SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JACEY CLOONAN,

Plaintiff,

-against-

PARKOFF ORGANIZATION, 19 SEAMAN LLC, NYBEC, KINGSWAY EXTERMINATING, THERMARID, JOHN DOE 1-100 (fictitious name, actual name unknown), RICHARD ROB 1-100 (fictitious name, actual name unknown), ABC COMPANY 1-100 (fictitious name, actual name unknown),

Defendants.

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Index No. 150865/14

Motion seq. no. 005

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendant NYBEC moves pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing the complaint and all cross claims against it. Plaintiff and defendant Parkoff Organization oppose. Defendant Thermarid partially opposes.

I. BACKGROUND

In December 2012, plaintiff, a tenant residing in a Manhattan apartment building owned and operated by defendants 19 Seaman LLC and Parkoff Organization, complained to them of

bedbugs in her unit. (NYSCEF 63). Later that month, Parkoff hired defendant NYBEC, an exterminator, to inspect and service her unit. On December 21, 2012, NYBEC invoiced Parkoff for the work it performed. Shortly thereafter, plaintiff again complained of bedbugs, prompting Parkoff to hire NYBEC a second time to dry vapor steam her unit; on January 2, 2013, NYBEC again invoiced Parkoff for its services. (NYSCEF 87. 94). Between December 2012 and May 2013, NYBEC serviced plaintiff's unit an additional ten times. (NYSCEF 98, 106).

On January 29, 2014, plaintiff commenced this action against Parkoff and Seaman. (NYSCEF 1). On May 8, 2014, Parkoff and Seaman commenced a third-party action against NYBEC and defendants Thermarid and Kingsway Exterminating. (NYSCEF 28).

By stipulation dated July 11, 2014, plaintiff agreed, and Parkoff and Seaman consented, to the withdrawal of the first and second amended complaints earlier filed by plaintiff. (NYSCEF 91).

On September 10, 2014, Kingsway answered the third-party complaint and asserted cross claims against NYBEC for contribution and failure to procure insurance. (NYSCEF 72-73). That same day, plaintiff amended her complaint to add NYBEC, Thermarid, and Kingsway. As pertinent here, she asserts against NYBEC a claim of negligence and seeks a declaration that it is liable to her for damages. She also alleges, through counsel alone, that NYBEC used repeatedly unsuccessful "inefficient and cost-effective methods" to rid her unit of bedbugs, and claims that NYBEC breached its duty to her to perform the extermination services in a professional and workman-like manner to eradicate the bedbugs, resulting in physical and emotional harm. She requests actual and punitive damages, as well as attorney fees. (NYSCEF 83).

On October 29, 2014, Thermarid answered the third-party complaint and asserted cross

claims against NYBEC for contribution and common law indemnification. (NYSCEF 86). During the pendency of the instant motion, Thermarid answered the amended complaint and asserted the same cross claims against NYBEC. (NYSCEF 99).

II. FIRST AMENDED COMPLAINT

A. Contentions

NYBEC argues that absent any contractual privity or relationship with plaintiff, it owes her no duty. It maintains that because the bedbug infestation predated its relationship with plaintiff, it could not be liable for creating a force or instrument of harm against her, and denies that she detrimentally relied on its performance, or that Parkoff or Seaman delegated to it their duties to maintain the premises so as to give rise to liability to her. NYBEC also argues that plaintiff's claim for a declaratory judgment fails absent a contractual relationship between them. While NYBEC acknowledges that the remaining causes of action are not asserted against it, it contends they are nonetheless precluded absent contractual privity, or are time-barred. (NYSCEF 87).

In response, plaintiff claims, though counsel alone, that discovery will show that she is an intended third-party beneficiary of the Parkoff-NYBEC contract, that contractual privity exists between her and NYBEC, or that even if she is not in privity with NYBEC, it may be held liable to her. Her attorney claims that she will later testify that she occasionally communicated exclusively with NYBEC, arranged for it to perform exterminating services in her unit, and was asked to sign documents indicating NYBEC provided services. (NYSCEF 97).

