

<b>Arbor Realty Funding, LLC v Herrick, Feinstein LLP</b>
2018 NY Slip Op 31792(U)
April 3, 2018
Supreme Court, New York County
Docket Number: 651079/11
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
ARBOR REALTY FUNDING, LLC,

Plaintiff,

Index No.: 651079/11  
DECISION/ORDER

-against-

HERRICK, FEINSTEIN LLP,

Defendant.

-----X  
HERRICK, FEINSTEIN LLP,

Third-Party Plaintiff,

-against-

IVAN KAUFMAN, FRED WEBER, ARBOR  
COMMERCIAL MORTGAGa LLC and ARBOR  
REALTY TRUST, LLC,

Third-Party Defendants.

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**HON. CAROL R. EDMEAD, J.S.C.:**

In this third-party contribution action, which follows an underlying legal malpractice action, the third-party defendants each submit separate motions to dismiss the amended third-party complaint (motion sequence numbers 012, 013 1nd 014, respectively). For the following reasons, all of these motions are granted.

**BACKGROUND**

Defendant/third-party plaintiff Herrick, Feinstein LLP. (Herrick) is the law firm that previously advised plaintiff Arbor Realty Funding, LLC (Arbor Funding) in connection with a series of construction loans that Arbor Funding issued to non-party East 51<sup>st</sup> Street Development Company, LLC (East 51<sup>st</sup> St.). In 2011, when East 51<sup>st</sup> St. defaulted on those loans, Arbor Funding commenced a legal malpractice action against Herrick (the underlying action). That

action is still *sub judice*.

Defendant Arbor Realty Trust, LLC (Arbor Realty) is a New York State licensed real estate investment trust, of which plaintiff Arbor Funding and co-defendant Arbor Commercial Mortgage, LLC (Arbor Commercial) are corporate subsidiaries. Individually named co-defendants Ivan Kaufman (Kaufman) and Fred Weber (Weber) are principals and officers of both Arbor Realty and Arbor Commercial.

In the underlying action, which was commenced on April 25, 2011, Arbor Funding alleged that Herrick committed acts of professional malpractice and negligent misrepresentation in the course of its representation of Arbor Funding concerning the aforementioned loans. *See* notice of motion (motion sequence number 012), exhibit A (complaint). On May 16, 2011, Herrick filed an answer that raised the affirmative defenses of: 1) failure to state a claim; 2) the doctrines of waiver, estoppel and laches; 3) the doctrine of unclean hands; 4) no misrepresentation of material facts; 5) no detrimental reliance; 6) no duties owed; 7) documentary conduct; 8) no actionable conduct; 9) plaintiff's bad faith; 10) defendant's good faith; 11) failure to mitigate damages; 12) contributory negligence; and 13) such other affirmative defenses as may be applicable. *Id.*, exhibit B (answer).<sup>1</sup> Procedurally attenuated litigation ensued, which featured, *inter alia*, a number of withdrawn motions and/or orders to show cause, and an appeal to the Appellate Division, First Department, regarding this court's decision on Herrick's proper motion for spoliation sanctions (motion sequence number 007). Herrick eventually commenced its third-party action on April 6, 2017. The third-party defendants moved to dismiss Herrick's complaint, but later withdrew their motions (motion sequence numbers 009,

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<sup>1</sup> The affirmative defenses in Herrick's answer are misnumbered.

010 and 011). On August 22, 2017, Herrick filed an amended third-party complaint with causes of action for: 1) “contribution based on breach of fiduciary duty of care” (against Arbor Commercial, Kaufman and Weber); 2) “contribution based on breach of fiduciary duty of loyalty” (against Arbor Commercial, Kaufman and Weber); 3) “contribution based on aiding and abetting breach of fiduciary duty” (against Arbor Realty and Weber); 4) “contribution based on gross negligence” (against Arbor Commercial, Kaufman and Weber); and 5) “contribution based on negligence” (against Arbor Commercial, Kaufman and Weber). *Id.*, exhibit C. The third-party defendants did not file answers to this amended complaint, but instead submitted their respective dismissal motions (Kaufman and Arbor Commercial, motion sequence number 012; Arbor Realty, motion sequence number 013; and Weber, motion sequence number 014).

