

**Vineyard Sky, LLC v Ian Banks, Inc.**

2013 NY Slip Op 32405(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 650392/2012

Judge: Ellen M. Coin

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

*Justice*

Index Number : 650392/2012  
VINEYARD SKY, LLC  
vs  
IAN BANKS, INC.  
Sequence Number : 005  
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

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ANNEXED DECISION  
AND ORDER.**

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

*This constitutes the decision and order of the Court.*

Dated: 10/3/13

*EW*  
\_\_\_\_\_  
**HON. ELLEN M. COIN**, 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 63

-----X  
VINEYARD SKY, LLC and ALLCO REALTY, LLC,

Plaintiffs,

-against-

IAN BANKS, INC., EVEREST NATIONAL  
INSURANCE COMPANY, PCF STATE  
RESTORATION INC. and ENDURANCE  
AMERICAN INSURANCE COMPANY,

Defendants.  
-----X

Index No. 650392/2012  
Motion Date: June 12, 2012  
Motion Sequence: 005  
**DECISION AND ORDER**

**For Plaintiff :**  
Thomas Melone, Esq.  
43 West 64<sup>th</sup> Street, 14A  
New York, New York 10023  
212-681-1120

**For Defendants PCF and Endurance:**  
Litchfield Cavo LLP  
420 Lexington Avenue, Suite 2104  
New York, New York 10170  
212-434-0100

Papers considered in review of this motion:

Papers	Numbered
Notice of Motion .....	<u>1</u>
Affirmation in in Opposition.....	<u>2</u>
Affirmation in Reply.....	<u>3</u>

**ELLEN M. COIN, J.:**

In this action seeking to recover for negligence and breach of contract, defendants PCF State Restoration Inc. (PCF) and Endurance American Insurance Company (Endurance) move pursuant to CPLR 3211 to dismiss the complaint as against them.

The moving defendants also seek to disqualify plaintiffs' counsel on the ground that he is also plaintiffs' managing agent and that, as such, he negotiated and signed the contracts that are the subject of this action.

## THE COMPLAINT

Plaintiff Vineyard Sky, LLC is the owner of condominium unit 14A and plaintiff Allco Realty, LLC is the owner of condominium unit 12A in a condominium located at 43 West 64<sup>th</sup> Street in Manhattan.

The complaint alleges that in September 2006, Thomas Melone (Melone), plaintiffs' manager, entered into a construction contract with defendant Ian Banks, Inc. (IBI) for renovations to plaintiffs' condominium units and that as part of those renovations IBI hired a subcontractor, defendant PCF State Restoration, Inc. (PCF) to perform work on the roof above unit 14A. According to plaintiffs, in or about June 14, 2008, PCF left the roof uncovered during a rainstorm, which allowed water to enter and cause substantial property damage to units 14A and 12A.

The complaint alleges that pursuant to its contract, PCF and/or its insurer, defendant Endurance American Insurance Company (Endurance), were obligated to pay plaintiffs for the property damages to the condominium units; that Melone, as plaintiffs' agent, was an additional insured under the Endurance comprehensive general liability (CGL) policy and an intended third-party beneficiary of that policy; and that plaintiffs made claims against PCF and Endurance which have not been paid.

Plaintiffs assert against PCF claims for negligence (first cause of action) and breach of the construction contract (second cause of action) and against Endurance claims for breach of the insurance contract and promissory estoppel (sixth cause of action), failure to act in good faith (seventh cause of action) and unfair settlement practices (eighth cause of action).

## CONTENTIONS

PCF argues that it did not enter into a contract with plaintiffs to perform the work on the roof, and that the negligence cause of action as against it is time-barred. Endurance seeks dismissal on grounds that plaintiffs were not insureds under the subject policy and that because they are strangers to the policy, they cannot maintain a direct action against Endurance unless and until they are able to secure a judgment against PCF as tortfeasor.