In reply, NYBEC argues that all of the invoices documenting its work evidence its contractual privity with Parkoff alone, and conclusively establishes that it owed no duty to

plaintiff. It contends that plaintiff's potential testimony is irrelevant as it would not evidence a contractual relationship between them, and that her request for discovery is based on mere hope and speculation. In any event, NYBEC argues, plaintiff may not recover in negligence for emotional injury and economic harm. NYBEC also observes that plaintiff fails to oppose dismissal of the other causes of action in her complaint against the other defendants. (NYSCEF 106).

B. Analysis

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]).

A party may also move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. (CPLR 3211[a][1]). The motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]). And pursuant to CPLR 3211(d), the court may deny a motion to

dismiss as premature if it "appear[s] from affidavits submitted in opposition to the motion . . . that facts essential to justify opposition may exist but cannot then be stated." especially where the facts are in the exclusive control of the moving party. (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466 [1974]).

1. Negligence

In order to establish a cause of action for negligence, the plaintiff must prove the following elements: duty owed, duty breached, and damages. (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]; *Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007]).

As a general rule, a contractual obligation, standing alone, gives rise to a duty of care in favor of only the promisee and intended third-party beneficiaries to the contract. (*Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). However, a duty of care may also arise, as relevant here, "(1) where the contracting party, in failing to exercise the reasonable care in the performance of his duties, launches a force or instrument of harm; [or] (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties." (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002] [internal quotation marks and citations omitted]; *Medinas v MILT Holdings LLC*, – AD3d – , 2015 NY Slip Op 06044 [1st Dept 2015]). In order to prove detrimental reliance on the defendant's continued performance, the plaintiff must also show that she was aware of the contract pursuant to which the defendant's obligation arises (*eg, Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]), and there must be a direct and demonstrable nexus between the plaintiff's reliance on the

defendant's contractual duties and the plaintiff's injury (*Cresvale Intl., Inc. v Reuters Am., Inc.*, 257 AD2d 502, 505 [1st Dept 1999]).

NYBEC has demonstrated with admissible evidence, namely, the invoices, that there was no contractual privity between it and plaintiff. As plaintiff submits no affidavit or evidence based on her personal knowledge that NYBEC created a force or instrument of harm, or that she detrimentally relied on its performance, there is no basis on which to find that NYBEC owed her a duty of care in the absence of contractual privity. Plaintiff's allegations in her unverified complaint that NYBEC owed her a duty to render services in a workman-like manner to rid her unit of bedbugs, are likewise insufficient absent facts supporting the application of an exception as set forth in *Espinal*. Consequently, she fails to state of cause of action in negligence against NYBEC. (*See Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 761 [4th Dept 2006] [injured third party failed to state cause of action in negligence against snow plower as there was "no allegation in the complaint or bill of particulars, nor any proof in the record, that plaintiff detrimentally relied on (defendant's) continued performance of the snow plowing contract or that (defendant) launched a force or instrument of harm"]; *Mastrobattista v Borges*, 2014 WL 8841193, *2 [Sup Ct, NY County 2014] [plaintiff's allegation of an "undefined" duty of care insufficient to maintain action in negligence against party with whom plaintiff had no privity]).

Although NYBEC addresses plaintiff's proposed testimony, absent an affidavit from plaintiff, I do not consider it. In any event, her awareness of NYBEC's contract with Parkoff and the fact that she had occasionally communicated with NYBEC does not, without more, constitute detrimental reliance on NYBEC's performance. (*Cf. Bugiada v Iko*, 274 AD2d 368, 369 [2d Dept 2000], *appeal dismissed* 96 NY2d 726 [2001] [nothing in record indicated that plaintiff had

relied on past performance of defendant and thus no viable claim of detrimental reliance]; *Cresvale Intl., Inc.*, 257 AD2d at 505 [no detrimental reliance where plaintiffs failed to show "direct and demonstrable" connection between reliance and injury]; *see also Aiello*, 110 AD3d at 246 [Tom, J., concurring] ["Likewise, irrespective of (plaintiff's) knowledge of (defendant's) contractual duties, he lacked a sufficiently extensive history of treatment at the hospital to have developed a detrimental reliance that (defendant) would continue to provide security services."]).