#### DISCUSSION

When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a), the court “must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference.” *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff’s factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1<sup>st</sup> Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1<sup>st</sup> Dept 1994). Here, as was previously mentioned, the third-party defendants submit separate dismissal motions that are directed to whichever of the third-party causes of action that Herrick has asserted against them.

Motion Sequence Number 012

The first dismissal motion is jointly submitted by Arbor Commercial and Kaufman, who are named as “manager defendants” (along with Weber) in Herrick’s first, second, fourth and fifth third-party causes of action (motion sequence number 012). *See* notice of motion (motion sequence number 012), exhibit C (amended third-party complaint), ¶¶ 96-116, 122-142. The two former claims seek contribution based on theories of breach of fiduciary duty, while the latter two claims seek contribution based on theories of negligence. Each of those claims contains the allegation that: “[t]o the extent, if any, it is determined that Herrick is liable to Arbor [Funding], all of Arbor [Funding’s] damages are attributable to the manager defendants’ [purportedly wrongful conduct].” *Id.*, ¶¶ 107, 116, 132, 142. The third-party complaint also alleges that Arbor Commercial “was Arbor [Funding’s] external manager and agent with the responsibility to manage Arbor [Funding’s] business and operations,” and that “Kaufman and Weber were among the most senior officers, employees, agents or control persons of [Arbor Commercial].” *Id.*, ¶ 23. The court notes that the twelfth affirmative defense in Herrick’s answer raises a claim of contributory negligence against Arbor Funding. *Id.*, exhibit B at 18 (paragraphs incorrectly numbered).

In their motion, Arbor Commercial and Kaufman first argue that “Herrick’s [third-party] contribution claims are barred by agency principles.” *See* third-party defendants’ mem of law (motion sequence number 012) at 7-10. They cite the general rule, set forth in *Hercules Chem. Co. v North Star Reins. Corp.* (72 AD2d 538, 538 [1<sup>st</sup> Dept 1979]), that a defendant’s affirmative defense of comparative negligence precludes a third-party claim for contribution against any third-party defendant who was acting as the plaintiff’s agent, since the affirmative defense and the

third-party claims are deemed to be duplicative of each other, as a matter of law. Arbor Commercial and Kaufman then note the exception to this rule, set forth in *Millennium Import, LLC v Reed Smith LLP* (104 AD3d 190, 195-196 [1<sup>st</sup> Dept 2013]), that a third-party claim for contribution against a third-party defendant will “not be viewed as duplicative [where] the affirmative defense [does] not specifically name [the third-party defendant] as plaintiff’s agent whose alleged negligence defendant sought to impute to plaintiff for comparative negligence purposes.” Arbor Commercial and Kaufman argue that the *Millennium Import* exception does not apply to Herrick’s third-party contribution claims against them, “because both are expressly agents of plaintiff (Arbor Funding) and thus their conduct is chargeable to plaintiff.” See third-party defendants’ mem of law (motion sequence number 012) at 7. They explain that agency “principles prevent ‘double counting’ of the agent’s allegedly culpable conduct both as a defense reducing the plaintiff’s damages and as a claim for contribution based on ‘the exact same acts.’” *Id.* at 8. Arbor Commercial and Kaufman assert that the provisions of Herrick’s answer and its amended third-party complaint disclose that Herrick is attempting to do just this. *Id.* at 9-10. Arbor Commercial and Kaufman conclude that Herrick’s third-party claims are improper, and should be dismissed pursuant to the general rule of *Hercules Chem. Co.* *Id.* at 10.

Herrick responds that “the *Hercules* rule does not apply to [its] third-party claims against the manager defendants,” and asserts that its claims against Arbor Commercial and Kaufman instead fall within the exception set forth in *Millennium Import*. See third-party plaintiff’s mem of law (motion sequence number 012) at 17-22. Herrick specifically avers that, while it “served as Arbor [Funding]’s legal representative in connection with the loans, the manager defendants concurrently provided services - both business and legal in nature - . . . that caused or contributed

to the losses alleged by Arbor [Funding],” and further characterizes the manager defendants “as outside agent advisors” who are analogous to the third-party defendant outside law firms in *Millennium Import. Id.* at 19-21.