In opposition to the motion to dismiss, plaintiffs contend that the action against PCF is not time-barred because it sounds in contract, not negligence, and therefore the six-year statute of limitations applies. In addition, they argue that they were additional insureds and/or specific third-party beneficiaries under the Endurance CGL policy and, as such, they have the right to maintain a direct action against Endurance.

## DISCUSSION

On a motion to dismiss, the “court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts.” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1<sup>st</sup> Dept 2003], citing *McGill v Parker*, 179 AD2d 98, 105 [1<sup>st</sup> Dept 1992]); *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1<sup>st</sup> Dept 2009] ). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one . . . (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *White Plains Plaza Realty, LLC v Cappelli Enterprises, Inc.*, 108 AD3d 634, 636 [2d Dept 2013]). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames*, 1 AD3d at 250).

Where, as here, defendants rely on documentary evidence,<sup>1</sup> dismissal will not result unless the documentary evidence utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1<sup>st</sup> Dept 2013]; *Shuttle Contr. Corp. v Peikarian*, 108 AD3d 516, 518 [2d Dept 2013]).

### 1. Negligence

Plaintiffs denominate the first cause of action as a claim in negligence against PCF and allege that PCF failed to exercise the standard of care for performing work on a roof which resulted in plaintiffs' damages. Plaintiffs claim that the property damage to their condominium units occurred in June 2008. Negligence actions are governed by a three-year statute of limitations (CPLR 214). Defendants correctly argue that the statute of limitations on plaintiffs' negligence claim ran in June, 2011, and because the complaint in this action was filed in February 2012, more than six months after the statute of limitations ran, the negligence cause of action as against PCF is time-barred (*see Baron v Galasso*, 83 AD3d 626, 627 [2d Dept 2011]).

However, even if the negligence claim were not time-barred, which it is, dismissal would be required because the claim is duplicative of the breach of contract claim and does not posit any source of duty other than the alleged PCF contract. (*See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1<sup>st</sup> Dept 2010]).

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<sup>1</sup> Moving defendants submit, as exhibit B to the Velardo affidavit, the insurance policy between Endurance and PCF that was in effect during the relevant period.

## 2. The Contract Causes of Action against PCF and Endurance

The documentary evidence submitted does not utterly refute plaintiffs' claims that they are entitled to indemnity under the contract between IBI and PCF or that they are additional insureds or otherwise entitled to be indemnified under the Endurance policy.

"One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental." (*The Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1<sup>st</sup> Dept 2006][citations omitted]. "One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the benefit of the promised performance." (*Id.* [internal quotations omitted]). The crucial evidence of the parties' actual intent is the language of the agreement. (*Zelber v Lewoc*, 6AD3d 1043, 1045 [3<sup>rd</sup> Dept 2004]).

PCF and Endurance rely on a letter generated by UTC Risk Management Services, Inc., which is the designated claims adjusting service for defendant Everest National Insurance Company (Complaint, exhibit A), stating that Melone was to be named as additional insured under the Endurance CGL policy, along with a list of businesses that does not include the plaintiffs. That document states, in pertinent part:

"Our investigation into this matter has revealed that Ian Banks, Inc. hired P.C.F. State Restoration, Inc. to perform all the various work at the loss location including the installation of a new roof system. The written contract obligates P.C.F. State Restoration to indemnify, defend and hold harmless Thomas Melone, Ian Banks, Inc., Athena Group LLC,

Athena Liberty Lofts LP, Athens Liberty LLC, 43 W. 64<sup>th</sup> Street Condominium and Brown, Harris Stevens Residential Management LLC against claims, damages and losses arising out of or resulting from performance of the work. A copy of the contract is attached for your reference.

Additionally, P.C.F. State Restoration Inc. is required to name Thomas Melone, Ian Banks, Inc. Athena Group LLC, Athena Liberty Lofts LP, Athens Liberty LLC, 43 W. 64<sup>th</sup> Street Condominium and Brown, Harris Stevens Residential Management LLC as additional insureds on the commercial general liability policy issued by Endurance American Insurance Company . . . .”

