

Seminara v Board of Mgrs. of the Fitzgerald Condominium
2013 NY Slip Op 32224(U)
September 16, 2013
Supreme Court, New York County
Docket Number: 65259/2012
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART _____

Index Number : 652959/2012
SEMINARA, GEORGE
vs.
BOARD OF MANAGERS
SEQUENCE NUMBER : 001
DISMISS ACTION

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

is decided in accordance with the annexed decision.

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

Dated: 9/16/17

CK
CYNTHIA S. KERN, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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 55

-----x
GEORGE AND DR. LAURIE SEMINARA
AND SONIA ROBERTS,

Plaintiffs,

Index No.65259/2012

-against-

DECISION/ORDER

THE BOARD OF MANAGERS OF THE FITZGERALD
CONDOMINIUM, THE FITZGERALD CONDOMINIUM,
ET AL.,

Defendants.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	<u>3</u>
Exhibits.....	_____

Plaintiffs commenced this action to recover property damages from an accident that caused flooding to their condominium apartment, located in a building known as the Fitzgerald Condominium (the "Condominium") and to recover damages allegedly caused by the bad faith efforts of the Condominium to resolve their property damage claim against the Condominium. Defendant David Tane ("Tane"), who was the attorney for the Condominium, has brought the

present motion to dismiss the complaint and cross-claims asserted by defendant Floorworks, Ltd. (“Floorworks”) against him. After bringing this motion, plaintiffs have withdrawn their opposition to Tane’s motion to dismiss. For the reasons stated below, the motion by Tane to dismiss Floorworks’ cross-claims asserted against him is granted.

The relevant facts are as follows. Plaintiffs own unit 1C (the “Unit”) in the Condominium. In March 2011, while the sponsor still owned unit 3D, there was a flood in unit 3D which caused damage to units 2D and 1C. In 2012, the insurance adjuster reached an agreement with the sponsor and the Condominium to settle the building claim portion of the damages from the flood, which included damage to the common elements and units 2D and 1C. The amount that was budgeted to restore the Unit was approximately \$66,000. In August 2012, a condominium representative advised plaintiffs that in consideration of the payment of the insurance proceeds, the plaintiffs would need to release the condominium board from liability with respect to the water damage. The plaintiffs were not willing to sign the release, as a result of which the insurance proceeds were not distributed to plaintiffs. Plaintiffs allege in their complaint that the building defendants refused to approve the work that plaintiffs needed to do on their Unit to repair the water damages and shut down the work they began, at their own expense, unless the plaintiffs signed the release accepting the \$66,000 in insurance proceeds.

There is no allegation in the complaint that defendant Tane was in any way responsible for causing the property damage to plaintiffs’ Unit. The only allegations against Tane are in his capacity as counsel to the Condominium. According to plaintiffs’ opposition papers, the claims against defendant Tane are for aiding and abetting the condominium’s breach of fiduciary duty, negligence and intentional infliction of emotional distress and for tortious interference with

the by laws between plaintiff and the Condominium. More specifically, plaintiffs allege that Tane instructed the board defendants to refuse plaintiffs' requests regarding the insurance proceeds the building received for their repair of the damage and that Tane approved the use of the building's insurance proceeds to pay for the repairs to another unit and the withholding of the insurance funds from plaintiffs and that he prepared the release which the building attempted to have plaintiffs sign.

Floorworks has asserted cross-claims against defendant Tane for contribution and indemnification, which Tane has now moved to dismiss on the ground that they fail to state a cause of action. On a motion to dismiss a complaint for failure to state a claim pursuant to CPLR section 3211 (a)(7), the court's role is to decide whether "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the fact stated." *Campaign For Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). The court must accept "each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of facts." *219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506 (1979).

Under New York's contribution statute, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CPLR § 1401. In "determining whether a valid third-party claim for contribution exists, the critical issue is whether the third party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages." *Rosner v. Paley* 65 N.Y.2d 736 (1985).