Arbor Commercial and Kaufman reply that “Herrick’s contribution claims against the third-party defendants are entirely duplicative.” *See* third-party defendants’ consolidated reply mem of law at 2-11. Arbor Commercial and Kaufman assert that *Millennium Import* is factually distinguishable, and thus unavailable to support Herrick’s third-party claims, because the third-party defendants in *Millennium Import* were all law firms who served as co-counsel with the defendant/third-party plaintiff therein (and against who the third-party legal malpractice claims were raised). By contrast, the movants describe the nature of Arbor Funding’s relationship with Arbor Realty and Arbor Commercial as one between a corporation (Arbor Funding), “its corporate parent [Arbor Realty] and a commonly owned affiliate [Arbor Commercial].” *Id.* at 4. Arbor Commercial and Kaufman have also submitted an affirmation from Vincent J. Syracuse, Esq. (Syracuse), counsel for plaintiff Arbor Funding, who states that:

“Arbor Funding acknowledges its responsibility in this action for the conduct of Ivan Kaufman, Arbor Commercial Mortgage, LLC and Fred Weber and its parent Arbor Trust (together, the ‘Arbor Agents’).” Arbor Funding agrees that any culpable conduct attributable to the Arbor Agents in this action is also attributable to Arbor Funding and thus, pursuant to CPLR Section 1411, ‘the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to [Arbor Funding or the Arbor Agents] bears to the culpable conduct which causes the damages.’ Arbor Funding will not assert any ‘adverse interest’ exception to agency imputation rules or otherwise change position on this issue.”

*See* Syracuse reply affirmation, ¶ 2. Arbor Commercial and Kaufman conclude that, given the foregoing, neither they nor the other named third-party defendants can be considered “true third

parties,” like the third-party defendants in *Millennium Import*, and that Herrick’s claims against them must therefore be dismissed. *Id.* at 9. After reviewing the documentary evidence and the governing case law, the court agrees.

In *Millennium Import*, the First Department permitted the third-party claims against the defendant/third-party plaintiff’s co-counsel law firms to stand because “the affirmative defenses [in the defendant/third-party plaintiff’s answer] did not specifically name [the third-party defendant law firms] as plaintiff’s agents whose alleged negligence [defendant/third-party plaintiff] sought to impute to plaintiff for comparative negligence purposes.” 104 AD3d at 196. Here, Herrick’s 12<sup>th</sup> affirmative defense of contributory negligence does not specifically name any of the instant third-party defendants as Arbor Funding’s agents either. *See* notice of motion (motion sequence number 012), exhibit B at 18 (paragraphs incorrectly numbered). However, Syracuse’s reply affirmation specifically acknowledges that all of the third-party defendants herein *are* Arbor Funding’s agents, and further affirms that Arbor Funding will *not* attempt to deny that agency relationship, either via an “adverse interest” argument, or otherwise. *See* Syracuse reply affirmation, ¶ 2. The First Department explained the underlying concern that led to its holding in *Millennium Import* thusly:

“Perhaps the underlying facts in *Hercules* justified the Court’s conclusion that the third-party plaintiff was sufficiently protected by the affirmative defense [of contributory negligence]. However, where, as here, a defendant charged with legal malpractice has a viable claim against other law firms that represented its client for concurrent or successive malpractice contributing to the client’s damages, the defendant law firm is not necessarily ‘afforded all the protection to which it is entitled’ by the affirmative defense of comparative negligence. On the contrary, where several law firms allegedly participated in giving the advice that led to the plaintiff’s damages, the sole law firm named as a defendant must be entitled to bring the other law firms in as parties to the action to ensure that it has the ability to fully protect its rights. We find that [defendant’s] third-party claim



against the three firms is not necessarily completely duplicative of its comparative negligence defense, and therefore decline to apply the *Hercules* decision to these circumstances.”