2. Declaratory judgment

Pursuant to CPLR 3001, the court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy." A justiciable controversy requires a real dispute between adverse parties with a stake in the outcome of the dispute. (*Long Is. Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). Declaratory relief may be denied if adequate alternative remedies are available through another cause of action. (*Morgenthau v Eribaum*, 59 NY2d 143, 148 [1983]; *JMF Consulting Grp. II, Inc. v Beverage Mktg. USA, Inc.*, 97 AD3d 540, 542 [2d Dept 2012], *lv denied* 19 NY3d 816).

Absent any reason to believe that plaintiff's claim of negligence would not constitute an adequate remedy, plaintiff has failed to establish a basis for seeking declaratory relief. (*See Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006] [declaratory relief denied where breach of contract action available]; *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 53-54 [1st Dept 1988] [declaration of plaintiffs' rights under contract unnecessary in light of breach of contract claim]; *Essa Realty Corp. v J. Thomas Realty Corp.*, 31 Misc 3d 1235[A], 2011 NY Slip Op. 51006[U], *4 [Sup Ct, NY County 2011] [plaintiff's trespass and

nuisance claims required determination of same factual issues and thus declaratory judgment unnecessary]).

I need not consider NYBEC's contentions supporting dismissal of the remaining causes of action asserted against other parties.

III. CROSS CLAIMS

In opposition, Parkoff and Seaman argue that if the complaint is dismissed against NYBEC, their third-party claims against it should nonetheless survive as its liability and obligation to them are separate from plaintiff's claims. (NYSCEF 100). In partial opposition, Thermarid notes that it asserted cross claims against NYBEC in both the third-party action and in the main action, once plaintiff served her amended complaint, and to the extent NYBEC seeks dismissal of those cross claims in the instant motion, it offers no supporting arguments. In any event, Thermarid contends that dismissal is premature as it should have discovery to determine the extent of NYBEC's liability and thus Thermarid's entitlement to contribution and/or indemnification. (NYSCEF 101).

In response, NYBEC argues that the third-party action to which Parkoff and Seaman refer was discontinued when the underlying pleadings were withdrawn by stipulation, and that Parkoff and Seaman have not interposed an answer and/or cross claims to the pleadings to which the instant motion is directed, nor have they commenced a new third-party action. In any event, it contends, their claim of contractual indemnification does not include the subject contract, which it alleges does not exist. (NYSCEF 106).

Absent any arguments in support of dismissal, that branch of NYBEC's motion seeking dismissal of all cross claims against it is denied. (*See Bd. of Mrgs. of Caton Ct. Condominium v*

Caton Dev. LP, 41 Misc 3d 1231[A], 2013 NY Slip Op 51951[U]. *10 [Sup Ct, Kings County 2013] [defendants made no arguments supporting dismissal of several causes of action, which thus survived defendants' motion]). Consequently, I need not reach the issue of whether the July 2014 stipulation effectively discontinued Parkoff and Seaman's earlier third-party action.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant NYBEC's motion for an order dismissing the first amended complaint against it is granted and the complaint is dismissed in its entirety as against said defendant; it is further

ORDERED, that the action is severed and continued against the remaining defendants; and it is further

ORDERED, that defendant NYBEC's motion for an order dismissing all cross claims against it is denied.

ENTER:

Barbara Jaffe, JSC

DATED: August 20, 2015
New York, New York