED; Third Party Defendants' motion to dismiss Morrison + Foerster's claim for implied indemnity is DENIED per the attached Decision and Order.

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

Dated: August 20, 2013

MELVIN L. SCHWEITZER J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

CIT LENDING SERVICES CORPORATION, Plaintiff, -against- MORRISON & FOERSTER LLP Defendant.	Index No. 653797/2012 DECISION AND ORDER Motion Sequence No. 003
MORRISON & FOERSTER LLP, Third-Party Plaintiff, -against- FIRST AMERICAN TITLE INSURANCE COMPANY and PRESTIGE TITLE AGENCY, INC. Third-Party Defendants.	

MELVIN L. SCHWEITZER, J.:

This dispute arises out of the untimely filing of an amendment of a building loan agreement. The lender, CIT Lending Services Corporations (CIT), brought a claim against its counsel, Morrison & Foerster LLP (Morrison & Foerster), for legal malpractice. Morrison & Foerster served its Answer denying the allegations made by CIT, and simultaneously filed a Third-Party Complaint against First American Title Insurance (First American) and Prestige Title Agency, Inc. (Prestige), the title insurance companies, for contribution and for implied indemnity. Third-Party Defendants have moved to dismiss the Third-Party complaint pursuant to CPLR 3211(a)(1) and (a)(7).

Background

There were three related, but separate, loans that CIT made to East Houston Partners LLC (the Borrower) in connection with the development of property located at 41-45 East Houston Street, New York, New York. The three loans consisted of a project loan, an acquisition loan, and a building loan, which were secured by mortgages on the property. In 2006, CIT retained Morrison & Foerster as its counsel in connection with these loans. First American was chosen to provide title insurance for the mortgage interests CIT was receiving as security, and Prestige was selected to act as the Title Agent for First American in connection with the title insurance and making and closing the loans.

The three loans closed in late December 2006. In connection with that closing, Morrison & Foerster delivered to First American's agent, Prestige, various documents, including a Building Loan Agreement, for filing and recording. Prestige filed a copy of the Building Loan Agreement with the New York County Clerk's office pursuant to Section 22 of the New York Lien Law, and separately recorded the various mortgage documents in the Office of the City Register of the City of New York.

In early 2007, the Borrower discovered that it had incorrectly included an interest reserve for the acquisition loan in its budgeted allocation of loan proceeds for the building loan, instead of including the interest reserve in the budget for the project loan. To address this issue, the Borrower and CIT determined that they would need to amend the loan documents, and the related mortgages. CIT again engaged Morrison & Foerster to prepare amended loan documents, and to work with First American and its agent, Prestige, to obtain an additional Title Insurance Policy with respect to certain of the amended loans and mortgage documents.

On May 2, 2007, Morrison & Foerster sent fully executed copies of the Amendment to the Building Loan Agreement and amended mortgage documents to Prestige for recording and/or filing. The Amendment to the Building Loan Agreement was dated April 27, 2007. On May 2, 2007, Prestige confirmed via e-mail that it would file those documents once it received payment for its services. It did on May 3, 2007. Part of the fees paid to Prestige was for the premiums of the new Title Insurance Policy that Prestige was issuing to CIT with respect to the amended Project Loan. Prestige filed the Amendment to the Building Loan Agreement in the New York County Clerk's Office on May 9, 2007.

Section 22 of the New York Lien Law requires that any material amendment of a building loan be embodied in a written agreement and filed with the County Clerk's Office within ten days after the date of the amendment, and that failure to timely file such an amendment could result in subordination of the loan. *See* NY Lien Law Section 22. The deadline for timely filing the amendment was May 7, 2007, and the Amendment to the Building Loan Agreement was filed two days after the deadline, on May 9, 2007.

The three loans made by CIT to the Borrower went into default, and mechanics liens were filed by individuals and companies who claimed that they had not been paid for goods and services provided in connection with the development of the property. In a foreclosure action brought by CIT, those lienholders asserted that they had priority over CIT's mortgages on the grounds that the Amendment to the Building Loan Agreement was not filed within ten days of its execution. CIT was required to settle the foreclosure action for less than the outstanding aggregate loan amount for the three loans.