104 AD3d at 195-196. The First Department plainly rejected the notion that the defendant law firm which the plaintiff sued for malpractice in *Millennium Import* stood in the same shoes as the co-counsel law firms that were not sued by the plaintiff (and against which the defendant attempted to assert third-party contribution claims). Instead, the First Department found that, because all of those law firms were separate entities, the named defendant law firm was entitled to bring third-party contribution claims against the co-counsel firms in order to be fully protected against liability for the plaintiff’s malpractice claim against it. Here, however, Syracuse’s affirmation admits that Herrick’s third-party defendants are all agents of the plaintiff Arbor Funding, and dispels any notion that they are separate entities, like the co-counsel law firms in *Millennium Import*. Indeed, Syracuse’s affirmation contains an express statement that Arbor Funding will *not* raise any legal or factual arguments to deny its agency relationship with the third-party defendants. As a result, the considerations that motivated the First Department to permit the defendant’s third-party claims in *Millennium Import* do not exist in this action. Therefore, the exception to the *Hercules* rule that the First Department recognized in *Millennium Import* is not available to Herrick. Instead, this case is much more on point with *Hercules*, in which the First Department had earlier ruled that “the third-party plaintiff’s concern that it will be unable to impute the [third-party defendants’] negligence to the plaintiff, and that it requires contribution [from them] to reach the same result, is ill founded.” 72 AD2d at 538. This court finds that Herrick’s assertion that it must raise contribution claims against Arbor Funding’s agents in order to be fully protected from Arbor Funding’s malpractice claims against it is also

“ill founded.” Therefore, the court further finds that, pursuant to the *Hercules* rule, Herrick’s third-party claims against Arbor Commercial and Kaufman should be dismissed as unnecessary, as a matter of law. Accordingly, the court grants the dismissal motion of Arbor Commercial and Kaufman in full.

#### Motion Sequence Number 013

The second dismissal motion is submitted by Arbor Realty, which is only named as a defendant in Herrick’s third-party claim for contribution (based on a theory of aiding and abetting a breach of fiduciary duty). *See* notice of motion (motion sequence number 013), exhibit 3 (amended third-party complaint), ¶¶ 117-121. Arbor Realty joined in with the dismissal arguments that Arbor Commercial and Kaufman raised in their joint motion. *See* third-party defendant’s mem of law (motion sequence number 013), at 5. The court has already accepted those arguments for the reasons discussed in the preceding section of this decision. Accordingly, the court grants Arbor Trust’s dismissal motion in full.

#### Motion Sequence Number 014

The final dismissal motion is submitted by Weber, who is named as a defendant in all of Herrick’s third-party claims. *See* notice of motion (motion sequence number 014), exhibit B (amended third-party complaint), ¶¶ 96-142. Weber, too, raised the same dismissal arguments that Arbor Commercial and Kaufman asserted in their joint motion. *See* third-party defendant’s mem of law (motion sequence number 014), at 1-5. . The court has already accepted those arguments for the reasons discussed in the first section of this decision. Accordingly, the court grants Weber’s dismissal motion in full.

## DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of third-party defendants Ivan Kaufman and Arbor Commercial Mortgage, LLC (motion sequence number 012) is granted and the third-party complaint is dismissed in its entirety as against said third-party defendants, with costs and disbursements to said third-party defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendants; and it is further

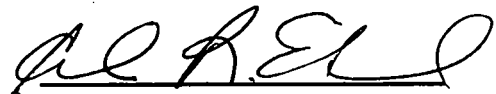
ORDERED that the motion, pursuant to CPLR 3211, of third-party defendant Arbor Realty Trust, LLC (motion sequence number 013) is granted and the third-party complaint is dismissed in its entirety as against said third-party defendant, with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant; and it is further

ORDERED that the motion, pursuant to CPLR 3211, of third-party defendant Fred Weber (motion sequence number 014) is granted, and the third-party complaint is dismissed in its entirety as against said third-party defendant, with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant; and it is further

ORDERED that counsel for Third-Part defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: New York, New York  
April 3, 2018

ENTER:



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDMEAD**  
**J.S.C.**