Initially, Floorworks' contribution claim is legally insufficient as the complaint fails to adequately allege that Tane owed a duty to the plaintiffs which was breached. The law is well established in New York that a "third party, without privity cannot maintain a claim against an attorney in professional negligence, 'absent fraud, collusion, malicious acts or other special circumstances.'" *Estate of Schneider v. Finmann*, 15 N.Y.3d 306 (2010). As a result, an attorney's conduct is "immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith." *Beatie v. DeLong*, 164 A.D.2d 104 (1st Dept 1990). Thus, an attorney will not be held civilly liable when the actions complained of "fall completely within the scope of defendant's duties as an attorney" and the acts complained of do not "suggest that defendant acted in any capacity other than as an attorney." *Art Capital Group, LLC v. Neuhaus*, 70 A.D.3d 605 (1st Dept 2010). In *Art Capital*, the First Department held that claims against an attorney for aiding and abetting various tortious actions of its clients should have been dismissed where all of the claims against the attorneys were based on actions taken by the attorneys within the scope of their duties as an attorney.

In the instant case, the claims against Tane for aiding and abetting the tortious acts of the Condominium defendants and for tortious interference with the contract between the Condominium and the plaintiffs are insufficient as a matter of law because all of the actions taken by Tane were done in his capacity as an attorney for the Condominium and in the context of his providing legal advice to the Condominium regarding their dealings with plaintiffs. Under these circumstances, Tane is entitled to the shield afforded attorneys in advising their clients. Moreover, the mere conclusory allegation that the actions by Tane were taken in bad faith are

insufficient to state a claim where there is no allegation that Tane had any personal interest in the advice he gave the Condominium or that he was performing any role other than his role as an attorney in advising the Condominium.

The contribution claims are also legally insufficient because the actions allegedly taken by Tane did not contribute to or aggravate the damages allegedly caused by Floorworks's actions in causing property damage to the plaintiffs' Unit—the damages being claimed based on Tane's alleged actions are different damages than the damages being asserted based on Floorworks' actions. Plaintiff's claim for damages against Floorworks is for property damage caused by the flooding in their apartment whereas the plaintiff's claim for damages against Tane are not for property damage. The claims against Tane are based on damages plaintiffs allegedly incurred based on the bad faith efforts of the Condominium in distributing the insurance proceeds the Condominium received as a result of the flooding.

The court now turns to Floorworks' remaining cross-claim for indemnity. Initially, the indemnity claim must be dismissed for the same reason that the contribution claim is being dismissed—there can be no claim for indemnification against Tane if plaintiffs cannot establish that Tane owed plaintiffs any duty which was breached. The indemnity claim is also insufficient on the ground that a movant cannot have a valid claim for indemnity where there is no claim being asserted against it for vicarious liability. A claim for “indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer.” *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract

or may be implied by law. *Id.* Implied indemnity allows one who “is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer.” *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999). As the First Department has stated, “[s]ince 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.” *SSDW Company*, 151 A.D.2d at 296 (quoting *Trustees of Columbia Univ.*, 109 A.D.2d at 453).

In the instant case, Floorworks cannot maintain an indemnity claim against Tane as there is no valid claim asserted against it based on vicarious liability. Floorworks is being charged with liability for negligence based on the work it was performing in the building. As such, it is being charged with liability for its own alleged wrongdoing and not merely vicariously for the work done by any other party. If it is ultimately found that Floorworks is not negligent based on its own actions, then the claim against it will be dismissed and it will not require any indemnification.

Finally, Floorworks’s contention that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding is unavailing. “A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” *Ruttore & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, none of the facts within

Floorworks' knowledge would change the essential fact that all of the actions taken by Tane were performed within the scope of his duties as an attorney and that any potential liability Floorworks faces is based upon its own wrongdoing, not merely vicariously for the work done by another party.

Based on the foregoing, the motion by Tane to dismiss the cross-claims asserted by Floorworks and the complaint is granted and Tane is dismissed from the action. The clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 9/16/13

CK

J.S.C.

CYNTHIA S. KERN
J.S.C.