Procedural History

On May 6, 2010, CIT filed an action in this court against First American and Prestige. *CIT v First American Title Insurance Company of New York and Prestige Title Agency, Inc.* (Index No. 601174/10) ("*CIT Action II.*"). In its Summons with Notice, dated May 6, 2010, CIT alleged (i) negligence and (ii) breach of contract, both arising out of the improper filing of the First Amendment Building Loan Agreement, dated as of April 27, 2007, and also Section 22 of the New York Lien Law. CIT agreed to extend Third-Party Defendants' time for responding to the Summons with Notice. No other proceedings have occurred in *CIT Action II.*

On November 2, 2012, CIT filed a summons with notice against Morrison & Foerster alleging legal malpractice arising out of Morrison & Foerster's representation of CIT in connection with the untimely filing of the amendment of the Building Loan Agreement (*CIT Action I.)* On January 14, 2013, Morrison & Foerster served its Answer denying the allegations made by CIT, and simultaneously filed a Third-Party Complaint against First American and Prestige. In its Third-Party Complaint, Morrison & Foerster asserted claims for contribution, alleging that First American and Prestige breached their duties to CIT by failing to timely file the First Amendment to the Building Loan Agreement. In June 2013, *CIT Action I* and *CIT Action II* were consolidated.

On March 4, 2013, the Third-Party Defendants filed this motion to dismiss the Third-Party Complaint. On March12, 2013, Morrison & Foerster served an Amended Third-Party Complaint in which, in addition to its existing claim for contribution, it asserted claims for implied indemnity. On April 10, 2013, the Third-Party Defendants submitted a reply memorandum in support of their motion to dismiss Morrison & Foerster's Amended Third-Party Complaint, addressing the added claim of implied indemnity.

Discussion

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]. "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *lv to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable reference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Contribution Claim

CPLR 1401 allows claims for contribution where "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death . . . whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CLPR 1401. "[P]urely economic loss resulting from a

breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]" *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Chrenshaw & Folley*, 71 NY2d 21, 26 (1987). "[T]he existence of some form of tort liability is a prerequisite to application of" CPLR 1401. *Id.* at 28.

Morrison & Foerster argues that the Third-Party Defendants are liable to CIT for untimely filing the Amendment to the Building Loan Agreement, which caused the injury for which CIT is seeking relief in the action against Morrison & Foerster, thus giving rise to a claim for contribution. Third-Party Defendants argue that the relationship between CIT and the Third-Party Defendants is purely contractual under the Building Loan Title Policy and New York law. The court must determine whether the contribution claim meets the prerequisite basis in tort to survive the motion to dismiss.

Morrison & Foerster offers three theories to support the claim that Third-Party Defendants are liable to CIT in tort: (1) CIT alleges a tort claim against Third-Party Defendants in the Summons with Notice, (2) the Exculpatory Clause in the contract does not preclude a claim for contribution, and (3) Third-Party Defendants owed a duty of care independent from the Building Loan Title Policy in favor of CIT, which supports a tort claim against Third-Party Defendants.

CIT's Negligence Claim Against Third-Party Defendants.

CIT has asserted a tort claim and a breach of contract claim against Third-Party Defendants in the Summons with Notice. Third-Party Defendants claim that CIT has merely noticed a possible cause of action for negligence in the Summons with Notice, and that it has not asserted such claims in a complaint. There are no authorities cited to support why this court should not treat claims made in the summons with notice as asserted claims. Morrison &

Foerster argue that although Third-Party Defendants may ultimately not be held liable in tort, a tort claim remains pending, "and thus, 'the necessary predicate tort liability for a contribution action remains in the case'" *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 AD2d at 230, quoting *St. Patrick's Home for Aged & Infirm v Laticrete Intl.*, 264 AD2d 652, 658 (1999).