(Complaint, Ex. A).

This letter, together with the allegations in the complaint, raises issues of fact as to whether Melone entered into the contract with IBI as agent on behalf of plaintiffs; whether under IBI’s contract with PCF Melone was to be indemnified by PCF in his representative capacity, if any; whether Melone, in his representative capacity, and plaintiffs were either third-party beneficiaries or additional insureds under the policy or otherwise entitled to indemnification under the November 5, 2012 settlement agreement and assignment.<sup>2</sup> The documents or deposition testimony required to resolve these issues are not before the Court and, even if available, would generally not be considered on a pre-answer motion.<sup>3</sup> Accordingly, the motion to dismiss the second, sixth, seventh and eighth causes of action must be denied, with leave to

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<sup>2</sup> Indeed, in the branch of the motion that seeks to disqualify Melone as plaintiffs’ counsel, defendant avers, that, “it is undisputed the Mr. Melone acted as manager for plaintiffs. He negotiated and signed contracts . . . which are the subject of this dispute . . . (Reply brief, para. 19).

<sup>3</sup> The letters attached to the complaint in this case do not constitute documentary evidence. In order to qualify as documentary evidence, the evidence submitted must be “unambiguous, authentic and undeniable.” (See *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012] [internal quotation marks and citations omitted]).



renew following completion of discovery. (See *Logan-Baldwin v L.S.M. General Contractors, Inc.*, 94 AD3d 1466, 1468-1470 [4<sup>th</sup> Dept 2012][citations omitted]; *R. H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 320 [1<sup>st</sup> Dept 1989]).

### 3. Disqualification of Counsel

The advocate-witness rule prevents an attorney from representing a party and serving as a witness in the same proceeding. Rules 3.7 of Rules of Professional Conduct requires an attorney to withdraw from a case "if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client." (22 NYCRR 1200.0; *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 446 [1987]). "In order to disqualify counsel pursuant to the advocate-witness rule, the moving party must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party." (*McElduff v McElduff*, 101 AD3d 832, 833 [2d Dept 2012]).

The proper timing of disqualification is dependent on the specific policy rationale implicated in the advocate-witness disqualification analysis. If an attorney's role as both the advocate and witness for his client will confuse the jury, disqualification is appropriate only for the purposes of jury trial and any concerns may be allayed by designation of a separate trial counsel. (*Clifford v Montana Mills Bread Co.*, 275 AD2d 909, 909 [4<sup>th</sup> Dept 2000]). On the other hand, if an attorney may be called to give evidence adverse to client at some point during the course of litigation, disqualification is appropriate at the earliest time the conflict is discovered. (*Tatalovic v Nightlife Enterprises, L.P.*, 69 AD3d 439, 440 [1<sup>st</sup> Dept 2010]).

The challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be "so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification." (*Martinez v Suozzi*, 186 AD2d 378, 379 [1<sup>st</sup> Dept 1992]).

The branch of the motion seeking to disqualify Melone as counsel for plaintiffs is premature. At this time, the Court cannot assess the nature of Melone's future testimony, whether it is necessary and adverse to plaintiffs' interests, or whether it might merely concern undisputed facts. Nor can the Court currently determine whether Melone may avoid the advocate-witness rule by procuring separate trial counsel.

In accordance with the foregoing, it is hereby

ORDERED that so much of the motion of defendants PCF State Restoration Inc. and Endurance American Insurance Company as seeks to dismiss the First Cause of Action sounding in negligence is granted, and the First Cause of Action is dismissed as against PCF State Restoration Inc. and Endurance American Insurance Company, and the balance of the motion is denied; and it is further

ORDERED that the second branch of the motion seeking to disqualify Thomas Melone, Esq. as plaintiff's counsel is denied with leave to renew following completion of discovery; and it is further

ORDERED that the moving defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on December 11, 2013, at 2:00 PM.

Dated: October 3, 2013

ENTER:

*Em*

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Ellen M. Coin, A.J.S.C.