Notwithstanding the existence of a necessary predicate, merely including an alternative tort claim in a breach of contract action will not create a right of contribution if the plaintiff's sole measure of damages lies in contract remedies. *See e.g. Children's Corner Learning Center v A. Miranda Contracting Corp.*, 64 AD3d 318 (1st Dept 2009); *Scalp & Blade, Inc. v Advest, Inc.*, 300 AD2d 1068 (4th Dept 2002); *Rothberg v Reichelt*, 270 AD2d 760 (3d Dept 2000). As explained below, that is the case here.

The Exculpatory Clause

Section 14(b) of the Building Loan Title Policy (exculpatory clause) states that "[a]ny claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insurance mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy."

Third-Party Defendants argue that CIT's negligence claim against them is meritless as a matter of law because under the exculpatory clause in the Building Loan Title Policy, CIT's sole remedy is an action under the contract, and independently from the contract, under New York Law, CIT's relationship with Third-Party Defendants is governed by contract law.

Under certain circumstances, an exculpatory clause *alone* would not constitute a bar to the contribution claim because a contribution claim may be asserted independently of whether CIT has a direct right of recovery against the Third-Party Defendant or not, as long as the Third-Party Defendants contributed to the injuries of CIT. *Sommer v Federal Signal Corp.*, 79

NY2d 540, 551 [1992]. A defendant "may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule." *Raquet v Braun*, 90 NY2d 177, 183 (1997).

More importantly, Morrison & Foerster has alleged that the policy itself may not apply at all since it is not clear whether the Building Loan Title Policy provided coverage for statutorily created liens on the project after the Building Loan Agreement was amended. The policy was issued in 2006, five months before the Building Loan Agreement was amended in late April 2007. Third-Party Defendants argue the Policy remained in force by way of "subsequent endorsements," however those endorsements have not been included in the record. Taking Morrison & Foerster's factual allegation as true, the applicability of the whole contract has been put in question and the exculpatory clause cannot be a bar to the contribution claim.

Third-Party Defendants owe no liability in tort to CIT, not because of the exculpatory clause in the contract, but because a "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]" *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Chrenshaw & Folley*, 71 NY2d 21, 26 (1987).

Third-Party Defendants' Independent Duty of Care

Morrison & Foerster allege that independent from their obligations under the contract, the Third-Party Defendants agreed to take on the responsibility of filing the Amendment to the Building Loan Agreement and, in doing so, owed a duty of care to CIT to perform that act correctly and in compliance with Section 22 of New York Lien Law. Morrison & Foerster rely heavily on *Sommer* for the proposition that New York law has recognized a legal duty independent of contractual obligations as an incident to the parties' relationship and the nature of

the services covered by the contract. *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 (1992); *See Sound Refri .& A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349 (2d Dept 2011).

In *Sommer*, the plaintiff, a building owner, contracted with the defendant, a fire alarm company, to inform the New York City Fire Department when fire alarms sounded in the building. Because of a misunderstanding between the building engineer and one of the defendant's dispatchers with regard to the reactivation of the fire alarm system, the defendant did not inform the fire department when the alarm went off due to a fire in the building one evening. The plaintiff filed a complaint for breach of contract as well as for negligence arising out of the same nucleus of fact. The Court of Appeals allowed both claims noting that:

> "A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care" *Sommer v Federal Signal Corp.*, 79 NY2d at 551-552.

The court noted that "the nature of the injury, the manner in which the injury occurred and the resulting harm" are all relevant in assessing whether a claim for both breach of contract and tort may exist. Id.

An independent duty of care has only been recognized in cases where, as in *Sommer*, the nature of the industry's services dealt with the protection of people and property from physical harm, and where the failure to perform the contractual obligations with due care could lead to "catastrophic consequences." *N.Y. Univ. v Continental Ins. Co,* 87 NY2d 308 at 317 (1995) (citing *Sommer*). Both the nature of the industry's service and the injury claimed by CIT make *Sommer* inapplicable here.

"[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]" *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Chrenshaw & Folley*, 71 NY2d 21, 26 (1987). The nature of the industry here differs greatly from the one in *Sommer*. Insurers have an obligation to deal fairly and protect the fiscal interest of those insured, not to protect the personal safety of citizens. *N.Y. Univ. v Continental Ins. Co.*, 87 NY2d at 317 (1995). Insurers' liability is based on contract law, and governed by agreements, terms, provisions, and conditions of the insurance policy. *Citibank, N.A. v Commonwealth Land Tit. Ins. Co*, 228 AD2d 635, 637 (2d Dept 1996). Though the Third-Party Defendants' conduct, as alleged here, did violate NY Lien Law 22, statutory law regulates the insurer's performance of its contractual obligation, and it does not impose a separate duty of care. *NY. Univ,* 87 NY2d at 317-318.

Morrison & Foerster argues that its contribution claim is not barred by the pure economic loss doctrine, because a tort claim remains pending against Third-Party Defendants, even if that claim may eventually fail. *Sound Refrig. and A.C., Inc. v All City Testing & Balancing Corp.,* 84 AD3d 1349, 1350 (2d Dept 2011). As previously mentioned, the Appellate Divisions have held that merely including an alternative tort claim in a breach of contract action will not create a right of contribution if the plaintiff's sole measure of damages is the lost benefit of the bargain. *See e.g. Children's Corner Learning Center v A. Miranda Contracting Corp.*, 64 AD3d 318 [1st Dept 2009]; *Scalp & Blade, Inc. v Advest, Inc.*, 300 AD2d 1068 (4th Dept 2002); *Rothberg v Reichelt*, 270 AD2d 760 (3d Dept 2000).

Although CIT has asserted a negligence claim against Third-Party Defendants that remains pending, the plaintiff's sole measure of damages lies in contract remedies because of the nature of the third-party defendants industry, the tort language notwithstanding.

The contribution claim lacks the necessary predicate tort liability, and the motion to dismiss Morrison & Foerster's contribution claim is granted.

Implied Indemnity Claim

Morrison & Foerster amended its complaint to include an implied indemnity claim after the Third-Party Defendants' motion to dismiss. Morrison & Foerster objects to Third-Party Defendant's attempt to expand their motion to address that separate claim for relief in their reply papers. "[T]he moving party has the option to decide whether its motion should be applied to the new pleadings." *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 (1st Dept 1998). Morrison & Foerster has fully argued the issues in dispute in its memoranda and sur-reply papers. In favor of judicial efficiency, the Third-Party Defendants motion to dismiss applies to the claim for implied indemnity.

The common law doctrine of implied indemnity permits one who is held vicariously liable, solely on account of the negligence of another, to shift its burden of the loss to the actual wrongdoer. Third Party Defendants argue that in the absence of vicarious liability, the claim for implied indemnity should be dismissed. Although indemnity commonly arises in cases involving an express contract, an implied indemnity obligation may be based upon the law's notion of what is fair and proper between the parties. *See Mas v Two Bridges Assoc. by Nat. Kinney Corp.*, 75 NY2d 680, 690 (1990).

Third-Party Defendants argue that the claim for implied indemnity should be dismissed because Morrison & Foerster is being sued for its own alleged wrongdoing, attorney malpractice, which bears no relation to the Third-Party Defendants' actions. A party cannot seek common-law implied indemnification, when its liability is predicated on its own fault. *See Bleecker St.*

Health & Beauty Aids, Inc. v Granite State Ins. Co., 38 AD3d 231, 233 (1st Dept 2007); *Mathis v Central Park Conservancy,* AD2d 171, 172 (1998).

The basis for liability in claims of implied indemnity "arises from the principle that 'every one is responsible for the consequences of his own negligence, and if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.'" *Raquet v Braun*, 90 NY2d 177, 183 (1997). CIT's malpractice claim against Morrison & Foerster is primarily based on the improper filing of the Building Loan Agreement which, as alleged in the Third-Party Complaint, resulted from the Third-Party Defendants' untimely filing of the Amendment to the Building Loan Agreement.

Morrison & Foerster has properly alleged a claim for implied indemnity against Third-Party Defendants.

ORDERED that Third Party Defendants motion to dismiss Morrison & Foerster's claim for contribution is granted.

ORDERED that Third Party Defendants' motion to dismiss Morrison & Foerster's claim for implied indemnity is denied.

Dated: August 20, 2013

ENTER:

J.S.C.
MELVIN L. SCHWEITZER